SOCIAL MEDIA THREATS AND HOW WE CAN ADDRESS THEM

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In a world where technology develops at an exponential rate, it is becoming increasingly easy to communicate with others. Between social media, messaging services, and various online forums, there is a plethora of ways to communicate with people across the country. While these innovations have made life easier for benevolent actors, they have also allowed those with bad intentions to thrive on the internet. Technology, as it often does, has put our legal system in a dilemma: we want it to be the force for good that we know it can be while limiting the ways in which it can be abused. The consequences of how we resolve the issue of enabling positive uses of technology while tamping down on negative uses are most dire in the criminal context.

It is well-known at this point that the unprecedented attack on the Capitol Building was coordinated across various internet platforms.[1] The insurrectionists discussed these plans in relatively public online settings well before the events of January 6th.[2] And while Facebook, Twitter, and peer platforms are beginning to take more concrete steps towards preventing their services from being used to facilitate violence,[3] they're a day late and a dollar short. Some of our country's most egregious tragedies in the past decade have been contemplated, planned, and set in motion on social media

1. *See, e.g.*, Rebecca Heilweil and Shirin Ghaffary, *How Trump's Internet Built and Broadcast the Capitol Insurrection*, VOX (Jan. 8, 2021), https://www.vox.com/recode/22221285/trump-online-capitol-riot-far-right-parler-twitter-facebook [https://perma.cc/8HT6-B94U]; Ian Talley and Rachael Levy, *Extremists Posted Plans of Capitol Attack Online*, WALL ST. J. (Jan. 7, 2021), https://www.wsj.com/livecoverage/biden-trump-electoral-college-certification-congress/card/x1dwwPqnJM1XfQh5LaUj [https://perma.cc/99UW-46UE]; Ben Collins and Brandy Zadrozny, *Extremists Made Little Secret of Ambitions to 'Occupy' Capitol in Weeks Before Attack*, NBC NEWS (Jan. 8, 2021, 12:36 PM), https://www.nbcnews.com/tech/internet/extremists-made-little-secret-ambitions-occupy-capital-weeks-attack-n1253499 [https://perma.cc/AJ5U-XGS6].

2. Collins and Zadrozny, *supra* note 1.

3. *See* Andrea Chang and Sam Dean, *Social Media Platforms are Cracking Down to Prevent Inauguration Day Violence*, L.A. TIMES (Jan. 18, 2021, 10:58 AM), https://www.latimes.com/business/technology/story/2021-01-18/inauguration-platforms [https://perma.cc/78H9-NHHX].

sites and discussion boards.[4] This raises a key question that we will continue to face through the 21st century: can we ensure the internet is used for good without excessively restricting that use? Put another way, can we have our cake and eat it too?

There is no better illustration of this dilemma than the recent Supreme Court case *Elonis v. United States*.[5] In *Elonis*, the defendant made multiple threatening statements about his ex-wife in Facebook posts. Despite making his vulgar statements in the form of posts of rap lyrics, many readers of the posts took these statements seriously, including the FBI.[6] This led to the defendant being indicted under 18 U.S.C. § 875(c),[7] which prohibits transmitting "in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." The defendant was convicted based on a jury instruction that liability hinged on whether a reasonable person would characterize his statements as threats; the defendant's awareness of the threatening nature of his statements was deemed irrelevant by the District Court. In that court's opinion, the only relevant intent was that the defendant made these statements intentionally.[8]

In an 8-1 opinion, the Supreme Court found it difficult to view this standard as anything other than a negligence standard,[9] which they declined to read into § 875(c). This is because when it comes to federal statutes that omit a specific *mens rea* requirement, the Court follows its longstanding practice of reading into such statutes "only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct."[10] Negligence, it concluded, did not meet that description. Because it felt that negligence as the *mens rea* requirement for this statute would sweep up innocent speech, the Court reversed the defendant's conviction.[11] While the Court went on to say that purpose and knowledge as *mens rea* requirements would clearly not criminalize speech that is otherwise innocent (to clarify, these were not the standards applied to the defendant here) it specifically declined to decide whether recklessness would.[12]

4. *See* Heilweil and Ghaffary, *supra* note 1.
5. Elonis v. United States, 575 U.S. 723 (2015).
6. *Id.*
7. 18 U.S.C. § 875(c) (2020).
8. United States v. Elonis, 897 F. Supp. 2d 335 (E.D. Pa 2012).
9. *Elonis*, 575 U.S. at 738.
10. *Id.* at 745 (quoting Carter v. United States, 530 U.S. 255, 269, (2000)).
11. *Id.* at 737-38.
12. *Id.* at 740.

When faced with a related issue in 2020, the Supreme Court denied certiorari in *Kansas v. Boettger*, a case which would have resolved the question of whether States may *constitutionally* criminalize threats made in reckless disregard of causing fear.[13] While State Supreme Courts have answered this question themselves in different ways,[14] the U.S. Supreme Court has yet to condemn or endorse any particular approach.

As a result, the question remains: does recklessness qualify under *Elonis* as "only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct" when it comes to § 875(c) and similar statutes?[15] Further, does the Constitution even permit the criminalization of threats made in reckless disregard of causing fear? This piece will posit that the answer to both of these questions is yes. This is because a recklessness standard for criminality of threats comports not only with the Supreme Court's decision in *Elonis*, but also *Virginia v. Black*, another notable case in this area, and its progeny.

Part I-A of this paper begins by exploring the development of the definition of a true threat under the Constitution, and where the Supreme Court has drawn the line for when statements will lose their First Amendment protections. Part I-B focuses on what differentiates true threats and constitutionally protected speech. I-C provides an analysis of the Court's decision in *Elonis* following years of varied approaches within the federal courts. Part II-A then picks up where the court left off in *Elonis* and argues that a recklessness standard could be read into federal threat statutes consistent with that decision. Part II- B then answers the question that the Supreme Court declined to address in *Boettger* and demonstrates that a recklessness *mens rea* standard for threats would not violate the First Amendment. Parts II-C and II-D explain how recklessness would work in practice, and why we need it. Ultimately, this paper concludes that a recklessness *mens rea* standard would comport with the First Amendment and *Elonis*, and that if used properly it could be an invaluable tool in stopping those who use the internet for wrongdoing.

