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Domestic Violence Law, Abusers' Intent, and Social Media: How Transaction-Bound Statutes Are the True Threats to Prosecuting Perpetrators of Gender-Based Violence

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Domestic Violence Law, Abusers' Intent, and Social Media

HOW TRANSACTION-BOUND STATUTES ARE THE TRUE THREATS TO PROSECUTING PERPETRATORS OF GENDER-BASED VIOLENCE

"Hi, I'm Tone Elonis.

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

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. . . .

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

But not illegal to say with a mortar launcher.

Because that's its own sentence. . . .

I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room. . . .

Yet even more illegal to show an illustrated diagram. [diagram of the house] . . . ."[1]

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[1] Elonis v. United States, 135 S. Ct. 2001, 2005–06 (2015) (alteration in original) (omissions in original) (quoting United States v. Elonis, 730 F.3d 321, 333 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015)). After Anthony Douglas Elonis posted this to Facebook, a Pennsylvania county court granted his wife a three-year protection-from-abuse order. *Id.*

INTRODUCTION

After almost seven years of marriage, Tara Elonis left her husband, Anthony Elonis, removing their two young children, in May 2010.[2] Shortly thereafter, Mr. Elonis began having problems at work, eventually getting fired for a Facebook post he would make about a coworker.[3] After these events, Mr. Elonis changed his Facebook name to "Tone Dougie" and started posting rap lyrics on the social media site, many about his ex-wife.[4] Not only was Mr. Elonis Facebook "friends" with his wife's friends and family, but his page was public and all of his posts were visible to the hundreds of people he was "friends" with on Facebook and "accessible to the public at large."[5] Afraid for her safety—like many women who experience abusive Internet communications from intimate partners—Tara sought assistance from the judicial system.[6] But, because the presently available statutes to prosecute perpetrators of domestic violence are inadequate, the legal system was and is unable to do much to protect Tara and other victims from further abuse.

In November 2010, a Pennsylvania county court granted Tara custody of the couple's two children and a three-year protection-from-abuse order, the longest such order available in the state.[7] However, even after the issuance of the order, Mr.

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[2] *Id.* at 2004.

[3] *Elonis*, 730 F.3d at 324. Mr. Elonis was fired for posting a threatening photo about a coworker who had filed five sexual harassment charges against him. *Id.* The post included a picture of Mr. Elonis holding a knife to the coworker's neck (they worked at a Halloween park) with the caption "I wish." *Id.*

[4] *Elonis*, 135 S. Ct. at 2005.

[5] Brief for the United States at 2, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983).

[6] *See* JD Malone, *Anthony Elonis' Estranged Wife Testifies About Facebook Threats*, EXPRESS-TIMES (Oct. 19, 2000), http://www.lehighvalleylive.com/bethlehem/index.ssf/2011/10/anthony_elonis_estranged_wife.html [https://perma.cc/Q72D-RLFV].

[7] Brief for the United States, *supra* note 5, at 4. Though jurisdictions refer to these orders by different terms, such as a "restraining order," "protective order," or "order of protection," a "protective order" is "[a] court order prohibiting or restricting a party from engaging in conduct . . . that unduly annoys or burdens" the other party. *Protective Order*, BLACK'S LAW DICTIONARY (10th ed. 2014). There are three types of these orders of protection in New York: Family Court, Supreme Court, and Criminal Court orders of protection. *Frequently Asked Questions: Obtaining an Order of Protection*, NYCOURTS.GOV, https://www.nycourts.gov/faq/orderofprotection.shtml#q3 [https://perma.cc/2AQ9-TB9U]. A prosecutor may seek a criminal protection order on behalf of a victim after arresting the batterer. *See id.* In contrast, an abuse victim may seek a civil protection order on her own, in two stages. *Orders of Protection*, WOMENSLAW.ORG, http://www.womenslaw.org/laws_state_type.php?id=561&state_code=NY [https://perma.cc/R99H-FQMJ] (last updated Apr. 20, 2017). The first is a "temporary" or "emergency" order, granted after an ex parte hearing, which requires no notice to the abuser but does need to be served on him or her before the order is effective. *Id.* A judge will not grant a final order until a later trial where both parties are present. *See id.* These orders of protection may mandate the abuser to stay away for the victim's home and/or

Elonis continued to post about his ex-wife on Facebook; he even posted about the protection-from-abuse order and what he suggested Tara should do with it.[8] It was this post in particular that made Tara "extremely afraid for [her] life" because, in spite of the order, he "was still making the threats for everyone to see."[9] In response to these and other Facebook posts, including a post about an FBI agent, the federal government began investigating and, soon thereafter, arrested Mr. Elonis in December 2010.[10] Mr. Elonis was convicted of transmitting a "communication containing any threat . . . to injure the person of another" in interstate commerce.[11] He appealed his conviction all the way to the Supreme Court.

