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# LOST IN TRANSLATION: THE CASE FOR THE ADDITION OF A DIRECTNESS TEST IN ONLINE TRUE THREAT ANALYSIS

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The Founding Fathers added the First Amendment to the United States Constitution guaranteeing that “Congress shall make no law . . . abridging the freedom of speech,”<sup>1</sup> as a result of states’ fears that a federal government may try to restrict state independence based on colonial experiences under British rule.<sup>2</sup> However, Congress has passed several statutes, such as 18 U.S.C. § 875, that allow for the conviction of individuals based solely on their speech.<sup>3</sup> While the Supreme Court has upheld 18 U.S.C. § 875 in determining that certain types of speech including “true threats” are not protected by the First Amendment, the debate continues as to whether forms of artistry and expression, such as rap music, are protected.<sup>4</sup>

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> *The Bill of Rights: A Brief History*, ACLU (Mar. 4, 2002), [https://www.aclu.org/racial-justice\\_prisoners-rights\\_drug-law-reform\\_immigrants-rights/bill-rights-brief-history](https://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/bill-rights-brief-history).

<sup>3</sup> 18 U.S.C. § 875 (2012).

<sup>4</sup> See Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 679 (2003) (identifying true threats as a category of speech that is not protected by the First Amendment); *About The First Amendment*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/about-the-first-amendment> (last visited Mar. 29, 2015).

Anthony Elonis posted these rap lyrics to his public Facebook page between October and November 2010:

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/.../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/.../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!]<sup>5</sup>

This post, and others, caused Elonis's arrest in December 2010 for violating 18 U.S.C. § 875(c).<sup>6</sup>

Specifically, 18 U.S.C. § 875(c) makes it illegal for any person who “transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another.”<sup>7</sup> The consequences under this criminal statute include a fine and up to five years of imprisonment.<sup>8</sup> After he was convicted under this statute, Elonis was sentenced to forty-four months' imprisonment with a subsequent three-year supervised release.<sup>9</sup>

The U.S. Court of Appeals for the Third Circuit affirmed Elonis's conviction.<sup>10</sup> Elonis then petitioned the Supreme Court for writ of certiorari, which the Court granted on June 16, 2014.<sup>11</sup> In his Petition to the Court, Elonis argued that the test under 18 U.S.C. § 875 is outdated and should explicitly require a subjective intent to threaten.<sup>12</sup> Elonis further claimed that his Facebook posts are protected speech under the First Amendment of the U.S. Constitution.<sup>13</sup>

If Elonis's Facebook posts are considered “true threats,” they would no longer constitute protected speech under the First Amendment.<sup>14</sup> Per the Third

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<sup>5</sup> United States v. Elonis, 730 F.3d 321, 326 (3d Cir. 2013).

<sup>6</sup> *Id.* at 323-26.

<sup>7</sup> § 875(c).

<sup>8</sup> *Id.*

<sup>9</sup> 730 F.3d at 327.

<sup>10</sup> *Id.* at 335.

<sup>11</sup> *Id.* at 321, *cert. granted*, 82 USLW 3538 (U.S. June 16, 2014) (No. 13-983); Elonis v. United States, SCOTUSBLOG, [www.scotusblog.com/case-files/cases/elonis-v-united-states/](http://www.scotusblog.com/case-files/cases/elonis-v-united-states/) (last visited Feb. 18, 2015) (mentioning that arguments are scheduled for December 1, 2014).

<sup>12</sup> 730 F.3d at 327

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

*Id.*; Petition for Writ of Certiorari at I, 21, United States v. Elonis, 134 S. Ct. 2819 (2014) (No. 13-983).

<sup>13</sup> 730 F.3d at 327; U.S. CONST. amend. I.

<sup>14</sup> United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012); *see* Redfield, *supra* note

Circuit, a “true threat” occurs when a speaker intentionally makes a statement that a reasonable person could foresee to be understood by the subject of the speech as a “serious expression of an intention to inflict bodily injury or take the life of an individual.”<sup>15</sup> To determine whether these words constitute a “true threat,” it is important to consider the medium through which the words were conveyed.<sup>16</sup>

Currently, there is a split amongst the courts as to whether the test for true threats includes subjective intent.<sup>17</sup> Additionally, courts are split regarding what constitutes “subjective intent.” Some courts hold that a true threat analysis should include an individual’s subjective intent to place speech in interstate or foreign commerce.<sup>18</sup> Other courts evaluate a speaker’s subjective intent to threaten when placing their speech into interstate or foreign commerce.<sup>19</sup>

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4 (identifying true threats as a category of speech that is not protected by the First Amendment).

<sup>15</sup> *Elonis*, 730 F.3d at 327

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

<sup>16</sup> *Id.* 327-28

[A] true threat requires that the 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 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.

(quoting *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991)).

<sup>17</sup> *See, e.g.*, *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (stating that earlier cases found the willfulness requirement fulfilled when a person voluntarily uttered the charged words with an intention to carry out the act, but there are still doubts from the Court of its interpretation); *see, e.g.*, *United States v. Jeffries*, 692 F.3d 473, 477 (6th Cir. 2012) (instructing the jury to convict Jeffries under 18 U.S.C. § 875(c) and to consider whether a reasonable person “would believe that the statement was made as a serious expression of intent to inflict bodily injury”); *see, e.g.*, *United States v. Kelner*, 534 F.2d 1020, 1026 (2d Cir. 1976) (holding that because of First Amendment concerns, specific intent to carry out a threat is required to prosecute).

<sup>18</sup> *See, e.g.*, 394 U.S. at 707-08 (stating that earlier cases found the willfulness requirement fulfilled when a person voluntarily uttered the charged words with an intention to carry out the act, but there are still doubts from the Court of its interpretation); *see, e.g.*, 692 F.3d at 477 (instructing the jury to convict Jeffries under 18 U.S.C. § 875(c) and to consider whether a reasonable person “would believe that the statement was made as a serious expression of intent to inflict bodily injury”); *see, e.g.*, 534 F.2d at 1026 (holding that because of First Amendment concerns, specific intent to carry out a threat is required to prosecute).

<sup>19</sup> *See* Brief for Petitioner at 20, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983) (stating that the Fourth Circuit confirms that a true threat is not protected by the First Amendment if there is intent (citing *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966))); *see also* Reply Brief for the Petitioner at 2-3, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983) (citing *United States v. Bagdasarian*)

Meanwhile, other courts look at the objective intent of the individual who receives the speech.<sup>20</sup>

However, in deciding whether a social media post constitutes a “true threat,” intent is not the determinative factor.<sup>21</sup> Instead, the manner in which the speech is posted on a social media website should determine whether a true threat exists under 18 U.S.C. § 875 and is thus unprotected speech.<sup>22</sup> To improve the test for true threats, courts should consider the directness of the threat in conjunction with the actual fear of the recipient. The creation of a stronger test will allow courts to better distinguish true threats, like those embodied in 18 U.S.C. § 875, from protected speech under the First Amendment.<sup>23</sup>

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[T]he Ninth Circuit resolved any uncertainty that might remain from its previous practice by holding that, under *Black*, ‘only intentional threats are criminally punishable consistent[] with the First Amendment’... that court held, ‘the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech’; it is ‘not sufficient that objective observers would reasonably perceive such speech as a threat.’

*Id.*; see also *id.* at 5 (noting that the Seventh Circuit recognized that *Black* undermines its position (citing *United States v. Parr*)); see, e.g., *Watts*, 394 U.S. at 707-08 (noting that, with some doubts, the Court believes lower courts to be correct, that “[s]ome early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with ‘an apparent determination to carry them into execution’”); see, e.g., *Jeffries*, 692 F.3d at 477 (instructing the jury to convict *Jeffries* under 18 U.S.C. § 875(c) in consideration of “whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury”); see, e.g., *Kelner*, 534 F.2d at 1026 (holding that because of First Amendment concerns, a specific intent to carry out a threat is required to prosecute).

<sup>20</sup> See Brief for the Petitioner at 2-3 *Elonis*, 134 S. Ct. 2819 (No. 13-983) (stating that the Third Circuit looks to “whether the defendant *intended* to threaten someone was irrelevant: As the government explained, ‘it doesn’t matter what he thinks.’ All that mattered was whether ‘the defendant intentionally ma[d]e a statement...under such circumstances where-in a reasonable person would foresee that the statement would be interpreted’ as a threat” (quoting *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991))); see, e.g., 394 U.S. at 707-08 (“Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with ‘an apparent determination to carry them into execution.’ The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it.”); see, e.g., 692 F.3d at 477-78 (instructing the jury to convict *Jeffries* under 18 U.S.C. § 875(c) if “whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury”); see, e.g., 534 F.2d at 1026 (holding that because of First Amendment concerns, a specific intent to carry out a threat is required to prosecute).

<sup>21</sup> PAUL J. LARKING & JORDAN RICHARDSON, THE HERITAGE FOUND., TRUE THREATS AND THE LIMITS OF FIRST AMENDMENT PROTECTION 5 (Dec. 8, 2014), available at [http://thf\\_media.s3.amazonaws.com/2014/pdf/LM142.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/LM142.pdf).

<sup>22</sup> *Id.* at 9 (noting that while it is easier to attribute intent to spoken word, it is not as clear when messages are posted on Facebook as “personal thoughts and musings”).

<sup>23</sup> See *Determining the Legality of a Threat*, NUREMBERG FILES, <http://cs.stanford.edu/people/eroberts/cs181/projects/nuremberg-files/legal.html> (last visited Feb. 21, 2014) (citing an Amicus Curiae brief of the ACLU of Oregon urging a series of

It is not necessary to include a subjective intent test in determining whether a true threat exists under 18 U.S.C. § 875. Instead, the United States Supreme Court should adopt the objective intent standard to determine whether a true threat exists. Objective intent focuses on the directness of a threat to a particular victim. The standard therefore evaluates whether a reasonable person in the place of the victim would feel threatened. If answered affirmatively, a true threat exists.