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13. Kansas v. Boettger, 140 S. Ct. 1956, 1956 (2020).

14. *Compare* Major v. State, 800 S.E.2d 348, 348 (Ga. 2017) (upholding Georgia's criminalization of threats made in reckless disregard of causing fear), *with* State v. Boettger, 310 Kan. 800, 800-01, 450 P.3d 805, 806 (2019) (striking down Kansas's statute criminalizing threats made in reckless disregard of causing fear).

15. *Elonis*, 575 U.S. at 745 (quoting Carter, 530 U.S. 255, 269).

PART I

A. True Threats Defined

The best starting point in a search for the definition of a true threat is *Watts v. United States*.[16] In that case, a young man attending an antiwar rally told a group of fellow protesters that "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[17] He was indicted and convicted under 18 U.S.C. § 871 for "knowingly and willfully" making a threat to "take the life of, to kidnap, or to inflict bodily harm upon the President of the United States[.]"[18] While the Supreme Court declared this statute constitutional on its face, it acknowledged that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind."[19] While the Court did not provide a clear definition of what a true threat is, it did make clear that "political hyperbole" was not a true threat, which is what the defendant in this case engaged in.[20] In coming to this conclusion, the Court found the circumstances of the defendant's statement to be significant: it was made at an emotionally charged protest, it was a conditional statement, and all of the listeners laughed.[21] This case made clear that statutes criminalizing true threats are facially Constitutional. However, such statutes should be handled with care as to not chill innocent speech, even speech that "is often vituperative, abusive, and inexact."[22]

Between the years in which *Watts v. United States* and *Virginia v. Black* were decided, the Supreme Court did not provide any further elaboration on what exactly constitutes a true threat. However, in *R.A.V. v. St. Paul*,[23] the Court did have an opportunity to discuss why threats of violence fall outside of the protection of the First Amendment. Although this case primarily concerned content-based discrimination in threat statutes (in the context of cross burning), the Court offered three reasons why threats of violence are beyond the purview of the First Amendment: "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]"[24]

16. Watts v. United States, 394 U.S. 705 (1969).
17. *Id.* at 706.
18. 18 U.S.C. § 871 (2020).
19. *Watts*, 394 U.S. at 707.
20. *Id.* at 708.
21. *Id.* at 707.
22. *Id.* at 708.
23. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).
24. *Id.*

Similar to "fighting words," threats of violence are not protected by the First Amendment because such threats "by their very utterance inflict injury" on those who they are directed at.[25] However, it is clear from *Watts* that distinguishing "what is a threat. . .from what is constitutionally protected speech [ ]"[26] is an exercise done out of concern for the speaker's First Amendment rights.

The Supreme Court's further elaboration on what a true threat is under the Constitution came in *Virginia v. Black*.[27] This case, like *R.A.V.*, involved another cross burning. Citing *Watts* as authority, the Court stated that the Constitution permits the prohibition of true threats and defined them as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[28] In addition, the Court articulated that the speaker does not need to intend or be able to carry out the threat, and further, that intimidation is a type of true threat and therefore can be prohibited as well.[29] The statute was upheld as constitutional insofar as it prohibited cross-burning with a specific intent to intimidate.[30] However, the provision of the statute that deemed cross-burning to be *prima facie* evidence of an intent to intimidate was struck down because it blurred the line between constitutionally protected speech and unprotected threatening speech,[31] nullifying the part of the statute that was constitutional. In other words, because the provision automatically classified *any* cross-burning as a true threat, the Court felt that it bypassed the constitutionally required process of separating "what is a threat. . .from what is constitutionally protected speech."[32] However, the statute's criminalization of cross burnings when coupled with a culpable state of mind did *not* violate the Constitution, because it appropriately prohibited true threats without sweeping up potentially innocent speech in the process.

Building off of the Supreme Court's jurisprudence across *Watts*, *R.A.V.*, and *Black*, each Federal Circuit has developed its own test for whether a statement is considered a true threat and is therefore unprotected by the First Amendment. The Second and Fourth

25. *Id.* at 424 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

26. *Watts*, 394 U.S. at 707.

27. Virginia v. Black, 538 U.S. 343 (2003).

28. *Id.* at 359 (citing *Watts*, 394 U.S. at 708; *R.A.V.*, 505 U.S. at 388).

29. *Id.* at 360.

30. *Id.* at 343.

31. *See id.* at 345.

32. *Watts,* 394 U.S. at 707.

Circuits ask "whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret [the communication] as a threat of injury."[33] The Sixth Circuit asks "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[.]"[34] The Ninth Circuit defines a true threat as "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted. . .as a serious expression of intent to inflict bodily harm[.]"[35]

While each of these tests uses slightly different language to sort protected innocent speech from unprotected threats, there is a common thread among them: statements (or acts of intimidation, like cross burning) are judged to be true threats by an objective standard for how a reasonable person would interpret the statement in context. Importantly, this inquiry determines whether a statement is a true threat without regard to the defendant's future intentions.[36] That is, a defendant's lack of capability or intention to actualize the threatened conduct does not transform a true threat into constitutionally protected speech. What is criminalized is the act of causing fear, not the possibility that what is feared will become a reality. Thus, these tests do not just protect the speaker's First Amendment rights—they also protect the listener from the fear of violence, regardless of the actual probability thereof.

Usually, courts use tests like the ones above in the context of statutes that have a clear intent requirement. Take for example the FACE Act, which makes civilly and criminally liable anyone who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any other class of persons from, obtaining or providing reproductive health services[.][37]

The FACE Act has a clear intent requirement. To be liable under the statute, a person must make a true threat with the goal of intimidating or interfering with someone who is obtaining or pro-

33. United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973); United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) (quoting Maisonet, 484 F.2d at 1358).

34. United States v. Jeffries, 692 F.3d 473, 477 (6th Cir. 2012).

35. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1077 (9th Cir. 2002).