In *Elonis v. United States*, the Supreme Court determined that proving negligence alone is not sufficient to sustain a conviction for transmitting threats through interstate commerce; instead, the government needs to prove something more than an objective, reasonable person standard.[12] While Justice Roberts, writing for the seven-to-two majority, asserted that what a speaker "'thinks' does matter" in determining culpability, just how much it matters remains unclear.[13] With the circuits requiring guidance as to the proper standard to use when determining what constitutes a "true threat," this highly anticipated case of first impression fell far short of its potential.[14]

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workplace, to cease any communication with the victim, and to relinquish firearms. *Id.* They can also vary in length, depending on need and severity. *Id.*

[8] Brief for the United States, *supra* note 5, at 7; *see infra* note 214 and accompanying text.

[9] *Id.* at 8 (alteration in original).

[10] Mr. Elonis was arrested on December 8, 2010, after he wrote a post about the female FBI agent who was investigating his conduct. Brief for the United States, *supra* note 5, at 8–9. After she left his home, Mr. Elonis posted "Little Agent Lady stood so close[,] [t]ook all the strength I had not to turn the bitch ghost[.] Pull my knife, flick my wrist, and slit her throat." *Id.*; *see* Docket, United States v. Elonis, No. 5:11-cr-00013-LS (E.D. Pa. 2010).

[11] *See* 18 U.S.C. § 875(c) (2012). The second count was as follows:

> On or about November 6, 2010, through on or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant ANTHONY DOUGLAS ELONIS knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure and kill T.E., a person known to the grand jury. In violation of Title 18, United States Code, Section 875(c).

Indictment at 2, United States v. Elonis, 5:11-cr-00013-LS (E.D. Pa. Jan. 1, 2011).

[12] Elonis v. United States, 135 S. Ct. 2001, 2012–13 (2015).

[13] *Id.* at 2011.

[14] *See* P. Brooks Fuller, *Evaluating Intent in True Threat Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 39, 76 (2015); Press Release, Nat'l Ctr. for Victims of Crime, National Center for Victims of Crime Statement on *Elonis v. U.S.* (Dec. 1, 2014), http://www.victimsofcrime.org/media/full-story/2014/12/01/national-center-for-victims-of-crime-

By "say[ing] only what the law is not" rather than what the law is,[15] the Court avoided its "emphatic[] . . . province and duty,"[16] leaving many concerned about the "confusion and serious problems" that will result from the Court's indecision.[17]

Yet *Elonis* will not "throw[] *everyone* from appellate judges to everyday Facebook users into a state of uncertainty."[18] Justice Thomas, in his dissenting *Elonis* opinion, suggested that lower courts can "safely infer that a majority" of the Supreme Court does not believe the First Amendment demands an intent-to-threaten finding, as the *Elonis* majority "carefully le[ft] open the possibility that recklessness may be enough."[19] Although lower courts may be able to "safely infer" some things about the decision, they will quite certainly require further clarification from the Supreme Court about the constitutionally mandated standard to define the line between protected and prosecutable speech of certain types. Communication between intimate partners with a history of abuse—like that of Tara and Anthony Elonis—is not one of those types.[20]

There is a fundamental difference between the speech of a citizen directed at a fellow citizen or government official[21] and that of an abusive intimate partner directed at his or her partner. Between these partners, communications may not be protected speech at all, but an abusive act. With abuse between

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statement-on-elonis-v.-u.s [https://perma.cc/EW58-X2QB]; 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 [https://perma.cc/9SD4-SFF7]; Robert Barnes, *Supreme Court Throws Out Conviction for Violent Facebook Postings*, WASH. POST (June 1, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-throws-out-conviction-for-violent-facebook-postings/2015/06/01/68af3ee0-086b-11e5-a7ad-b430fc1d3f5c_story.html?utm_term=.a26b691ce786 [https://perma.cc/K6MH-FX7E]. *But see* Vauhini Vara, *The Nuances of Threats on Facebook*, NEW YORKER (Dec. 3, 2014), http://www.newyorker.com/news/news-desk/nuances-threat-facebook [https://perma.cc/LV9C-5SRU] (referencing the predication by James Grimmelmann, a prominent Internet law scholar, that the Court would not use the case to expand threat standards).

[15] *Elonis*, 135 S. Ct. at 2013 (Alito, J., dissenting).