This Note specifically focuses on social media posts. In an Internet context, the speaker's intent is easily lost in translation, as the recipient of the speech may place their own emphasis on words that they never directly heard. Therefore, Part I of this Note details First Amendment protections for speech and argues that the manner of speech is the most important part of any true threat test through a discussion of protected speech and the impact location has on any available speech protections. Part II of this Note then examines the legislative history of 18 U.S.C. § 875(c) and different definitions of "intent" utilized by the courts in providing the context necessary to understand Anthony Elonis's conviction and the determinative nature of speech formatting in a social media context in a test for true threats. Subsequently, Part III analyzes *Elonis v. United States* in greater detail. *Elonis* then serves as a model to demonstrate that social media threats are easier to analyze when courts have a greater focus on the way in which speech is disseminated. Finally, Part V discusses the practical implications that could ensue should the Supreme Court adopt the subjective intent to threaten instead of the objective intent test in conjunction with a focus on directness.

## I. THE FIRST AMENDMENT AND FREEDOM OF SPEECH

### A. Protected Speech

The United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."<sup>24</sup> Freedom of speech protects an individual's ability to voice his or her own views and opinions.<sup>25</sup> These views and opinions are what make up the "marketplace of ideas"<sup>26</sup> and allows for the

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considerations to determine a "true threat," such as whether a reasonable person would perceive a statement as a threat, and whether the threat was directed to a person or a group of people).

<sup>24</sup> U.S. CONST. amend. I.

<sup>25</sup> DAVID S. SCHWARTZ & LORI A. RINGHAND, CONSTITUTIONAL LAW: A CONTEXT AND PRACTICE CASEBOOK 938 (2013) ("Speech" . . . includes spoken or written expression . . . the Court has extended it to other conduct intended to convey ideas or information.").

<sup>26</sup> See *id.* at 939.

quintessential functioning of the representative democracy that makes up the United States government.<sup>27</sup>

The Court worries about restrictions that pose a risk to free speech.<sup>28</sup> For example, “criminal prohibitions on pure speech a[re] [a] ‘matter of special concern’ . . . because ‘[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate . . . .’”<sup>29</sup> Moreover, “[t]he mere ‘threat of criminal prosecution . . . can inhibit the speaker from making [lawful] statements,’ thereby chilling ‘speech that lies at the First Amendment’s heart.’”<sup>30</sup> Furthermore, the Supreme Court has held that “‘negligence . . . is [a] constitutionally insufficient’ standard for imposing liability for speech.”<sup>31</sup> Thus, it is clear that protecting free speech is of the utmost importance to the Supreme Court.

## B. Unprotected Speech

While it is important to protect an individual’s ability to voice his or her views and opinions, this does not imply that all speech is protected.<sup>32</sup> For example, obscenities,<sup>33</sup> child pornography,<sup>34</sup> libel,<sup>35</sup> fighting words,<sup>36</sup> incitement to violence,<sup>37</sup> and true threats, are not protected by the First Amendment.<sup>38</sup>

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<sup>27</sup> *See id.* (“Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.” (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1925))).

<sup>28</sup> Brief for the Petitioner, *supra* note 19, at 3.

<sup>29</sup> *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 871-872 (1997)).

<sup>30</sup> *Id.* (quoting *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring)).

<sup>31</sup> *Id.*; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964).

<sup>32</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1941).

<sup>33</sup> *See Miller v. California*, 413 U.S. 15, 24 (1973) (holding that speech or expression is considered obscene if it “appeals to the prurient interest . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . taken as a whole, lacks serious literary, artistic, political, or scientific value”).

<sup>34</sup> *See New York v. Ferber*, 458 U.S. 747, 764 (1982) (detailing that child pornography is not protected by the First Amendment).

<sup>35</sup> *See, e.g., Sullivan*, 376 U.S. at 254.

<sup>36</sup> *See Chaplinsky*, 315 U.S. at 572 (detailing that fighting words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” and are not protected by the First Amendment).

<sup>37</sup> *See Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (detailing that speech that’s purpose is to incite or produce imminent lawless action and likely to actually incite or cause such action is not protected by the First Amendment).

<sup>38</sup> *See United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (finding that true threats are not protected by the First Amendment); *see also Redfield*, *supra* note 4 (identifying several categories of speech that are not protected by the First Amendment).

### 1. *True Threats*

Yet even the Supreme Court directly struggles with what some of these restrictions truly mean.<sup>39</sup> During oral arguments in *Elonis v. United States*, Justice Kennedy noted that he is “not sure that the Court did either the law or the English language much of a good service when it said ‘true threat,’”<sup>40</sup> and further stated that “it’s a most unhelpful phrase.”<sup>41</sup> During his oral argument, John P. Elwood, Anthony Elonis’s attorney, concluded that “true threat” is confusing because “it was announced in a per curium decision that didn’t have the benefit of merits, briefing, or argument.”<sup>42</sup>

Despite the lack of clarity in the definition of true threat, many courts have stated that true threats are “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 individuals.”<sup>43</sup> This definition also focuses on the response to the speech and therefore evaluates whether the speech causes a risk of violence, fear, or disruption to the recipient’s normal activities.<sup>44</sup> However, as Justice Kennedy has poignantly pointed out, a true threat could mean that the speaker “really intend[s] to carry it out, . . . really intend[s] to intimidate the person; or that no one could possibly believe it.”<sup>45</sup> Thus, it is clear that there is even confusion within the Supreme Court as to what a true threat actually is.

### 2. *Location, Location, Location: The Place Where Speech Occurs Determines the Level of Protection it Receives*

#### a. *Traditional Public Fora*

The location of speech can determine whether or not the speech is protected.<sup>46</sup> For instance, in a traditional public forum, individuals generally have

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<sup>39</sup> Transcript of Oral Argument at 3, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-983\\_bq7d.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-983_bq7d.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>44</sup> *United States v. Aman*, 31 F.3d 550, 555 (7th Cir. 1994) (“The threat alone is disruptive of the recipient’s sense of personal safety and well-being and is the true gravamen of the offense.” (quoting *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991))).

<sup>45</sup> Transcript of Oral Argument, *supra* note 39.

<sup>46</sup> See generally Sarah H. Duggin, Constitutional Law II Lecture 15-17 (Oct. 15, 2014) (unpublished manuscript) (on file with the Author); *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 44 (1983) (noting that the standards of free speech analysis “differ depending on the character of the property at issue”).

unhindered access to utilize protected speech.<sup>47</sup> In traditional public fora, speech cannot be restricted merely because of its content or viewpoint; however, it can possibly be limited by reasonable time, place, or manner restrictions.<sup>48</sup> Furthermore, if another type of restriction is placed on protected speech in a public fora that is serving a compelling state interest and is narrowly tailed to meet that interest, the restriction may be deemed constitutional, even though there is a general notion that individuals can speak freely and openly.<sup>49</sup> Sidewalks, for example, are generally considered public fora.<sup>50</sup>

*b. Designated Public Fora*

Additionally, there are designated public fora.<sup>51</sup> Designated public fora exist when the government voluntarily opens a place that it could normally close to speech.<sup>52</sup> Generally, the Court applies the rules for traditional public fora to such areas during periods without censorship.<sup>53</sup> Designated public fora include locations such as meeting rooms at state universities.<sup>54</sup> Such meetings rooms can be used for uninhibited speech with the permission of the state run university.<sup>55</sup>

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<sup>47</sup> See *id.* at 45 (discussing the strict scrutiny standard used to analyze regulation of speech in traditional public forums such as streets and parks); see also *Hill v. Colorado*, 530 U.S. 703, 729-30 (2000) (holding that a ban on approaching within eight feet of a person who was within 100 feet of a health care facility was reasonable and narrowly tailored because even though it prohibited leafleting, it left “ample room to communicate a message through speech”).

<sup>48</sup> 460 U.S. at 45; see generally Duggin, *supra* note 46, at 16 (listing examples of reasonable time place or manner restrictions on public forms as loudspeaker restrictions, regulations of demonstrations to avoid safety and traffic problems, regulation of overnight sleeping in city parks, and clinic buffer zones).

<sup>49</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>50</sup> See generally Duggin, *supra* note 46 (listing examples of reasonable time place or manner restrictions on public forms as loudspeaker restrictions, regulations of demonstrations to avoid safety and traffic problems, regulation of overnight sleeping in city parks, and clinic buffer zones); see also 460 U.S. at 45 (discussing the strict scrutiny standard used to analyze regulation of speech in traditional public forums such as streets and parks); see also *Hill*, 530 U.S. at 729-30 (holding that a ban on approaching within eight feet of a person who was within 100 feet of a health care facility was reasonable and narrowly tailored because even though it prohibited leafleting, it left “ample room to communicate a message through speech”).

<sup>51</sup> See generally Duggin, *supra* note 46; see also *Perry Educ. Ass’n*, 460 U.S. at 45.

<sup>52</sup> See Duggin, *supra* note 46, at 17; 460 U.S. at 45-46.

<sup>53</sup> See Duggin, *supra* note 46, at 17; 460 U.S. at 45-46 (1983).

<sup>54</sup> *Id.* at 37-38 (citing *Widmar v. Vincent*, 454 U.S. 263, 280 (1981)).

<sup>55</sup> See, e.g., *id.* at 37.



*c. Limited Public Fora*

Limited public fora are locations reserved for “certain groups or for the discussion of certain topics.”<sup>56</sup> In a limited public forum, it is permissible for speech to be restricted based on subject matter so long as the restrictions are reasonable and viewpoint-neutral.<sup>57</sup> For example, should an individual want to speak at a public school, it has been determined that it is acceptable for the school to restrict where, at what times, and in which ways speech may occur.<sup>58</sup>

*d. Private Property*

Furthermore, on private property, free speech can be restricted to a much greater degree.<sup>59</sup> Despite the varying degrees of availability for protected speech, in large part caused by the variety of different fora, unprotected speech, such as true threats, is never permissible.<sup>60</sup> Therefore, statutes are often used to criminalize unprotected speech, regardless of where the speech occurs.<sup>61</sup> Eighteen U.S.C. § 875, the statute under which Anthony Elonis was convicted due to his alleged unprotected speech, is one such statute.<sup>62</sup>

### III. 18 U.S.C. § 875(C): A STATUTE LIMITING SPEECH THAT CONSTITUTES TRUE THREATS

Eighteen U.S.C. § 875(c) is a statute that places restrictions on free speech fora.<sup>63</sup> This statute makes it illegal to “transmit in interstate or foreign com-

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<sup>56</sup> See Duggin, *supra* note 46, at 18; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001).