36. *See Black*, 538 U.S. at 360.

37. Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (2020).

viding reproductive health services, because they are doing so. If all statutes had a clear intent requirement like the FACE Act, that would be the end of the discussion. Unfortunately, that is not the case. Take for example the statute that the defendant in *Elonis* was indicted under,

§ 875(c): "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."[38] What is the *mens rea* requirement for this statute? That is, aside from the *actus reus* requirement in all criminal prosecutions that the act (here, the communication) was voluntary,[39] what must be the state of mind of the individual as to how they wish or think that the communication will be interpreted? Must the defendant make the communication with the express purpose of causing a fear of violence, or would a lower *mens rea* suffice? Before *Elonis v. United States*, the answer would depend on which court you asked.

B. Interpretations of Black *and the Subjective-Threat Element Circuit Split*

In *United States v. Jeffries*, the Sixth Circuit heard an appeal from a conviction under

§ 875(c).[40] The defendant, a virtuoso like the defendant in *Elonis*, wrote a song entitled "Daughter's Love" about his ongoing domestic troubles, in which he threatened the judge handling his custody proceedings. Lyrics aimed at this judge included "I killed a man downrange in war[,]" "You don't deserve to live in my book[,]" and "I can shoot you. I can kill you."[41] While this ballad was in a different musical genre (country) than the song in *Elonis* (rap), it had the same effect: it caused fear. The defendant was convicted under § 875(c) after a trial and the question on appeal was not whether the defendant's statements were a true threat, but rather whether § 875(c) requires the Government to show that the defendant subjectively intended for these statements to be threats.[42] The defendant's contention was that under *Virginia v. Black*, statutes criminalizing communicative threats are invalid under the First

38. 18 U.S.C. § 875(c) (2020).

39. *See* Martin v. State, 31 Ala. App. 334, 335 (1944) (holding that a defendant could not be prosecuted for public drunkenness when he was involuntarily and forcibly brought to a public place by the police).

40. United States v. Jeffries, 692 F.3d 473 (6th Cir. 2012).

41. *Id.* at 475-77.

42. *Id.* at 478.

Amendment unless they contain a "subjective-threat element."[43] However, the Sixth Circuit rejected this argument, because it understood the Supreme Court's decision in *Black* to hinge on the fact that the statutory provision in question in that case failed to distinguish threats from constitutionally protected speech as required by *Watts*.[44] The Sixth Circuit stated that the reasonable person test it uses[45] for § 875(c) thus does not run afoul of the Supreme Court's overbreadth standard iterated in *Black*, because jurors can consider the circumstances and reasonable connotations of one's statements.[46] This process, the Court asserted, allows for the separation of threats and constitutionally protected speech as required by *Watts* and *Black*.[47] The Court affirmed the defendant's conviction, and upheld § 875(c) as constitutional under the First Amendment. However, unlike the Sixth Circuit and a majority of the Courts of Appeals at that time, the Ninth Circuit would have accepted the defendant's argument.

In *United States v. Bagdasarian*, the Ninth Circuit was faced with a defendant who, like the defendant in *Jeffries*, posted threatening statements online.[48] Not only that, the defendant also sent emails to a friend describing how a particular gun would help create the picture he attached of a smoldering car.[49] The subject of these threats was then President-elect Barack Obama, and so Bagdasarian was indicted under 18 U.S.C. § 879(a)(3) for threatening a major candidate for the office of President.[50] While this was not the first case in which the Ninth Circuit read a subjective intent element into a threat statute, it is germane to this discussion because it concerned an online threat. The court went on to explain that *Virginia v. Black* had affirmed its own dicta in prior cases that intent is what separates speech protected by the First Amendment from unprotected speech.[51] Unlike the Sixth Circuit though, the Ninth Circuit read *Black* as requiring that in order to abide by the First Amendment, an appropriate intent element must be read into threat statutes that otherwise lack one. To the Ninth Circuit, whether any given appli-

43. *Id.* at 479.

44. *Id.* at 480.

45. *Id.* at 477 ("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[.]").

46. *Jeffries,* 692 F.3d at 480.

47. *Id.*

48. United States v. Bagdasarian, 652 F.3d 1113, 1115 (9th Cir. 2011).

49. *Id.* at 1116.

50. 18 U.S.C. § 879(a)(3) (2020).

51. *Bagdasarian*, 652 F.3d at 1118.

cation of a threat statute is constitutional turns on whether in addition to the objective true threat element, there is an intent element that facilitates sorting through protected and unprotected speech.[52]

At the time *Bagdasarian* was decided, the Ninth Circuit's approach was the minority approach among the Courts of Appeals. However, this is a version of the view that the Supreme Court ultimately adopted in *Elonis*.[53] As will be discussed below, though, unlike the 9th Circuit, the *Elonis* Court read an intent requirement into § 875(c) as a matter of statutory interpretation, not on constitutional grounds.[54] Notably, what *Elonis* and *Bagdasarian* both fail to specify is which intent requirements separate protected speech from unprotected speech and which do not.

C. Elonis *and* Boettger

The Supreme Court finally had the opportunity to state what the intent requirement, if any, of § 875(c) is in *Elonis v. United States*.[55] In this case, after his wife of seven years left him, a defendant began posting what he referred to as rap lyrics on Facebook. He consistently included a disclaimer in these posts stating that (although the lyrics clearly referred to his own life) the lyrics depicted fictitious people and scenarios.[56] The lyrics were concerning nonetheless: "I've got enough explosives/To take care of the State Police and the Sheriff's Department[,]" "Enough elementary schools in a ten mile radius/To initiate the most heinous school shooting ever imagined[,]" and finally "Fold up your [protection-from-abuse order] and put it in your pocket/Is it thick enough to stop a bullet?"[57] At trial the Government maintained, and the District Court agreed, that it did not matter what the defendant thought about the threatening nature of these posts at the time he wrote them. Rather, the focus was on whether he intentionally wrote and posted these lyrics, and whether a reasonable person would interpret them as true threats.[58] The defendant was convicted under this standard, and on appeal the Third Circuit affirmed using reasoning similar to that of the Sixth Circuit in *Jeffries*.[59] The Supreme Court reversed, instead

52. *Id.*
53. *See* Elonis v. United States, 575 U.S. 723, 738 (2015).
54. *See id.*
55. *Id.*
56. *Id.* at 727.
57. *Id.* at 729.
58. *Id.* at 732.
59. United States v. Elonis, 730 F.3d 321 (3d Cir. 2013).

arriving at the same conclusion the Ninth Circuit did in *Bagdasarian*—but using vastly different reasoning. Instead of deciding the case on constitutional grounds, the Court inserted a subjective intent requirement as a matter of statutory interpretation.