[16] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[17] *See Elonis*, 135 S. Ct. at 2013 (Alito, J., dissenting); *see, e.g.*, Barnes, *supra* note 14; Catherine J. Ross, Address at the Boston University Law Review Symposium: Why Is It So Hard to Reign in Sexually Violent Speech? (Nov. 5, 2015), http://www.bu.edu/bulawreview/ross-sexually-violent-speech/#_ftn12 [https://perma.cc/UR3R-CPVR].

[18] *Cf. Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting) (emphasis added). Further, Facebook policy already states: "We remove content, disable accounts, and work with law enforcement when we believe there is a genuine risk of physical harm or direct threats to public safety." *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards [https://perma.cc/N5MA-GKPG].

[19] *Elonis*,135 S. Ct. at 2018 (Thomas, J., dissenting).

[20] *See infra* Section II.C.

[21] In addition to the charges for some of Mr. Elonis' posts about his ex-wife, the government prosecuted Mr. Elonis for posts about his coworkers and an FBI agent. *See supra* notes 3, 10 and accompanying text.

intimate partners, the abuser's subjective intent to assert power and control over another is a vital element of what makes the act criminal—be that act sexual, physical, verbal, or a threatening Facebook comment. And advocates for victims of domestic violence should focus on removing the barriers to prosecuting these criminal acts that presently exist.

The largest current barrier is the use of existing, transaction-bound criminal statutes, like "battery," "harassment," or "the interstate communication of a threat."[22] These statutes are problematic because they are temporally constrained and do not recognize the pattern of power and control central to this abuse or capture the true harm of the behavior. This is the behavior that conflicts with the normative values of our society, the behavior we seek to penalize when prosecuting perpetrators of gender-based violence. While use of these existing statutes was critical in initially recognizing domestic violence as a criminal offense, the time has come to remove the true threat to prosecution of perpetrators of domestic violence. That threat is not the First Amendment, the *Elonis* decision, or the "established tenets of criminal law";[23] these demand that the government must prove a "union between act and mind" to prosecute someone for violative speech.[24] The true threat is the absence of a domestic violence statute from the books that includes the abuser's subjective intent and recognizes this pattern of abuse and control.

Professor Alafair S. Burke presented a new domestic violence statute that incorporates these contextual elements that have been conspicuously absent from existing statutes. The statute criminalizes "coercive domestic violence," which encompasses the defendant's coercive acts and emotional abuse that coincide with physical violence.[25] She concludes her proposal by asking whether there is enough of a reformist "wave," one surrounding the inadequacies of current transaction-bound statutes, to effect the enactment of a domestic violence specific statute.[26] While she concludes that this "is a question [she is] not able, or ready, to answer," this note argues that such a "wave" exists, or at least, that the reformist tide is coming in.[27] Part I of this note presents domestic violence background, research about an abuser's motivations, the increasing and novel problem of

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[22] Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 554–55, 558 n.32 (2007).

[23] *Id.* at 598.

[24] *See id.*

[25] *Id.* at 601–02.

[26] *Id.* at 612.

[27] *Id.*

social media threats for victims of domestic violence, and the developments, as well as inadequacies, of existing laws that govern domestic violence cases. Part II lays out the true threat doctrine, explaining what constitutes a true threat and why it is not protected speech under the First Amendment. It then outlines the case law of the doctrine and analyzes why the *Elonis* decision—despite being a missed opportunity for the Court—was ultimately not the proper solution for prosecuting perpetrators of domestic violence. And finally, Part III argues that Professor Burke's "Coercive Domestic Violence" statute is the perfect solution to prosecuting perpetrators of domestic violence who have threatened their victims on social media. And the facts of *Elonis* function as a powerful case study to analyze and illustrate how the statute strikes the requisite balance between protecting the First Amendment rights of abusers and advocating for victims of gender-based violence.

I. DOMESTIC VIOLENCE: BACKGROUND, LAW, AND ISSUES

> "If I only knew then what I know now . . . I would have smothered your ass with a pillow. Dumped your body in the back seat. Dropped you off in Toad Creak and made it look like a rape and murder."[28]

Since the identification of "domestic violence" as a societal problem and not a family matter, the understanding of what "domestic violence" means between intimate partners has continued to evolve; much of that evolution stems from a greater understanding of the abuser's intent. Before diving into the multifaceted, pervasive[29] problem that is domestic violence, it is first necessary to establish the parameters of this note. While there are many types of intimate partner violence, this note will only address domestic violence between male perpetrators and female victims due to the frequency with which this type of domestic violence occurs.[30] It will also not contemplate the

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[28] Posted by Anthony Douglas Elonis on Facebook. Brief for the United States, *supra* note 5, at 3.