<sup>57</sup> See Duggin, *supra* note 46, at 18; *Good News Club*, 533 U.S. at 106.

<sup>58</sup> *Id.* at 107.

<sup>59</sup> See Duggin, *supra* note 46, at 18; *see, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 57-58 (1994) (holding that a city cannot ban individuals’ speech on their own property).

<sup>60</sup> *Cf.* *United States v. Kelner*, 534 F.2d 1020, 1026 (2d Cir. 1976) (holding that a threat’s “language and context conveyed a gravity of purpose and likelihood of execution so as to” constitute more than protected speech); *Good News Club*, 533 U.S. at 107 (demonstrating that a public high school could establish a limited public forum for after-school clubs and programs if the censorship by the school is not based on the organization’s viewpoint or position).

<sup>61</sup> *See, e.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 322 (1974) (upholding a restriction of advertising space on public buses to commercial ads rather than political ads); *see* 533 U.S. at 107 (demonstrating that a public high school could establish a limited public forum for after-school clubs and programs if the censorship by the school is not based on the organization’s viewpoint or position).

<sup>62</sup> *United States v. Elonis*, 730 F.3d 321, 327 (3d Cir. 2013); 18 U.S.C. § 875 (2012).

<sup>63</sup> § 875.

merce any communication containing any threat to kidnap any person or any threat to injure the person of another.”<sup>64</sup>

#### A. 18 U.S.C. § 875(c): History and Legislative Intent

This statute was originally intended to prevent the use of mail to transmit threats for the purpose of extortion.<sup>65</sup> This was largely due to a number of high profile extortion threats that occurred during that time.<sup>66</sup> As technology changed, Congress continued to amend this statute.<sup>67</sup> For instance, in 1939, Public Law 76-76, the Act on which 18 U.S.C. § 875(c) is based, was expanded to encompass non-extortionist threats as well.<sup>68</sup> Additionally, the statute was further broadened to include other forms of communication, such as the telephone and telegraph.<sup>69</sup>

The background of 18 U.S.C. § 875(c) is important because some argue that the amendment of this Act removed a requirement of a subjective intent to

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<sup>64</sup> *Id.*

<sup>65</sup> See Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649, 649 (1932)

Whoever, with intent to extort from any person any money or other thing of value, shall knowingly deposit or cause to be deposited in any post office or station . . . any written or printed letter or other communication . . . addressed to any other person, and containing any threat (1) to injure the person, property, or reputation of the addressee or of another . . . or (2) to kidnap any person, or (3) to accuse the addressee or any other person of a crime, or containing any demand or request for ransom or reward for the real ease of any kidnapped person, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

*Id.*

<sup>66</sup> Thomas DeBauche, Note, *Bursting Bottles: Doubting the Objective-only Approach to 12 U.S.C. § 875(c) in light of United States v. Jeffries and the norms of online social networking*, 51 HOUS. L. REV. 981, 995 (Winter 2014) (noting that the passage of the original Act which 18 U.S.C. § 875(c) is based on was motivated in large part by the kidnapping of Charles Lindbergh’s son and the kidnappers’ use of mail to relay their threats).

<sup>67</sup> See Act of May 15, 1939, Pub. L. No. 76-76, § 2(b), 53 Stat. 742, 744 (1939) (stating that “[w]hoever shall transmit in interstate commerce by any means whatsoever any communication containing any threat to kidnap any person or any threat to injure the person of another shall be fined not more than \$1,000 or imprisoned not more than five years, or both”); see also DeBauche, *supra* note 66, at 996 nn.110 & 111 (citing S. Rep. No. 73-533 that states “this bill supplements the Patterson Act, which makes it a Federal criminal offense to transmit threats through the mails,” by adding “the telephone, telegraph, radio, and other means of conveyance” to the ways in which threats cannot legally be administered).

<sup>68</sup> See § 2(b), 53 Stat. at 744 (stating that “[w]hoever shall transmit in interstate commerce by any means whatsoever any communication containing any threat to kidnap any person or any threat to injure the person of another shall be fined not more than \$1,000 or imprisoned not more than five years, or both”).

<sup>69</sup> DeBauche, *supra* note 66, at 996 nn.110 & 111 (citing S. Rep. No. 73-533 that states “this bill supplements the Patterson Act, which makes it a Federal criminal offense to transmit threats through the mails,” by adding “the telephone, telegraph, radio, and other means of conveyance” to the ways in which threats cannot legally be administered).

threaten.<sup>70</sup> Others argue that the statute “should cover words that might be objectively perceived as threatening when the speaker did not actually intend to have a threatening effect on a particular target.”<sup>71</sup> This ambiguity, due to congressional changes, caused the division amongst the courts at issue today.

#### B. Division Amongst the Courts: Intent to Threaten Requirement

The disagreement in the proper interpretation of 18 U.S.C. § 875(c) has led to great division amongst the courts.<sup>72</sup> Some circuits hold that the speech should be evaluated from the perspective of a reasonable person in the place of the speech’s recipient.<sup>73</sup> Other circuits find that the subjective intent of the speaker, rather than the recipient, should be used to determine whether a true threat exists.<sup>74</sup> Finally, some circuits require a finding of a speaker’s subjective intent to threaten.<sup>75</sup>

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<sup>70</sup> *Id.* at 996 (citing *United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., dubitante)).

<sup>71</sup> *Id.*

<sup>72</sup> Reply Brief for the Petitioner, *supra* note 19, at 2.

<sup>73</sup> Brief for the Petitioner, *supra* note 19, at 2-3 (stating that the Third Circuit looks to “whether the defendant *intended* to threaten someone was irrelevant: As the government explained, ‘it doesn’t matter what he thinks.’ All that mattered was whether ‘the defendant intentionally ma[d]e a statement . . . under such circumstances wherein a reasonable person would foresee that the statement would be interpreted’ as a threat”); *see, e.g.*, *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (“Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with ‘an apparent determination to carry them into execution.’ The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it.”); *see, e.g.*, *United States v. Jeffries*, 692 F.3d 473, 477-78 (6th Cir. 2012) (instructing the jury to convict Jeffries under 18 U.S.C. § 875(c) if “whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury”); *see, e.g.*, *United States v. Kelner*, 534 F.2d 1020, 1026 (2d Cir. 1976) (holding that a specific intent to carry out a threat is required to prosecute, where the threat’s “language and context conveyed a gravity of purpose and likelihood of execution so as to” constitute more than protected speech)

<sup>74</sup> *See* Brief for the Petitioner, *supra* note 19, at 20 (stating that the Fourth Circuit confirms that “18 U.S.C. § 875(c) requires a showing that a threat was intended”); Reply Brief for the Petitioner, *supra* note 19, at 2-3

[T]he Ninth Circuit resolved any uncertainty that might remain from its previous practice by holding that, under [*Virginia v. Black*], ‘only intentional threats are criminally punishable consistent with the First Amendment’... that court held, ‘the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech’; it is ‘not sufficient that objective observers would reasonably perceive such speech as a threat.’

*Id.*; *see also id.* at 5 (noting “that the Seventh Circuit has recognized that *Black* undermines its position”); *see, e.g.*, 394 U.S. at 707-08 (“Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with ‘an apparent determination to carry them into execution.’ The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it.”); *see, e.g.*, *Jeffries*, 692

### 1. *Objective Intent: A Reasonable Person's Reaction*

The objective intent standard focuses on whether a reasonable person in the place of the individual who received a form of speech would feel threatened.<sup>76</sup> The circuits that focus on the objective intent standard note that the reasonable person standard is appropriate “[b]ecause these social harms flow from the communicated threat itself and do not depend on the specific intent of the speaker.”<sup>77</sup> However, this is not the only form in which the objective standard exists.<sup>78</sup> Rather, the perspective of the reasonable person can replace that of the speaker, the listener, or a “neutral” reasonable person.<sup>79</sup>

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F.3d at 477-78 (instructing the jury to convict Jeffries under 18 U.S.C. § 875(c) if “whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury”); *see, e.g., Kelner*, 534 F.2d at 1026 (holding that a specific intent to carry out a threat is required to prosecute, where the threat’s “language and context conveyed a gravity of purpose and likelihood of execution so as to” constitute more than protected speech).

<sup>75</sup> *See, e.g., Watts*, 394 U.S. at 707-08 (“Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with ‘an apparent determination to carry them into execution.’ The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it.”); *see, e.g.,* 692 F.3d at 477-78 (The jury was instructed to convict Jeffries under 18 U.S.C. § 875(c) if “whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury”); *see, e.g.,* 534 F.2d at 1026 (holding that a specific intent to carry out a threat is required to prosecute, where the threat’s “language and context conveyed a gravity of purpose and likelihood of execution so as to” constitute more than protected speech).

<sup>76</sup> Brief for the Petitioner, *supra* note 19, at 2-3 (stating that the Third Circuit looks to “whether the defendant *intended* to threaten someone was irrelevant: As the government explained, ‘it doesn’t matter what he thinks.’ All that mattered was whether ‘the defendant intentionally ma[d]e a statement...under such circumstances wherein a reasonable person would foresee that the statement would be interpreted’ as a threat”); G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. Rev. 829, 938, 939, n. 328 (2002) (discussing the interpretations of the objective test in true threat analysis).