According to the eight Justice majority, there is indeed a subjective intent requirement within § 875(c); the defendant's state of mind while making the communication regarding how it will be interpreted *does* matter. However, this conclusion rested not on the Constitution, but on longstanding principles of criminal law and statutory interpretation: as the Court explained, "The fact that the statute does not specify any required mental state, however, does not mean that none exists."[60] Substantial precedent on this subject guides the Court to interpret "criminal statutes to include broadly applicable scienter requirements, even where the statute . . . does not contain them."[61] This practice is based on one of the most basic principles of criminal law: "wrongdoing [generally] must be conscious to be criminal."[62] Turning to § 875(c), the Court saw this statute as no different from the ones it had considered in cases like *X-Citement Video* and *Morissette*.[63] The Court then went on to say that the element that separates protected speech (legal innocence) from unprotected threats (wrongful conduct) is knowledge of the "threatening nature of the communication."[64] The Court continued: "[t]he mental state requirement must therefore apply to the fact the communication contains a threat."[65] It follows that a defendant need not be aware that making the communication is criminal, but must be aware of the fact that the communication is threatening in nature.

Since the defendant's conviction was premised on a negligence standard, it did not meet the heightened *mens rea* the Court described. Elonis was found guilty because the jury was told in sum that he could be convicted if he should have known that his statements were threatening, even if he did not in fact know it. Accordingly, the Supreme Court reversed the conviction.[66] The Court also noted that clearly, "the mental state requirement in § 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will

60. *Elonis*, 575 U.S. at 734.
61. *Id.* at 734 (quoting X-Citement Video, 513 U.S. 64, 70 (1994)).
62. *Id.* at 734 (quoting Morissette v. United States, 342 U.S. 246, 252, (1952)).
63. *Id.* at 734.
64. *Id.* at 737.
65. *Elonis*, 575 U.S. at 737.
66. *Id.* at 741.

be viewed as a threat."[67] However, the Court stopped short of addressing whether a finding of recklessness would meet the standard it had just laid out. The Court was comfortable doing so because this question only came up momentarily at oral argument, and neither side had briefed or argued it.[68] Further, the only disagreement among the Courts of Appeals was about the *existence* of a mental state requirement in the statute, not whether recklessness is sufficient.[69] Regardless, the Court did seem to acknowledge that it would perhaps one day face this question.[70]

In 2020, the Court was faced with a somewhat similar question. In *Kansas v. Boettger*, the Court had the opportunity to decide whether the First Amendment prohibits States from criminalizing threats of violence made in reckless disregard of causing fear.[71] However, despite the fact that a number of State Supreme Courts are split on the issue,[72] the Court denied certiorari. As he also did in *Elonis*, Justice Thomas wrote a short opinion expressing his displeasure with the Court's refusal to settle the issue of recklessness as the *mens rea*.[73] He also went further and briefly explained why he felt that the First Amendment does allow States to criminalize threats of violence made in reckless disregard of causing fear.[74] Setting that argument aside, Justice Thomas certainly has a point: State Supreme Courts are split on this issue, and at some point, the Court will have to resolve it. While each State is undoubtedly empowered to criminalize conduct in a variety of ways, the possibility that some States are violating the Constitution in doing so is concerning.

After *Elonis* and *Boettger*, three important questions remain. First, can a recklessness *mens rea* requirement be read into federal threat statutes like § 875(c)? Second, would the Constitution permit that—or similarly—permit the state and federal governments to expressly criminalize threats made in reckless disregard of causing fear? And finally, regardless of the answer to those questions, *should* this all be done? The remainder of this paper will focus on answering all of those questions in the affirmative.

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67. *Id.* at 725.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Boettger*, 140 S. Ct. at 1956 .
72. *Compare* Major v. State, 800 S.E.2d 348, 348 (Ga. 2017) (upholding Georgia's criminalization of threats made in reckless disregard of causing fear), *with* State v. Boettger, 310 Kan. 800, 800-01, 450 P.3d 805, 806 (2019) (striking down Kansas's statute criminalizing threats made in reckless disregard of causing fear).
73. *Boettger*, 140 S. Ct. at 1956 (Thomas, J., dissenting).
74. *Id.* at 1957 (Thomas, J., dissenting).

PART II

A. Why a Recklessness Standard Comports with Elonis

Before discussing whether a recklessness standard for threats should be implemented, it's necessary to determine whether one could be implemented at all. For all the benefits that a recklessness standard could provide, they will mean nothing if the standard contravenes such recent precedent as *Elonis*. However, upon further analysis, it is clear that *Elonis* would permit such a standard.

The *Elonis* court's decision rested on the principle that generally "wrongdoing must be conscious to be criminal."[75] In reversing the defendant's conviction, what was crucial to the Supreme Court was that the District Court had applied what could only be characterized as a negligence standard.[76] As discussed above in Part I-C,[77] the trial court had effectively told the jury that the defendant's state of mind did not matter. The conviction was premised on the idea that even if Elonis was completely unaware of the threatening nature of his statements, he was guilty if a reasonable person would have been aware, establishing a clear negligence standard. Paramount to the Court's decision was that negligence was not "'only that *mens rea* which is necessary to separate' wrongful from innocent conduct."[78] A negligence standard for threats would mean that defendants are unaware of the threatening nature of the communication (the fact making their conduct criminal), which would clearly go against the Court's precedent.

Recklessness, on the other hand, is the perfect benchmark *mens rea* that separates wrongful from innocent conduct. According to the Model Penal Code, a person is reckless when one

> consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[79]

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75. *Elonis*, 575 U.S. at 735 (quoting Morissette v. United States, 342 U.S. 246, 252 (1952)).

76. *Id.* at 738.

77. *See* discussion *supra* Part I-C.

78. *Elonis*, 575 U.S. at 736 (citing Carter v. United States, 530 U.S. 255, 269 (2000)).

79. MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2007).

Unlike negligence, one's mind is not innocent at the time of the act when one is reckless. Acting recklessly is to be aware of a substantial and unjustifiable risk, and to disregard that risk such that this decision is a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[80] A recklessness standard, then, would not sweep up innocent conduct as the *Elonis* Court was concerned with because the wrongdoing in question would not be unconscious. By definition, a showing of recklessness requires a demonstration of a *conscious* disregard. Were a defendant shown to be reckless, it follows that the defendant was aware of a "substantial and unjustifiable risk" of the threatening nature of the communication, which is the material fact making the alleged conduct criminal.[81]

It could be argued that still, recklessness does not precisely mean awareness of the material fact making conduct criminal; it only means awareness of a risk of its existence. However, the key feature of recklessness that makes it compatible with *Elonis* is this: when one is reckless, one knows that the material fact *may*—and likely does—exist. Therefore, the material fact making the actor's conduct criminal (here, the threatening nature of a communication) is not entirely unknown to the actor. The person making the alleged threat must know, at minimum, that there exists a high probability that their communication is threatening and consciously disregards that probability, such that the average law-abiding person would not do the same in that situation. This is vastly different from a negligence standard in this context, which would criminalize those who should have known that the communication was or might have been threatening, but in fact had no idea. It should also be noted that not only did the *Elonis* court state that purpose and knowledge were sufficient, but also the Model Penal Code itself states that purpose, knowledge, *and* recklessness all suffice to establish culpability in the absence of an express *mens rea* requirement.[82]

Even more support for the conclusion that the *Elonis* decision would permit a recklessness standard to be read into federal threat statutes comes from Justice Alito's opinion. Justice Alito's analysis "follows the same track as the Court's, as far as it goes."[83] He agreed that the presumption is that criminal statutes require some sort of

80. *Id.*

81. *Id.*

82. MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 2007).

83. *Elonis*, 595 U.S. at 744 (Alito, J., concurring in part and dissenting in part).

mens rea, especially a statute such as this.[84] Further, he felt that "[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct."[85] Therefore, he thought that recklessness cleared the bar that the majority set in its opinion. Neither the majority nor Justice Alito's opinion, however, provide controlling precedent on the question of whether the Constitution would permit recklessness to be the *mens rea* requirement.

B. Why a Recklessness Standard is Constitutional

As discussed above, the Constitution undoubtedly permits the prohibition of true threats.[86] Their "very utterance inflict[s] injury,"[87] and they are prohibited out of a concern for "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]"[88] However, as the Court famously declared in *Watts*, "[w]hat is a threat must be distinguished from what is constitutionally protected speech."[89] The question then becomes whether a recklessness standard would be able to distinguish the two. As mentioned above and will be discussed below, State Supreme Courts have answered this question differently.[90] The best case to help answer this question is *Virginia v. Black*.

In *Black*, what the Supreme Court saw as unconstitutional was the way in which the statute there bypassed the process of distinguishing threats from constitutionally protected speech.[91] By deeming all cross-burnings to be *prima facie* evidence of an intent to intimidate without an inquiry into *mens rea*, the statute assumed that the act itself demonstrated an intent that otherwise innocent actors may not have,[92] making the statute overbroad. The majority made it clear in this case that threat statutes must be carefully tailored to criminalize only that speech which originates in a blameworthy mind, otherwise they are overbroad and therefore violate the First Amendment. It is clear, then, that a recklessness standard for threat statutes falls squarely within the parameters of the relevant precedent. A negligence standard certainly would not: innocent cross

84. *Id.*
85. *Id.* at 745.
86. *Watts*, 394 U.S.at 708.
87. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
88. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).
89. *Watts*, 394 U.S. at 707.
90. *Supra* note 14.
91. *See Black*, 538 U.S. at 365–67.
92. This author would like to note that cross burning was a particularly poor context in which to discuss "otherwise innocent actors."

burners (whoever they are) could conceivably be said to have negligently intimidated victims. A recklessness standard, though, would punish only those who consciously disregarded a substantial and unjustifiable risk that their speech would be threatening such that this decision deviates from what a law-abiding person would do.[93] It would criminalize only that speech which originates in a blameworthy mind, and would not cast too wide a net as the statute in *Black* did. The Supreme Court, however, is not the only Court to have considered the constitutionality of threat statutes.

In *Major v. State*,[94] the Georgia Supreme Court upheld as constitutional the State's threat statute which criminalized the making of threats "in reckless disregard of the risk of causing [such] terror . . . or inconvenience[.]"[95] The defendant there had posted on Facebook that he was going to "get the [gun] out and make Columbine look childish."[96] On appeal the defendant's argument was that the statute's intent requirement was overly broad because it compelled juries to look at the mind of the listener and not the speaker in determining whether there was a substantial and unjustifiable risk.[97] In the defendant's view this was overly broad because this process would not protect innocent speakers as required.[98] The Court squarely rejected this argument, maintaining that a recklessness *mens rea* does focus on the speaker of the threat.[99] What the statute criminalizes is not the fact that there was a substantial and unjustifiable risk that the listener would interpret the statement as a threat (an inquiry directed at the listener), rather, what it criminalizes is the conscious disregard, by the defendant, of the risk of the statement being threatening.[100] It does not punish those who are oblivious, it only punishes those who "necessarily grasp[ ] that [they] are not engaged in innocent conduct."[101] The Georgia Supreme Court,

however, arrived at a conclusion very different from the one that the Kansas Supreme Court did in *Boettger*.[102]

93. MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2007).
94. Major v. State, 800 S.E.2d 348 (Ga. 2017).
95. GA. CODE ANN. § 16-11-37 (2020).
96. *Major*, 800 S.E.2d at 349.
97. *Id.* at 351
98. *Id.*
99. *Id.*
100. *See id.* at 351 - 52.
101. *Id.* at 352 (quoting Elonis v. United States, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part)).
102. *Compare* Major v. State, 800 S.E.2d 348, 348 (2017) (upholding Georgia's criminalization of threats made in reckless disregard of causing fear), *with* State v.