<sup>77</sup> *See* Brief for the Petitioner, *supra* note 19, at 2-3 (stating that the Third Circuit looks to “whether the defendant *intended* to threaten someone was irrelevant: As the government explained, ‘it doesn’t matter what he thinks.’ All that mattered was whether ‘the defendant intentionally ma[d]e a statement . . . under such circumstances wherein a reasonable person would foresee that the statement would be interpreted’ as a threat” (quoting *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991))); Blakey & Murray, *supra* note 76, at 993 (citing Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 SW. L. REV. 43, 46-48 (2011)).

<sup>78</sup> *See id.* at 938 n. 328 (discussing the interpretations of the objective test in true threat analysis).

<sup>79</sup> *See id.*

2. *Subjective Intent to Post: A Reasonable Person Knows That They Are Placing Speech Into A Forum*

The subjective intent to post standard continues to recognize that the harm comes from the speech, and not from the intent of the speaker. Furthermore, the standard adds another level of analysis.<sup>80</sup> Circuits that utilize the subjective intent to speak standard focus on whether the speaker “[was] knowingly speaking.”<sup>81</sup> The standard also considers whether a reasonable speaker would know that they are placing speech into interstate or foreign commerce.<sup>82</sup>

This standard permits great leeway for judges and juries to criminalize speech. Speech that another person disagrees with, does not like, or does not understand, for example, could be outlawed.<sup>83</sup> The ambiguity of such a test could lead to inconsistency and unfairness. Those who accidentally post a rant on social media that was intended for therapeutic purposes may be protected should they be able to prove that they actually had no intent to publish the speech,<sup>84</sup> however, those who intentionally post rap lyrics, which are sometimes violent or degrading, could be easily convicted.

This issue is even more problematic when considering what is lost in translation between the written and spoken word. For example, a current case pending in Texas arose from a miscommunication between two teenagers in a video game chat-room.<sup>85</sup> The incident began when one of the teenagers called the other “crazy” in response to what the other had said about the video game.<sup>86</sup> The other teen replied sarcastically and stated, “Yeah, I’m crazy; I’m going to

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<sup>80</sup> See, e.g., *Watts*, 394 U.S. at 707-08 (“Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with ‘an apparent determination to carry them into execution.’ The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it.”); see, e.g., *Jeffries*, 692 F.3d at 477-78 (instructing the jury to convict Jeffries under 18 U.S.C. § 875(c) if “whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury”); see, e.g., *Kelner*, 534 F.2d at 1026 (holding that because of First Amendment concerns, a specific intent to carry out a threat is required to prosecute).

<sup>81</sup> See, e.g., 394 U.S. at 707-08 (“Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with ‘an apparent determination to carry them into execution.’ The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it.”); see, e.g., 692 F.3d at 477-78 (instructing the jury to convict Jeffries under 18 U.S.C. § 875(c) if “whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury”); see, e.g., 534 F.2d at 1026 (holding that because of First Amendment concerns, a specific intent to carry out a threat is required to prosecute).

<sup>82</sup> *United States v. Elonis*, 730 F.3d 321, 332-33 (3d Cir. 2013).

<sup>83</sup> *Id.* at 332.

<sup>84</sup> *Id.*

<sup>85</sup> Transcript of Oral Argument, *supra* note 39, at 9.

<sup>86</sup> *Id.* at 9-10.

shoot up a kindergarten and eat one of their still beating hearts.”<sup>87</sup> While this statement was clearly made in poor taste, both teenagers understood it to be sarcasm.<sup>88</sup> However, a Canadian woman observing the chat, who clearly did not understand the sarcasm, proceeded to report the teenager to the authorities.<sup>89</sup> This teenager now faces criminal charges for a true threat simply because he knowingly placed sarcastic speech to an individual into interstate commerce and a third party misunderstood the speech as a threat.<sup>90</sup> Should an individual be convicted of a crime for having what many would believe to simply be poor taste?

### 3. Subjective Intent to Threaten: The Speaker’s Intent Is To Threaten Another

The final true threat analysis standard is the subjective intent to threaten.<sup>91</sup> This test focuses on whether the speaker knowingly made a statement.<sup>92</sup> Addi-

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 10.

<sup>90</sup> *Id.* at 9. This scenario also demonstrates the issues caused by the objective intent test in true threat analysis without more, as an individual who saw the written speech, who could arguably be considered to be reasonable, misunderstood the sarcastic speech as a threat.

<sup>91</sup> See Brief for the Petitioner, *supra* note 19 (stating that the Fourth Circuit confirms that “18 U.S.C. § 875(c) requires a showing that a threat was intended” (citing *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966))); Reply Brief for the Petitioner, *supra* 19, at 2-3

[T]he Ninth Circuit resolved any uncertainty that might remain from its previous practice by holding that, under *Black*, ‘only intentional threats are criminally punishable consistent with the First Amendment’... that court held, ‘the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech’; it is ‘not sufficient that objective observers would reasonably perceive such speech as a threat.’

(citing *United States v. Bagdasarian*, 652 F.3d 1113, 1116-1117 (2011)); see also *id.* at 5 (“[T]hat the Seventh Circuit has recognized that *Black* undermines its position.” (citing *United States v. Parr*, 545 F.3d 491, 500 (2008))); see *United States v. Twine*, 853 F.2d 676, 679-80 (9th Cir. 1988) (explaining that because the word “knowingly” is included in 18 U.S.C. § 875(c), proof of culpability that “exceeds a mere transgression of an objective standard of acceptable behavior...[such as] negligence [or] recklessness” is required).

<sup>92</sup> See Brief for the Petitioner, *supra* note 19 (stating that the Fourth Circuit confirms that “18 U.S.C. § 875(c) requires a showing that a threat was intended” (citing *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966))); Reply Brief for the Petitioner at 2-3, *Elonis*, 134 S. Ct. 2819 (No. 13-983)

[T]he Ninth Circuit resolved any uncertainty that might remain from its previous practice by holding that, under *Black*, ‘only intentional threats are criminally punishable consistent with the First Amendment’... that court held, ‘the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech’; it is ‘not sufficient that objective observers would reasonably perceive such speech as a threat.’

(citing *United States v. Bagdasarian*, 652 F.3d 1113, 1116-1117 (2011)); see also *id.* at 5

tionally, the government must prove beyond a reasonable doubt that the speaker not only intended to make the statement, but also intended the target of the statement to feel threatened.<sup>93</sup>

While this standard appears to be more protective of speech, it still leaves great ambiguity.<sup>94</sup> As Justice Ginsburg pointed out during oral arguments in the case of *Elonis v. United States*:

How does one prove what's in somebody else's mind? This case, the standard was would a reasonable person think that the words would put someone in fear, and reasonable people can make that judgment. But how would the government prove whether this threat in the mind of the threatener was genuine?<sup>95</sup>

The Court must strike a balance between the protection of free speech and prosecution of true threats in their ultimate decision of which standard of intent to adopt.

#### IV. *ELONIS V. UNITED STATES*: A CASE STUDY

The Supreme Court heard oral arguments for *Elonis v. United States* on December 1, 2014, to consider the three possible intent tests for true threat analysis.<sup>96</sup> The facts of this case make it ideal for the consideration of these tests.

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("[T]hat the Seventh Circuit has recognized that *Black* undermines its position." (citing *United States v. Parr*, 545 F.3d 491, 500 (2008))); see 853 F.2d at 679-80 (explaining that because the word "knowingly" is included in 18 U.S.C. § 875(c), proof of culpability that "exceeds a mere transgression of an objective standard of acceptable behavior...[such as] negligence [or] recklessness" is required).

<sup>93</sup> See Brief for the Petitioner, *supra* note 19 (stating that the Fourth Circuit confirms that "18 U.S.C. § 875(c) requires a showing that a threat was intended" (citing *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966))); Reply Brief for the Petitioner at 2-3, *Elonis*, 134 S. Ct. 2819 (No. 13-983)

[T]he Ninth Circuit resolved any uncertainty that might remain from its previous practice by holding that, under *Black*, 'only intentional threats are criminally punishable consistent with the First Amendment'... that court held, 'the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech'; it is 'not sufficient that objective observers would reasonably perceive such speech as a threat.'

(citing *United States v. Bagdasarian*, 652 F.3d 1113, 1116-1117 (2011)); see also *id.* at 5 ("[T]hat the Seventh Circuit has recognized that *Black* undermines its position." (citing *United States v. Parr*, 545 F.3d 491, 500 (2008))); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005); Paul T. Crane, Note, "True Threats" and the Issue of Intent, 92 VA. L. REV. 1225, 1236 (2006).

<sup>94</sup> See generally Transcript of Oral Argument at 4-5, *Elonis*, 134 S. Ct. 2819 (No. 13-983), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-983\\_bq7d.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-983_bq7d.pdf).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 3.

A. *Elonis v. United States*: Factual Background

In May 2010, Anthony Elonis separated from his wife, who moved out of their home with their two children.<sup>97</sup> Subsequently, Elonis, a former employee of Dorney Park, an amusement park in Pennsylvania, began experiencing difficulties at work<sup>98</sup> and was ultimately fired.<sup>99</sup>

In response, Mr. Elonis took to his public social media account on Facebook,<sup>100</sup> where he made a series of posts that appeared to be threats.<sup>101</sup> Mr. Elonis's posts targeted a variety of individuals, including his wife, Dorney Park Amusement Park (his former employer), an unspecified kindergarten class, the Pennsylvania State Police and Berks County Sheriff's Department, and a Federal Bureau of Investigations (FBI) agent who began to investigate the case once the posts were brought to the FBI's attention.<sup>102</sup> Several of these posts were in the form of rap lyrics written by Anthony Elonis.<sup>103</sup>

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<sup>97</sup> *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013).

<sup>98</sup> *See id.*; *see also* Brief for the Petitioner, *supra* note 19, at 6 (detailing that Elonis was sent home from work on several occasions because he was too upset about his separation from his wife to work).