Like Georgia, Kansas also had a threat statute criminalizing threats made in reckless disregard of causing fear. Unlike the Georgia Supreme Court, though, the Kansas Supreme Court held this statute to be unconstitutional.[103] In doing so, the Court relied heavily on *Black*'s statement that "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[104] To the Court, relying on Webster's Dictionary, the use of the word "mean" creates an implicit constitutional requirement that the speaker's express purpose was that the communication would be interpreted as a threat.[105] Of course, recklessness is not purpose, and so the Court declared the statute to be unconstitutional.

While the Kansas Supreme Court did note the ambiguity of that sentence,[106] it misinterpreted it. Notably absent from any of the opinions in *Black* is any clarification of that sentence resembling the conclusion of the Kansas Supreme Court.[107] Moreover, *Black* was not a case decided upon whether a particular mental state requirement was violative of the First Amendment. The decision there turned on the fact that there was mental state requirement contained in the Virginia statute; the *prima facie* evidence provision removed that consideration from prosecutions under the statute.[108] That is what made the statute overbroad, not any particular *mens rea* contained within the statute. The support that the Kansas Supreme Court draws from *Black* is, at best, indirect.

What's more, the Kansas Supreme Court simply misreads that crucial sentence in *Black*. The *Black* Court 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 group of individuals."[109] The word "means" here refers to the requirement that the communication be made voluntarily, not that the speaker's express purpose is for the statement to be interpreted as a threat. All this sentence does in the *Black* opinion is reaffirm the two aspects of the *actus reus* element of

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Boettger, 310 Kan. 800, 800-01, 450 P.3d 805, 806 (2019) (striking down Kansas's statute criminalizing threats made in reckless disregard of causing fear).

103. *Boettger*, 450 P.3d at 806.

104. *Black*, 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708; *R.A.V.*, 505 U.S. at 388) (internal quotation marks omitted).

105. *See Boettger*, 450 P.3d at 814.

106. *Id.*

107. *See Black,* 538 U.S. 343 (2003).

108. *See id.* at 345.

109. *Id.* at 359 (emphasis added).

the crime: first, that the speaker voluntarily make the statement ("means to communicate") and second that the communication be a "serious expression of an intent to commit an act of unlawful violence."[110] Whether a communication is a "serious expression of an intent to commit an unlawful act" is determined by the objective tests that courts have developed. This sentence describes that which the Constitution allows to be prohibited, not the state of mind that must be coupled with it. That is not to say that the *Black* opinion did not discuss states of mind. It did, and the problem that it had with the Virginia statute was that it imputed a state of mind to cross-burners that they did not necessarily have. It is just that this particular sentence speaks only to the objective element in threat prosecutions, while the rest of the decision focuses on the requirement that there be some subjective *mens rea* element paired with it.

Additionally, if the *Black* Court intended to say that a defendant must purposely or knowingly express a serious intent as the Kansas Supreme Court claims, that would seem to contradict the Court's following statement that a defendant "need not actually intend to carry out the threat."[111] If statements are not true threats unless the defendant expressly intends for them to be taken seriously, then the defendant would have to agree that what they are saying is "a serious expression of an intent to commit an act of unlawful violence."[112] Whether the defendant deems their threat to be serious would hinge on whether the defendant actually intended to carry out the threat. This is because to any speaker, whether an alleged threat is "a serious expression of an intent to commit an unlawful act"[113] depends on whether they intended to carry out the threat. When asked if the alleged threat was a serious statement, a hypothetical defendant will either respond "No, I would never do that" or "Yes, I would (or was going to) do that." This would directly contradict the *Black* Court's statement that the "speaker need not actually intend to carry out the threat."[114] What's more, this interpretation of *Black* undermines the very goals of prohibitions of threats as iterated in *R.A.V.*[115] Under the Kansas Supreme Court's

110. *See id.*

111. *Id.* at 360.

112. *Id.* at 359.

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

114. *Id.* at 360.

115. *R.A.V.*, 505 U.S. at 388 ("protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]").

reasoning, those who receive threats are left unprotected, and makers of threats are given far too much latitude.

It is clear that under both *Elonis* and *Black*, a recklessness standard can be read or written into threat statutes. While a lower *mens rea* such as negligence would not suffice, recklessness meets both the statutory interpretation and constitutional standards that the Supreme Court has laid out thus far. Even still, this does not answer the question of whether such a standard should be implemented.

C. Why (and how) a Recklessness Standard Should Be Used

While it does appear that recklessness could be the *mens rea* requirement for threat statutes, the question remains: is this a good idea? Why *should* recklessness be the minimum intent requirement for threat statutes, and how would it work in practice? In short, it is because it most effectively balances protection of speakers and hearers of allegedly threatening statements.

Model Penal Code § 2.02(2) lays out hierarchically four different types of culpability with respect to material elements of crimes: purposely, knowingly, recklessly, and negligently.[116] As applied to threat statutes, these different kinds of culpability would apply to the defendant's knowledge of the threatening nature of the communication. Purposely, obviously, would mean that it was the defendant's "conscious object" to make a statement that would be is a threat.[117] Knowingly would mean that a defendant is "practically certain" that the statement will be a threat.[118] Recklessly would mean that the defendant "consciously disregards a substantial and unjustifiable risk" that the statement will be a threat, such that this disregard "involves a gross deviation from the standard of conduct" of a law-abiding person.[119]And finally, negligently would simply mean that the defendant "should be aware of a substantial and unjustifiable risk" that the statement will is a threat, such that this lack of awareness amounts to a "gross deviation from the standard of care" a reasonable person would observe.[120] While each definition slightly varies, there is clearly a common thread among the first three: the defendant is aware, to some degree, of the material element of the crime.