<sup>99</sup> *See* 730 F.3d at 324; *see also* Brief for the Petitioner, *supra* note 19, at 8-9 (explaining that the petitioner had jokingly posted a picture with a friend in halloween costumes for a "haunted-house-themed event," and it was seen and interpreted as a threat by the Chief of Dorney Park Patrol, causing Elonis to be released from his position).

<sup>100</sup> 730 F.3d at 324.

<sup>101</sup> *See id.* at 324-26; Brief for the Petitioner, *supra* note 19, at 9-12

Moles. Didn't I tell y'all I had several? Y'all saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility for a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary? . . . Hi, I'm Tone Elonis. 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 accidentally 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. Because that's its own sentence. It's an incomplete sentence but it may have noth-/ing to do with the sentence before that. So that's/perfectly fine. Perfectly legal . . . Art is about pushing limits. I'm willing to go to jail for my constitutional rights. Are you? [including a link to the original video].

*Id.*

<sup>102</sup> 730 F.3d at 326.

<sup>103</sup> Brief for the Petitioner, *supra* note 19, at 6-7.



B. *Elonis v. United States*: Procedural History

On December 8, 2010, Anthony Elonis was arrested.<sup>104</sup> He was charged with violating 18 U.S.C. § 875(c), “[by] transmitting in interstate commerce communications containing a threat to injure the person of another.”<sup>105</sup> A grand jury indicted Mr. Elonis on five counts of 18 U.S.C. § 875(c) violations based on the “threatening” posts he made on his public Facebook account.<sup>106</sup>

Citing *Virginia v. Black*, Elonis moved to dismiss the indictment and argued that “a subjective intent to threaten was required under the true threat exception to the First Amendment and that his statements were not threats but were protected speech.”<sup>107</sup> The district court denied his motion to dismiss, and stated that the issues Elonis raised were matters of fact to be determined by a jury.<sup>108</sup>

At his jury trial, Anthony Elonis testified in his own defense.<sup>109</sup> The government responded by calling witnesses to demonstrate how a reasonable person would view Elonis’s posts.<sup>110</sup> These “reasonable person[s],” however, “had little familiarity with Facebook, no familiarity with rap music, and viewed [Elonis’s] posts in isolation, largely divorced from users’ comments and his surrounding posts.”<sup>111</sup> Without context for Elonis’s musical taste and sense of satire, the government’s witnesses only considered the words’ literal meaning.<sup>112</sup> Moreover, these “reasonable people” were “unfamiliar with the meaning of the emoticons petitioner used to provide his Facebook posts context.”<sup>113</sup> The jury convicted him of disseminating true threats through interstate commerce on four of the five counts of which he was accused.<sup>114</sup>

Elonis then filed a post-trial Motion to Dismiss Indictment with Prejudice under Federal Rule of Criminal Procedure 12(b)(3), and then moved for a New Trial under Federal Rule of Criminal Procedure 33(a), to Arrest Judgment under Federal Rule of Criminal Procedure 34(b), and/or Dismissal under Federal Rule of Criminal Procedure 29(c).<sup>115</sup> The district court denied these motions.<sup>116</sup>

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<sup>104</sup> *Elonis*, 730 F.3d at 326.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 327.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Brief for the Petitioner, *supra* note 19, at 17.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 17-18.

<sup>113</sup> *Id.* Emoticons are computer or keyboard generated faces, such as smiley faces, that are used in written Internet speech to assist with the demonstration of the writer’s attitude.

<sup>114</sup> *Elonis*, 730 F.3d at 327 (noting that the jury did not convict Anthony Elonis of administering a true threat via interstate commerce based on his postings on his public Facebook account regarding Dorney Park and its patrons).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

The United States Court of Appeals for the Third Circuit upheld *Elonis's* convictions, citing the Court's reasonable speaker standard, as articulated in *United States v. Kosma*.<sup>117</sup> The United States Supreme Court granted certiorari on June 16, 2014, in part to consider the differing intent standards in true threat analysis.<sup>118</sup>

## V. ANALYSIS: TRUE THREATS AND A NEW TEST

The intent standard used most often by courts in recent years is the objective intent test.<sup>119</sup> The objective intent test asks whether a reasonable person would be put in genuine fear for their safety based on their receipt of the speech in question.<sup>120</sup> This analysis constitutes an important portion of any true threat test.

However, there are other important factors that should be considered in true threat analysis, such as the analysis of whether it is feasible for the threat to

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The District Court denied the motion to dismiss the indictment, finding the indictment correctly tracked the language of the statute and stated the nature of the threat, the date of the threat and the victim of the threat . . . the objective intent standard conformed with Third Circuit precedent. . . [the] evidence supported the jury's finding that the statements in Count 3 and Count 5 were true threats . . . [and] the jury instruction presuming communications over the internet were transmitted through interstate commerce was supported by our precedent in *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006).

*Id.*

<sup>117</sup> See *id.* at 327-28, 332 (detailing that true threat analysis in the Third Circuit looks to whether a statement could be foreseen by a reasonable person to be interpreted by the speech's recipient as a legitimate threat of bodily injury or death).

<sup>118</sup> *Elonis v. United States*, 134 S. Ct. 2819 (2014).

<sup>119</sup> See Brief for the Petitioner, *supra* note 19, at 2-3

[W]hether the defendant *intended* to threaten someone was irrelevant: As the government explained, 'it doesn't matter what he thinks.' All that mattered was whether 'the defendant intentionally ma[d]e a statement. . . under such circumstances wherein a reasonable person would foresee that the statement would be interpreted' as a threat.

(internal citations omitted); see, e.g., *Watts v. United States*, 394 U.S. 705, 707-08 (1969) ("Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with 'an apparent determination to carry them into execution.' The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it."); see, e.g., *United States v. Jeffries*, 692 F.3d 473, 477-78 (6th Cir. 2012) (instructing the jury to convict Jeffries under 18 U.S.C. § 875(c) if "whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury"); see, e.g., *United States v. Kelner*, 534 F.2d 1020, 1026 (2d Cir. 1976) (holding that despite First Amendment concerns, a specific intent to carry out a threat is not specifically required to prosecute).

<sup>120</sup> Gene Policinski, *Examining the New Importance of 'Where' We Speak*, NEWSEUM INST. (July 25, 2014), <http://www.firstamendmentcenter.org/examining-the-new-importance-of-where-we-speak>.

actually be executed, which affects the reasonability of the inflicted fear.<sup>121</sup> For instance, “[w]ishing aloud that a certain person would be struck by a meteor...may be crude and tactless, but clearly the speaker cannot make that occur.”<sup>122</sup> Furthermore, to be a true threat, the speech has to be directed to a certain person or identifiable group.<sup>123</sup>

Rather than intent, the requirement that speech be directed at an identifiable person or group determines whether a true threat exists. This is because a true threat, under the objective intent test, is based on the reasonable reaction of the recipient of the speech.<sup>124</sup> On written social media forums, such as Facebook, Twitter, and Myspace, there is no ability for a recipient to recognize body language, tone of voice, or even handwriting style. These verbal and nonverbal cues have previously helped individuals (and courts) decipher whether a threat is serious.<sup>125</sup> Because the true meaning of text on social media is lost in translation, the Supreme Court should examine the directness of the threat, rather than the subjective or objective intent of the speaker. Moreover, the Supreme Court should adopt a true threat analysis test, which considers both the directness of the speech and the objective intent of the speech’s recipient. This two-fold test would allow strong protections for free speech while simplifying the analysis for unprotected true threats.

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

In 2002, the Arkansas Supreme Court upheld a juvenile-court conviction of a high school student for writing rap lyrics it said were a ‘true threat’ of physical violence . . . [because] the lyrics were written specifically for a fellow student, delivered to her and she was, the court said, ‘intensely frightened and upset’ by the threat and believed the juvenile might follow through on the threat because he had a criminal record . . . in 2012, a federal appeals court in California refused to reinstate the conviction of an Arizona man accused of planning a Super Bowl massacre, saying a rambling ‘manifesto’ did not constitute a threat to people, since it was addressed to media outlets not specific persons, and that man’s threat to ‘test the theory that bullets speak louder than words’ was not sufficient to support a conviction under federal law.

*Id.*

## A. The True Threat Test: Directness and Objective Intent as a Holistic Approach

### 1. Level 1: “Status Update”

To determine the directness of a possible true threat on social media, it is important to consider the three major types of social media posts.<sup>126</sup> The first level of posting to Facebook is that of the “status update.” This is a broad form of speech that, based on an individual’s privacy settings, allows members of Facebook to read what the user wrote.<sup>127</sup>

This level is akin to an individual speaking on the street with a megaphone. Assuming that a user employs the default Facebook privacy settings, when the user posts a status update to their own Facebook page, the entire Facebook community has the ability to view that post, even if the post is geared toward or directly names only one individual.<sup>128</sup> Thus, it is similar to someone who is standing on a street corner making verbal threats through a megaphone against an individual that they feel wronged them. There is no evidence that the individual targeted by the speaker knows or will ever know of the threat.<sup>129</sup> In true threat analysis, an individual must physically receive the speech in order to feel threatened.<sup>130</sup> Thus, it can be argued that this style of speech is more of a therapeutic rant and therefore less likely to be a true threat.<sup>131</sup>

Under the holistic directness test argued for here, if the disputed speech is posted as a status update, a jury would receive instructions such as: A true threat has occurred if a reasonable person, hearing this public statement shouted to no person in particular on the street, would believe the speech to be an

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<sup>126</sup> Because the case that is being used to demonstrate the possibility of analyzing a true threat through the directness of the speech involved posts to Facebook, Facebook will be used to represent all written social media websites.

<sup>127</sup> An individual can set their individual settings generally and per post to permit all of Facebook, just his or her “friends,” or those with whom the individual has linked his or her account, just his or her friends and friends of friends, just select individuals, or only the individual him or herself to see their Facebook page and each individual post. *Choose Who You Share With*, FACEBOOK, <https://www.facebook.com/help/459934584025324/> (last visited Feb. 1, 2015).