Purposely, knowingly, and recklessly all require that the defendant was aware of the material element in question. For each of

116. MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 2007).
117. *Id.* § 2.02(2)(a)(i).
118. *Id.* § 2.02(2)(b)(ii).
119. *Id.* § 2.02(2)(c).
120. *Id.* § 2.02(2)(d).

these types of culpability, in the context of threats, the speaker is aware of the certainty or substantial likelihood that the statement will be a threat. Negligence on the other hand is defined by a lack of awareness, a lack of awareness that can hardly be said to be appropriate for condemnation when it comes to threats. Recklessness, however, necessarily involves an awareness that the speech will likely be interpreted as threatening. While the question of whether negligence is morally culpable is up for debate as Justice Alito noted in *Elonis*, certainly recklessness is.[121] A defendant who is aware that there is a substantial and unjustifiable risk that a statement will cause fear and makes it anyway can hardly be said to be free of blame. It is also important to note that substantial and unjustifiable is a high bar. Even if there is an extremely substantial risk, if it is justifiable, then the defendant is not reckless.[122] Conversely, if there is an extremely low risk that is unjustifiable nonetheless, the defendant is not reckless.[123] Moreover, there is still the requirement that the defendant's conscious disregard of this risk must be a gross deviation from what a law-abiding person would do. One can imagine a scenario[124] in which a defendant says something and although there is a substantial and unjustifiable risk that it is threatening, a jury nonetheless concludes that the conscious disregard thereof is on par with what a law-abiding person would do in the defendant's situation. This offers ample protection for the speaker.

Additionally, this is not the first time recklessness has been argued for as the *mens rea* in criminal threat prosecutions. In the wake of *Elonis*, many wrote in support for such a standard.[125] These commentators' arguments, though, are a product of their time: because *Elonis* was decided on statutory instead of constitutional grounds,

121. Elonis v. United States, 575 U.S. 723, 745 (Alito, J., concurring in part and dissenting in part).

122. For example, a doctor is not reckless in attempting a very risky surgery if it is a patient's only chance at survival.

123. *See* People v. Hall, 999 P.2d 207, 215-16 (Colo. 2000) ("[A] trier of fact must weigh the likelihood and potential magnitude of harm presented by the conduct . . . .").

124. For example, someone who finds out their child was just killed by a drunk driver may say "I'm gonna kill them" but given the severe emotional distress that person is in, any possible juror would likely see themselves making similar statements about the drunk driver.

125. *See generally* Cameron Fields, *Unraveling a Ball of Confusion: Layers of Criminal Intent, Facebook, Rap, and Uncertainty in* Elonis v. United States, *135 S. Ct. 2001 (2015)*, 36 Miss. C. L. Rev. 133 (2017); Stephanie Charlin, *Clicking the "Like" Button for Recklessness: How* Elonis v. United States *Changed True Threats Analysis*, 49 Loy. L.A. L. Rev. 705 (2016); Marley Brison, Elonis v. United States*: The Need for a Recklessness Standard in True Threats Jurisprudence*, 78 U. Pitt. L. Rev. 493 (2017).

these arguments follow Justice Alito's opinion in *Elonis*, which is statutory in nature.[126] None of this reasoning, though, fully takes into account the question of whether using recklessness as the *mens rea* is constitutional. Nor did that seem to be a question worth addressing until State Supreme Courts began answering it in significantly different ways.[127] This paper serves to answer the question that the Supreme Court did not when it denied certiorari in *Boettger*.

It is also important to keep in mind that recklessness is already a widely used standard in criminal prosecutions. Take for example Penal Law § 120.25,[128] the statute for reckless endangerment in New York. Under this statute, one is guilty of reckless endangerment in the first degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person."[129] The commission staff notes give the example of someone who fires a gun into a crowd without any specific intent to kill or injure but does so with a "depraved kind of mischievousness."[130] Regardless of whether or not someone is injured, that person is guilty of reckless endangerment in the first degree.[131] Just as criminal threat statutes proscribe threats regardless of their realistic probability, this statute criminalizes the mere creation of a grave risk of death. In this way the statute can be seen as a preventative measure—meant to criminalize and deter even that conduct which fails to culminate in injury. A recklessness standard for criminal threat prosecutions would likewise deter communications, regardless of the form they are in, that cause fear in the reasonable person.

While this paper is concerned only with the use of recklessness as a standard for threats in criminal prosecutions,[132] it is worth

126. Fields, *supra* note 125; Charlin, *supra* note 125; Brison, *supra* note 125; Elonis v. United States, 135 S. Ct. 2001, 2014 (2015) (Alito, J., concurring in part and dissenting in part).

127. *Compare* Major v. State, 800 S.E.2d 348, 348 (2017) (upholding Georgia's criminalization of threats made in reckless disregard of causing fear), *with* State v. Boettger, 310 Kan. 800, 800-01, 450 P.3d 805, 806 (2019) (striking down Kansas's statute criminalizing threats made in reckless disregard of causing fear).

128. N.Y. PENAL LAW § 120.25 (2020).

129. *Id.*

130. *Id.*

131. *Id.*

132. This paper does not address the question of whether a civil cause of action based on recklessness would provide adequate relief. Theoretically it would, but in practice a lawsuit would presumably only serve to incense the person who made the threat. For that reason, the victim may be hesitant to sue altogether, and even if not, the situation could further escalate as a result of the lawsuit. While a

mentioning that recklessness is already used in another First Amendment context: libel. In *New York Times Co. v. Sullivan*, the Supreme Court expressed that the Constitution mandates that public officials cannot recover damages for defamation unless the statement was made with actual malice.[133] Actual malice, the Court explained, means that the statement was made with the knowledge that it was false or with a reckless disregard as to whether or not it was false.[134] In the libel context, recklessness works well as a standard, and provides ample protection to defendants. In these situations, the speaker is aware that there is a significant risk that what he or she is saying is not true, but disregards that risk in a way that the law deems to be unacceptable. It is difficult to characterize the speaker who does that as innocent, just as it is difficult to characterize the speaker who recklessly makes a threat as innocent. Regardless, this is a high bar for libel plaintiffs to meet. While mental state requirements are generally lower in the civil as compared to criminal contexts, certainly the fact that recklessness is already used as a standard in another First Amendment area cuts in favor of that standard being used in criminal threat prosecutions.