<sup>128</sup> *Id.*

<sup>129</sup> Just because a person is capable of reading a Facebook post, does not mean they will read it. *Id.* (explaining a Facebook user’s ability to customize the audience for their posts).

<sup>130</sup> Policinski, *supra* note 120 (noting that the objective test for true threats focuses on the reaction of the recipient to the speech).

<sup>131</sup> Richard Wolf, *Supreme Court to Hear Case on Facebook Threats*, USA TODAY (June 16, 2014, 4:25 PM), <http://www.usatoday.com/story/news/nation/2014/06/16/supreme-court-facebook-threats-free-speech/10326233/>; *see also* United States v. Kelner, 534 F.2d 1020, 1026 (2d Cir. 1976) (noting that offensive speech made in jest or as rhetoric should remain protected).

actual, feasible, and reliable threat of bodily injury or death.<sup>132</sup> By creating jury instructions that utilize the directness test, a jury will be better able to evaluate the true meaning of the speech in question, as the speech will be removed from the intangible Internet and considered in a more tangible, generally understood context.

## 2. Level 2: “Timeline Post”

The next level of placing speech in social media is “posting to someone’s timeline.”<sup>133</sup> When an individual posts on someone’s timeline, only those who are able to view the recipient user’s posts on that timeline can see the speech.<sup>134</sup> Writing on a “timeline” is similar to writing on an individual’s white-board on the outside of their college dorm door.<sup>135</sup> It is a public message to an individual that others may also read.<sup>136</sup>

This is analogous to speaking to an individual within a group of people. When speaking in a group setting, it is more likely that factors affecting the reasonability of the speech truly constituting a serious threat of bodily injury or death would be known.<sup>137</sup> In a group, other individuals may recognize that the speaker has violent tendencies or can be spontaneous in their actions. Depending on the surrounding circumstances, such as the specific language used and the criminal record of the speaker, this could be considered direct enough to warrant a true threat prosecution under 18 U.S.C. § 875(c).<sup>138</sup> Therefore, under the directness test, if the disputed speech is posted on someone’s wall, a jury would receive instructions such as: A true threat occurred if a reasonable person, having personal direct or indirect knowledge of the speaker and hearing this statement made in a group, would believe it to be an actual and feasible threat of bodily injury or death.<sup>139</sup> Creating jury instructions based on the directness of the speech and the objective standard of a reasonable recipient will

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<sup>132</sup> Cf. *United States v. Elonis*, 730 F.3d 321, 327 (3d Cir. 2013) (noting the jury instructions provided by the *Elonis* trial judge).

<sup>133</sup> *How do I post something on someone else’s Timeline?*, FACEBOOK, <https://www.facebook.com/help/173433019380025> (last visited Feb. 20, 2015).

<sup>134</sup> *Id.*

<sup>135</sup> *See generally What is Timeline*, FACEBOOK, <https://www.facebook.com/help/1462219934017791?sr=1&query=What%20is%20a%20Timeline&sid=0hjiUy5PLtnGvjtBx> (last visited Feb. 21, 2015).

<sup>136</sup> *How do I post something on someone else’s Timeline?*, *supra* note 133.

<sup>137</sup> Brief for the United States at 53, *Elonis v. United States*, 134 S.Ct. 2819 (Sept. 29, 2014) (No. 13-983).

<sup>138</sup> *Id.*

<sup>139</sup> Cf. *United States v. Elonis*, 730 F.3d 321, 327 (3d Cir. 2013) (noting the jury instructions provided by the *Elonis* trial judge).

remove much of the ambiguity of true threat analysis for Facebook timeline posts, while still allowing a jury to weigh the facts of the case at hand.<sup>140</sup>

### 3. Level 3: “Private Message”

The third and final level of posting speech to social media outlets such as Facebook is “private messaging” an individual.<sup>141</sup> Private messaging is useful when one wishes to send a message to an individual on Facebook, but does not want other individuals to read what is sent; this is analogous to sending an e-mail or a text message.<sup>142</sup> It is sent directly to the individual recipient and cannot be viewed by anyone other than the individual who wrote the message and the individual who received it.<sup>143</sup> This is similar to the note passed in a high school in Arkansas or the letter that 18 U.S.C. § 875(c) was originally designed to regulate.<sup>144</sup> Therefore, it is likely that speech which appears threatening and is delivered via a system of private messaging will likely constitute a true threat under 18 U.S.C. § 875(c) as “any communication containing . . . any threat to injure the person.”<sup>145</sup> Under the directness test, if the disputed speech is delivered through a private message, a jury would receive instructions such as: A true threat has occurred if a reasonable person, knowing the speaker, or

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<sup>140</sup> Sherry F. Colb, *The Supreme Court Considers “True Threats” and the First Amendment*, VERDICT (Dec. 10, 2014), <https://verdict.justia.com/2014/12/10/supreme-court-considers-true-threats-first-amendment>.

<sup>141</sup> William McCoy, *What is the Meaning of PM in Facebook?*, EHOW.COM, [http://www.ehow.com/info\\_10030591\\_meaning-pm-facebook.html](http://www.ehow.com/info_10030591_meaning-pm-facebook.html) (last visited Feb. 3, 2015).

<sup>142</sup> *Id.*

<sup>143</sup> *Who Can See My Messages*, FACEBOOK, <https://www.facebook.com/help/212388195458335> (last visited Feb. 21, 2015).

<sup>144</sup> Policinski, *supra* note 120

In 2002, the Arkansas Supreme Court upheld a juvenile-court conviction of a high school student for writing rap lyrics it said were a ‘true threat’ of physical violence . . . [because] the lyrics were written specifically for a fellow student, delivered to her and she was, the court said, ‘intensely frightened and upset’ by the threat and believed the juvenile might follow through on the threat because he had a criminal record.

*Id.*; see Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649

Whoever, with intent to extort from any person any money or other thing of value, shall knowingly deposit or cause to be deposited in any post office or station . . . any written or printed letter or other communication . . . addressed to any other person, and containing any threat (1) to injure the person, property, or reputation of the addressee or of another . . . or (2) to kidnap any person, or (3) to accuse the addressee or any other person of a crime, or containing any demand or request for ransom or reward for the real ease of any kidnapped person, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

*Id.*

<sup>145</sup> 18 U.S.C. § 875(c) (2012).

who has never had any contact with the speaker, received this speech directly and understood the speech to be an actual and feasible threat of bodily injury or death.<sup>146</sup> This jury instruction allows individuals to be prosecuted for their threatening speech, even if the recipient has had no prior contact with the speaker.<sup>147</sup> At the same time, this instruction allows for the protection of free speech, as the jury will be able to consider the facts in this context more easily. The significance of this directness test for true threats, as explained through the three major formats for speaking on social media platforms, can be demonstrated by its application to the case of *Elonis v. United States*.

#### B. Application of the Directness Test: *Elonis v. United States*

As detailed in *Elonis v. United States*, Anthony Elonis placed speech into interstate commerce through written posts on Facebook.<sup>148</sup> The five charges brought against Elonis<sup>149</sup> as analyzed by the holistic approach of the directness test, encompassing the directness of the threat and objective intent, demonstrate the ease with which this test allows for a simplified approach to true threat analysis while maintaining the role of the jury in criminal law. Thus, this analysis, in which each of Elonis's five charges will be considered independently, demonstrates why the Supreme Court should understand the test for true threats to consider the directness of the threat in conjunction with objective intent.

##### 1. Count 1: Anthony Elonis's Threat Against an Unspecified Kindergarten Class

The first charge brought against Anthony Elonis was that he allegedly threatened to shoot an unspecified kindergarten class.<sup>150</sup> On November 16, 2010, Anthony Elonis created a post on his public Facebook webpage that stated:

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?<sup>151</sup>

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<sup>146</sup> Cf. *United States v. Elonis*, 730 F.3d 321, 327 (3d Cir. 2013) (noting the jury instructions provided by the *Elonis* trial judge).

<sup>147</sup> Colb, *supra* note 140 (citing *Virginia v. Black*, 538 U.S. 343, 344 (2003)).

<sup>148</sup> 730 F.3d at 326-27.

<sup>149</sup> *Id.* at 326.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

Because Anthony Elonis's Facebook page was public, anyone with a Facebook account could access it, including the FBI agent who was monitoring Elonis's Facebook profile.<sup>152</sup> The way in which these rap lyrics were posted is similar to an individual rapping on a street corner. Therefore, a jury considering this charge, under the suggested true threat analysis, would receive a jury instruction such as, Anthony Elonis committed a true threat if a reasonable person walking down the street, having heard this speech being rapped to no person in particular, would believe the speech to be an actual, feasible, and reliable threat of bodily harm or death.<sup>153</sup>

A jury would decide whether Elonis was merely "venting his feelings [through] rap lyrics" on Facebook, or whether his post instead constituted a true threat.<sup>154</sup> Due to the many high profile school shootings that have recently occurred,<sup>155</sup> it is possible that a jury could find that a reasonable person would consider Elonis's words to be a true threat.<sup>156</sup> However, while the post mentions "elementary schools," it does not target a specific individual or group of individuals.<sup>157</sup> Instead, it mentions a kindergarten class, but does not name a particular class or school.<sup>158</sup> Because the statement "only conveys a vague timeline or condition," it is not likely to be considered a true threat.<sup>159</sup> If the post had included more detail about an elementary school in the area or shown Elonis's connection to a particular school, it is possible that a jury would find Elonis's statement specific enough to be recognized as a true threat.

Although Elonis's speech was inappropriate and would likely be considered offensive to a reasonable person, it does not mean that this speech is inherently a true threat. This is because without more, inappropriate speech does not constitute a true threat.<sup>160</sup> The United States Supreme Court has said that unpopu-

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<sup>152</sup> *Id.*

<sup>153</sup> *Cf. id.* at 327 (quoting the jury instructions provided by the *Elonis* trial judge).

<sup>154</sup> Irin Carmon, *Supreme Court dilemma: Was Facebook rant real threat or rap lyrics?*, MSNBC (Dec. 1, 2014, 7:12 PM), <http://www.msnbc.com/msnbc/supreme-court-rap-lyric-argument-facebook-threat-case>.

<sup>155</sup> Richard A. Serrano, *Mass shootings in U.S. have tripled in recent years, FBI says*, L.A. TIMES (Sept. 24, 2014, 6:25 PM), <http://www.latimes.com/nation/nationnow/la-nn-na-mass-shootings-fbi-20140924-story.html> (mentioning recent shootings such as the shootings in the Aurora movie theater and the elementary school shooting at Sandy Hook Elementary School in Newtown, CT in 2012).

<sup>156</sup> *Threats of Violence Against Individuals*, JUSTIA, <http://law.justia.com/constitution/us/amendment-01/43-threats-of-violence.html> (last visited Feb. 21, 2015).

<sup>157</sup> *Elonis*, 730 F.3d at 326.

<sup>158</sup> *Id.* ("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?").

<sup>159</sup> *Id.* at 334.

<sup>160</sup> *See, e.g., Virginia v. Black*, 538 U.S. 343, 359 (2003) (explaining that the burning of



lar or controversial speech deserves First Amendment protection.<sup>161</sup> Therefore, Elonis's speech should be protected and he should not have been convicted of violating 18 U.S.C. § 875(c) on this count.

The combination of directness and objective intent allows the jury to objectively apply the facts and external context to the issue at hand, rather than solely focusing on the tasteless speech itself.<sup>162</sup>

## 2. Count 2: Anthony Elonis's Threat Against Dorney Park

A second charge was brought against Elonis for a Facebook statement made about Dorney Park and its patrons.<sup>163</sup> Two days after Anthony Elonis was fired from his job at Dorney Park, he posted as a status update:

Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?<sup>164</sup>

Similar to Elonis's alleged threat against an unspecified kindergarten class, this speech was posted to the general public as a status update.<sup>165</sup> Therefore, a jury would receive instructions such as: A true threat was committed if a reasonable person walking down the street, having heard this speech yelled to no person in particular, would believe the speech to be an actual, feasible, and reliable threat of bodily harm or death.<sup>166</sup>

Given that Elonis targeted a specific location, in the context of these instructions, a jury may find that Elonis's words are a true threat.<sup>167</sup> However, while

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a cross alone does not constitute a true threat without something more, there must be intent to act unlawfully).

<sup>161</sup> See, e.g., *Snyder v. Phelps*, No. 09-751, 562 U.S. 443, slip op. at 12 (2011) (noting that because "Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection'" and "cannot be restricted simply because it is upsetting or arouses contempt").

<sup>162</sup> See *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012) (noting that reasonable-person standard would understand that "I'll tear your head off" has a different meaning when it comes from a professional athlete than when it comes from a serial killer because, "instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made").

<sup>163</sup> *Elonis*, 730 F.3d at 326.

<sup>164</sup> *Id.* at 324.

<sup>165</sup> *Id.*

<sup>166</sup> *Cf. id.* at 327 (quoting the jury instructions provided by the Elonis trial judge).

<sup>167</sup> See Policinski, *supra* note 120

In 2012, a federal appeals court in California . . . [said] a rambling "manifesto" did not constitute a threat to people, since it was addressed to media outlets not specific persons, and that man's threat to 'test the theory that bullets speak louder than words' was not sufficient to support a conviction under federal law.

*Id.*

this post appears to be aimed at Dorney Park, Elonis's former employer, and its patrons, this post is more analogous to the individual who threatened a Super Bowl Massacre.<sup>168</sup> This statement is similar to that made by the speaker in the Super Bowl Massacre threat case because it appears to be an unambiguous "rambling manifesto"<sup>169</sup> that does not actually or specifically "threaten" to do anything, but rather, states that Elonis has keys to the facilities and implies he may utilize them. Therefore, a neutral reasonable person hearing this statement on the street will probably not consider these words to be a true threat, and a jury could also reasonably decide not to convict Elonis on this count.<sup>170</sup> Thus, the jury likely found correctly on this charge against Elonis.<sup>171</sup> In considering disputed texts in this context, a jury relies on the actual facts of the case to judge whether Elonis's speech was actually a true threat, rather than focusing on the crudeness of the language itself.<sup>172</sup>

### 3. Count 3: Anthony Elonis's Threats Against the FBI

Similarly, a fifth count brought against Anthony Elonis was in regard to rap lyrics he posted to Facebook regarding the FBI<sup>173</sup>:

You know your shits 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 ya'll know, I was strapped wit' a bomb/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!]<sup>174</sup>

These lyrics were posted as a status update on Elonis's public Facebook page.<sup>175</sup> Using the intent to threaten standard of the Third Circuit, a jury found that this text constituted a true threat.<sup>176</sup> The jury instruction stated:

<sup>168</sup> *Cf. id.* (noting that a man's conviction was not reinstated because a "rambling 'manifesto'" about a Super Bowl Massacre does not reach the level of a true threat).

<sup>169</sup> *Id.* (noting that a federal appeals court found that a "rambling 'manifesto'" is not a true threat because "it was addressed to media outlets, not specific persons, and that man's threat to 'test the theory that bullets speak louder than words'" was not enough to support a conviction).

<sup>170</sup> *See Elonis*, 730 F.3d at 332 (applying the objective intent standard, which both addresses harm caused by true threats and protects "non-threatening speech").

<sup>171</sup> *Id.* at 327 (stating that Elonis was not convicted on this charge).

<sup>172</sup> *Cf. United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012) (stating that the reasonable-person standard "forces jurors to examine the circumstances in which a statement is made" and does not allow jurors to ignore context (citing *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997))).

<sup>173</sup> 730 F.3d at 326.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 327.

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.<sup>177</sup>

However, when considering Elonis's statement under the directness test, it is unlikely that a jury would come to the same conclusion.<sup>178</sup>

Under the directness analysis for true threats, a jury would be asked to consider whether a neutral reasonable person, hearing Elonis's lyrics rapped on the street towards no specific individual, would believe that the rapper *intended* to actually physically injure or kill the FBI agent mentioned, whether his "threat" was feasible, and whether the threat should be relied upon.<sup>179</sup> Considering that many rap lyrics are violent in nature and are often geared toward specific individuals, it is unlikely that a neutral reasonable bystander would consider these lyrics to constitute a true threat.<sup>180</sup> While there is always the possibility that the jury will find in the alternative, the decision is the jury's prerogative and will depend on their personal experiences and the facts of the case. The ability of a jury to take into account their own personal experiences in considering the facts of the case before them is imperative to the nature of a criminal trial.<sup>181</sup> The proposed true threat analysis, which combines directness with objective intent, is appropriate because it respects jury deliberation and experience while preventing a rogue jury from convicting a defendant solely based on the offense they felt by the statement in question.<sup>182</sup>

#### 4. Count 4: Anthony Elonis's Threats Against a Pennsylvania Police Department

A fourth count was brought against Elonis for a message he posted to Facebook "threatening" the Pennsylvania State Police and Sheriff's Department.<sup>183</sup> This statement read:

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<sup>177</sup> *Id.*

<sup>178</sup> See *Virginia v. Black*, 538 U.S. 343, 360 (2003) (stating that a true threat is a statement where a speaker directs a threat to a person or groups of persons *with the intent of placing the victim in fear of bodily harm or death* (emphasis added) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969))).

<sup>179</sup> See, e.g., *id.* at 360 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to person or groups of persons *with the intent of placing the victim in fear of bodily harm or death.*" (emphasis added)).

<sup>180</sup> See, e.g., *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012) ("A juror cannot permissibly ignore contextual cues in deciding whether a 'reasonable person' would perceive the charged conduct 'as a serious expression of an intention to inflict bodily harm.'" (citing *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997))).

<sup>181</sup> U.S. CONST. amend. VI.

<sup>182</sup> DeBauche, *supra* note 66, at 1013-14.

<sup>183</sup> *United States v. Elonis*, 730 F.3d 321, 333 (3d Cir. 2013).

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/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]<sup>184</sup>

This statement was posted as a status update to Elonis's public Facebook page.<sup>185</sup>

The district court jury and appellate court determined that a reasonable jury could have determined that this statement was a true threat. Therefore, Anthony Elonis was convicted of threatening a police station.<sup>186</sup> However, when considering this statement under the directness and objective intent test, the outcome is not as clear.<sup>187</sup>

Under the directness test, a jury would receive instructions that if a reasonable person, hearing this rap on a street corner, would consider the statement to be an actual threat against the police station, than a true threat exists.<sup>188</sup> Using the directness and objective intent test, a jury could find, from the perspective of a reasonable person, that the speaker is angry and ranting using hyperbolic speech.<sup>189</sup> However, given recent events such as Eric Frein's recent ambushing of police officers,<sup>190</sup> it is also possible that a jury could find that a reasonable person would consider this a true threat.<sup>191</sup> Furthermore, unlike the Super Bowl Massacre threat, these rap lyrics specify who the possible threat is against and what the speaker intends to do to the specified individuals, furthering the likelihood that this post is a true threat under 18 U.S.C. § 875(c).<sup>192</sup> Thus, it is likely Anthony Elonis should be convicted of a true threat under the directness test for his statement regarding police. However, this issue could reasonably be

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<sup>184</sup> *Id.* at 333-34.

<sup>185</sup> *Id.* at 333.

<sup>186</sup> *Id.* at 334.

<sup>187</sup> DeBauche, *supra* note 66, at 1016.

<sup>188</sup> *Id.* at 1015-16.

<sup>189</sup> *Elonis*, 730 F.3d at 328 (explaining that hyperbolic speech is not protected (citing *Watts v. United States*)).

<sup>190</sup> Andrew Jauregui, *Eric Frein Charged With Two Counts Of Terrorism*, THE HUFFINGTON POST (Nov. 13, 2014), [http://www.huffingtonpost.com/2014/11/13/eric-frein-terrorism-charges\\_n\\_6154674.html](http://www.huffingtonpost.com/2014/11/13/eric-frein-terrorism-charges_n_6154674.html).