Another reason that recklessness is an ideal standard for threats is because it is simply easier to prove than purpose or knowledge. In many of the cases discussed above, the thrust of the defendants' arguments was that they did not at the time of speaking intend their statements to be threats. That is, they did not act with purpose or knowledge. Rebutting that assertion, in terms of evidence, is difficult. What would be easier, however, would be to prove that the defendant was aware of a "substantial and unjustifiable" risk that the statement would be threatening and said it nonetheless. A good place to start would be to use the familiar concept that actions (in this case, words and their connotations) often reveal one's thoughts.[135] Depending on what exactly was said, perhaps one can infer what the defendant was aware of at the time of making the statement. This principle is a double-edged sword in that it also protects the defendant: the more benign the statement, the worse the inference that the defendant was aware of a substantial and unjustifiable risk. In addition, the more benign the state-

criminal recklessness standard seems more practical, this question requires far more than a footnote to be properly assessed.

133. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

134. *Id.*

135. *See* People v. Conley, 187 Ill. App. 3d 234 (1989) (inferring intent to cause permanent disability from surrounding circumstances and the defendant's actions).

ment, the lower the likelihood that the factfinder will deem the communication to be a true threat under one of the objective tests, which serve as additional protections for defendants.

One could argue that recklessness is too easy to prove, or is too low of a standard, and that therefore it will sweep up innocent speech. But this argument overlooks a crucial element of any threat prosecution: the statement must be a true threat. This objective element is what helps retain protection for the speaker when recklessness is the *mens rea* requirement. No matter the defendant's state of mind, if the statement is not a true threat, then there has been no threat made. Take for example lyrics from a 2016 rap song that read "Pusha T, Meek Millz, A$AP Rocky, Drake/Big Sean, Jay Electron', Tyler, Mac Miller/I got love for you all, but I'm tryna [sic] murder you[.]"[136] Assume for now that the singer of these lyrics, Kendrick Lamar, was reckless as to how fellow rapper Drake would interpret them. He would still be innocent under any threat statute because these lyrics are not a true threat under any objective test. The word murder is a metaphor for the success that the rapper wishes to attain relative to his peers, and any jury would be able to see that given the surrounding lyrics. The context of these lyrics makes clear that this is mere hyperbole, similar to the defendant's statement in *Watts*. This objective threat element applies in all threat prosecutions and, like recklessness, it is also a high bar. Each Court of Appeals has its own objective test,[137] all of which require the jury to consider the context and circumstances of a given statement. The Constitutional requirement that a statement be a true threat before it is proscribed by law is what would ensure that a recklessness standard does not impinge upon the speaker's First Amendment rights.

D. Why a Recklessness Standard Is Needed

Still, though: is such a standard truly necessary? Is online speech really an appropriate target for criminal statutes? To answer that question, one only needs to recall some of the many tragedies that have occurred in our country in recent years. The "Unite the Right" rally in Charlottesville, the Pittsburgh synagogue shooting, the Charleston church shooting, and most recently the attack on the Capitol Building, all had their roots on one internet platform or another.[138] Further, look again at *Elonis* and *Jeffries*.[139] Both cases

136. BIG SEAN, CONTROL (Def Jam Recordings 2013).

137. *See* United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973); *see supra* notes 33, 34, 35.

138. *See* Heilweil and Ghaffary, *supra* note 1.

involve abusive ex-husbands using Facebook to terrorize their former spouses and anyone who gets in the way.[140] These two cases are only the tip of the iceberg: online harassment is disproportionately aimed at women, and a recklessness *mens rea* for threats has previously been advocated for as a way to address this.[141] Social media platforms can issue statements,[142] ban accounts,[143] and even air commercials calling for internet regulation[144]—but none of this changes the fact that at their core, they are businesses. Their primary interest is profit. We cannot—and should not—count on them to ensure that people aren't using the internet to terrorize others.

The access, speed, and anonymity that the Internet gives to bad actors necessitate an appropriate counterweight. A recklessness standard for criminal threat prosecutions is the perfect preventative measure against those who reveal their potential future crimes via the Internet. Inaction in this area has very real consequences. A recklessness standard for threat prosecutions will by no means be a panacea for violence—but it is a good place to start. At the very minimum, it will deter the most flagrant bad actors from using the internet as a means to their violent ends.

CONCLUSION

Recklessness can and should be the *mens rea* requirement for threat statutes. Such a standard would comport with *Elonis* because it is "only that mens rea necessary"[145] to separate wrongful from innocent conduct. Further, it is constitutional under *Watts* because it distinguishes between protected and unprotected speech, and it is not overbroad and therefore constitutional under *Black* because it distinguishes between those who are aware of their wrongdoing and those who are not. As communicating with each other becomes easier, we need additional safeguards that make abusing that ability

139. Elonis v United States, 575 U.S. 723, 723; Jeffries, 692 F.3d 473.

140. *Id*.

141. *See* Jessica Formichella, *A Reckless Guessing Game: Online Threats Against Women In The Aftermath of* Elonis v. United States, 41 SETON HALL LEGIS. J. 117, 145 (2016).

142. *See Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021) https://blog.twitter.com/en_us/topics/company/2020/suspension.html [https://perma.cc/MN7J-Q9CJ].

143. Chang and Dean, *supra* note 3.

144. *See Internet Regulations: A (Too) Short History*, Facebook (Mar. 3, 2021), https://www.facebook.com/facebook/videos/154534176489084/ [https://perma.cc/W8KG-LSCE].

145. *Elonis*, 575 U.S. at 735.

more difficult. A recklessness standard for criminal threat prosecutions would do just that.