<sup>191</sup> DeBauche, *supra* note 66, at 987.

<sup>192</sup> Policinski, *supra* note 120

[I]n 2012, a federal appeals court in California refused to reinstate the conviction of an Arizona man accused of planning a Super Bowl massacre, saying a rambling "manifesto" did not constitute a threat to people, since it was addressed to media outlets not specific persons, and that man's threat to 'test the theory that bullets speak louder than words' was not sufficient to support a conviction under federal law.

*Id.*

decided by a jury either way and thus permits the traditional criminal law jury system to function as intended.<sup>193</sup>

##### 5. Count 5: Anthony Elonis's Threats Against His Wife

The fifth count was brought against Anthony Elonis for a series of “threatening” status updates that he posted on Facebook regarding his estranged wife.<sup>194</sup> One such post stated:

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... 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. Because that's its own sentence . . . .<sup>195</sup>

The post then continued to “not” inform any specific individual how to kill Tara Elonis, Anthony's estranged wife, with a mortar launcher, going so far as to use a keyboard generated model detailing where the mortar launcher should “not” be placed.<sup>196</sup> While it could be argued that this is disturbing, similar to Elonis's other two Facebook posts, this would likely be considered a therapeutic rant.<sup>197</sup> Not only is this post composed so that the maximum number of people can read it, making it analogous to an individual yelling on a street, but in addition, Elonis actually specifies that he intentionally crafted the speech to border on illegality.<sup>198</sup>

A jury could consider this to be a true threat, because Elonis made such a point of “not” threatening his wife;<sup>199</sup> however, it is likely that a neutral, reasonable person hearing this shouted on a street corner, may find this speech to be protected.<sup>200</sup> Moreover, while a specific individual is called out in this post, making it similar to the previously discussed juvenile criminal case in Arkansas, it is also very unrealistic, as mortar launchers are not a common item available to the public. Thus, this statement is unlikely to be a true threat.<sup>201</sup>

<sup>193</sup> U.S. CONST. amend. VI (detailing that individuals have a right to a jury trial in criminal cases).

<sup>194</sup> 730 F.3d at 326.

<sup>195</sup> *Id.* at 324-25.

<sup>196</sup> *Id.* at 325.

<sup>197</sup> Policinski, *supra* note 120.

<sup>198</sup> 730 F.3d at 324-25.

<sup>199</sup> *Id.* at 325.

<sup>200</sup> DeBauche, *supra* note 66, at 1015-16.

<sup>201</sup> Policinski, *supra* note 120

In 2002, the Arkansas Supreme Court upheld a juvenile-court conviction of a high school student for writing rap lyrics it said were a ‘true threat’ of physical violence . . . [because] the lyrics were written specifically for a fellow student, delivered to her and she was, the court said, ‘intensely frightened and upset’ by the threat and be-

On the other hand, several of Elonis's other statements regarding his ex-wife are not as straightforward.<sup>202</sup> For instance, in October 2010, Elonis commented on the status update of his sister-in-law.<sup>203</sup> Elonis's sister-in-law had posted that she was going Halloween costume shopping with her niece and nephew, Elonis's two children.<sup>204</sup> In response, Elonis commented, "Tell [my son] he should dress up as a Matricide for Halloween. I don't know what his costume would entail though. Maybe [Tara Elonis's] head on a stick?"<sup>205</sup>

This statement mentions a specific individual, Elonis's estranged wife, in the context of death.<sup>206</sup> Moreover, it is more direct than a status update because Elonis is commenting on the status update of a specific person, in this case, his sister-in-law.<sup>207</sup> Therefore, it is more direct than a status update, but, less direct than posting directly on someone's wall.

Here, the directness test would be similar to the test for statements posted on someone's wall, because of the direct connection between two individuals in regard to a discussion of a third person.<sup>208</sup> Therefore, the jury will be instructed to consider whether a reasonable person with direct or indirect personal knowledge of the speaker believes that the speaker actually intends to cause bodily harm or death to another in a way that is feasible. Thus, in this case, it would be important for a jury to recognize that Elonis had no history of physical violence of which his sister-in-law was aware, when placing themselves as reasonable persons, in the place of the sister-in-law receiving the speech.<sup>209</sup> In considering whether a reasonable person, familiar with the speaker and hearing Elonis's statement in a group setting, would believe the statement to be an actual, feasible, and reliable threat of bodily harm or death, it is unlikely that the jury will determine the language in question constitutes a true threat.

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lieved the juvenile might follow through on the threat because he had a criminal record . . . in 2012, a federal appeals court in California refused to reinstate the conviction of an Arizona man accused of planning a Super Bowl massacre, saying a rambling "manifesto" did not constitute a threat to people, since it was addressed to media outlets not specific persons, and that man's threat to 'test the theory that bullets speak louder than words' was not sufficient to support a conviction under federal law.

*Id.*

<sup>202</sup> *Elonis*, 730 F.3d at 324.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* (noting that Elonis had no history of physical violence or previous experience with writing rap lyrics).

Elonis's statements are hyperbolic and exaggerated, akin to his comment about mortar launchers.<sup>210</sup> It is highly unlikely that Elonis's son would actually carry around his mother's head on a stick, considering that there is no evidence that his son had issues with Tara Elonis, violent tendencies, or the capability of committing such an act.<sup>211</sup> Had there been evidence demonstrating that Elonis or his son had issues with Tara Elonis or a violent history, this case may have turned out differently.<sup>212</sup> Therefore, is it likely that this comment also does not constitute a true threat.

## VI. CONCLUSION

The jury's ultimate decision of whether a Facebook post is a true threat is far less important than the jury's decision-making process. The current tests for true threats, focusing solely on intent or the reasonable person standard while ignoring other situational factors, creates ambiguity by focusing on the word's literal meaning, rather than evaluating the words in context.<sup>213</sup> A word's meaning may change completely when it is considered in context, rather than in isolation.<sup>214</sup> Therefore, it is imperative for a jury to consider the directness of speech as it allows for the recognition and comprehension of the context in which statements are made in true threat analysis.

By permitting a jury to use the objective intent standard, which focuses on whether a reasonable person in the place of a speech recipient would feel threatened,<sup>215</sup> or the specific intent standard, which focuses on whether a reasonable person in the position of the speaker knowingly spoke or knowingly threatened,<sup>216</sup> the jury is given too much censorship capability.<sup>217</sup> The average person, in these positions, will likely censor speech that they disagree with, regardless of whether this is what a true reasonable person would do.<sup>218</sup> This censorship is contrary to the intent of 18 U.S.C. § 875(c), which made it a crime to threaten, not offend, an individual in interstate or foreign commerce.<sup>219</sup>

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<sup>210</sup> *Id.* at 325.

<sup>211</sup> *See generally id.* at 321.

<sup>212</sup> *See generally id.*

<sup>213</sup> *Id.* at 332.

<sup>214</sup> *See, e.g.,* Sophia Tesfaye, *Fox Leaves Out Important Context of Leon Panetta's Statement on Iraq Troop Withdrawal*, MEDIA MATTERS (Sept. 19, 2014, 9:25 PM), <http://mediamatters.org/blog/2014/09/19/fox-leaves-out-important-context-of-leon-panett/200836> (discussing a Fox News host's failure to provide a piece of information that gave context to a statement made by Leon Panetta about the withdrawal of troops from Iraq).

<sup>215</sup> *Elonis*, 730 F.3d at 332.

<sup>216</sup> *Id.* at 330.

<sup>217</sup> *Id.* at 334.

<sup>218</sup> *See* DeBauche, *supra* note 66, at 1013.

<sup>219</sup> *See id.* at 984 n.16 (noting that this expansion supplements the Patterson Act which

Moreover, the exemptions to free speech were not intended to censor speech solely because an individual disagrees with it or is offended by it.<sup>220</sup> Thus, it is clear that the division between the courts as to the proper standard for intent has harmed free speech.

Instead of focusing solely on intent, directness should be the determinative factor in a true threat analysis.<sup>221</sup> This allows for a greater degree of protection over free speech while still protecting victims of true threats.<sup>222</sup> In their ruling on *Elonis v. United States*, the Supreme Court should interpret the test for true threats to focus on the directness of the speech while considering the objective intent of the recipient.

This is especially true when considering the different levels of speech on social media.<sup>223</sup> Individuals on social media can censor speech on their own by refusing to view public pages that post speech in the way that Anthony Elonis did, or by “un-friending” or “un-following” individuals like Anthony Elonis.<sup>224</sup> Therefore, as individuals can censor such speech on their own, it follows that such censorship should further be removed from the thoughts of the jury during true threat analysis. When a jury considers speech, like that posted by Anthony Elonis on Facebook, without context in an intangible location, the risk of restricting protected speech becomes too great. Therefore, the test for true threats analysis should be changed so that directness is evaluated in combination with the objective intent of the recipient. A revised true threat test would both uphold free speech protections and permit adequate prosecution for those who violate 18 U.S.C. § 875(c), thus maintaining the safety and well-being of the subjects of disputed speech.

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made it a criminal offense to threaten via mail, by adding “the telephone, telegraph, radio, and other means of conveyance” to the ways in which threats cannot legally be administered (citing S. Rep. No. 73-533, at 1 (1934))).

<sup>220</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (explaining that the burning of a cross alone cannot prima facie be a true threat because we cannot prevent speech simply because it is offensive to some).

<sup>221</sup> See, e.g., *id.* at 359.

<sup>222</sup> See, e.g., *id.* at 363.

<sup>223</sup> See DeBauche, *supra* note 66, at 1001-02.

<sup>224</sup> Biz Carson, *How to unfollow, mute or ignore people on Facebook, Twitter, Snapchat and more*, GIGAOM (July 12, 2014, 8:00 AM), <https://gigaom.com/2014/07/12/how-to-unfollow-mute-or-ignore-people-on-facebook-twitter-snapchat-and-more/>.