[29] A survey sponsored by the Center for Disease Control and Prevention in 2000 revealed that of 16,000 Americans surveyed, 65% of women who reported being physically assaulted by an intimate partner had experienced more than one instance of physical violence. PATRICIA TJADEN & NANCY THOENNES, CTRS. FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, at iii, 39 (2000). This survey also suggests that the average length of abuse between intimate partners was four and a half years. *Id.* at 39.

[30] "From 1994 to 2010, about 4 in 5 victims of intimate partner violence were female." SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993–2010, at 1 (2015), https://www.bjs.gov/content/pub/pdf/ipv9310.pdf [https://perma.cc/HPZ7-NUVL]. And in 2010, there were over 900,000 reported nonfatal, violent incidents between intimate partners. *Id.* at 1. Further, women living with female

correlations between socioeconomic status, race, and domestic violence, though these are vital components of the issue. Additionally, the note will put aside the ethical complications and paternalistic arguments[31] that arise when women do not want their abusers prosecuted, just one of the many prosecutorial dilemmas that makes domestic violence the complex issue it is. Even the term "domestic violence" itself is problematic as it highlights only the problem's physicality, which is merely one aspect of the experience of abused women.[32] But with a growing understanding of an abuser's motivations, the increasing prevalence of social media, and the inadequacies of existing domestic violence law, the legal landscape is ripe and ready for the law to catch up to the science.

A. The Early Research on and the Reformist Strategy for Domestic Violence

Beginning in the 1970s, the awareness of domestic violence as a pervasive societal issue helped transform the issue from one law enforcement "at best [saw] as a nuisance to be mediated and at worst as a dangerous situation to be avoided" to one some courts recognize as an affirmative defense to murder.[33] Much of that transformation came from scholars such as Dr. Lenore Walker, whose works first identified what "domestic violence" actually was.[34] Early representations of domestic violence understood it as a repetitive cycle of violence with four distinct stages: a "tension building stage," an acute battering episode stage, the honeymoon/reconciliation stage, and a calm stage, with the cycle then repeating itself.[35] Similarly, much of

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intimate partners experience less violence than those who live with male intimate partners. TJADEN & THOENNES, *supra* note 29, at iv.

[31] *See e.g.,* Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1073–75 (1996) (arguing that the autonomy of women is not furthered when states enforce marital privileges and adverse testimony privileges); *see also* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 551, 586–96 (addressing the parallels between forcing women to prosecute their batterers against their will with domestic violence).

[32] ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 65 (2000) (identifying the problems with defining the "problem"); Burke, *supra* note 22, at 555; *see infra* note 41 and accompanying text. This note will use "domestic violence," "gender based violence," and "intimate partner violence" interchangeably.

[33] Burke, *supra* note 22, at 557; *see* Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 L. & HUM. BEHAV. 579, 585–90 (1990).

[34] *See* LENORE E. WALKER, THE BATTERED WOMAN (1979) [hereinafter WALKER 1ST]; LENORE E.A. WALKER, THE BATTERED WOMAN SYNDROME (2d ed. 2000) [hereinafter WALKER 2ND].

[35] *See* WALKER 1ST, *supra* note 34, at 55.

the early research focused on the psychology of the battered woman.[36] Initial advocates made the strategic decision to title abuse between intimate partners with terms like "domestic violence" and "battered women" because of a belief that "[s]ociety would be willing to redress demonstrable physical injury."[37] In other words, these early advocates realized the difficulty of capturing the problem's complexity with a single term. And for similar reasons, the reformists made the strategic decision to use existing, singular, transaction-based offenses in the criminal code, rather than develop a separate offense, one that would capture the cyclical nature of the abuse.[38]

The combination of this early research and these strategic decisions made notable headway in the legal sphere. An illustrative example of this success is the use and acceptance of "battered woman's syndrome" as a valid self-defense in homicide prosecutions where an abused woman has been charged with killing her batterer.[39] In just twenty or so years, society's perspective shifted from one that believed women "'ask for' or provoke the violence"[40] to courts blending a subjective and objective analysis to inquire whether a "reasonable, battered woman," not "reasonable person," would have feared for her life in the situation. Although this is a necessary shift away from legally blaming the abused woman for causing her own abuse, the defense is of limited value as it focuses solely on the woman's psychology, which is just one aspect of the abuse. Only recently has the understanding of "domestic violence" shifted away from learning about the perspective of the abused woman; today, there is greater focus on the psychology of why the batterer abuses.

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[36] *See generally* SCHNEIDER, *supra* note 32, at 65–67 (explaining the traditional emphasis on women's experiences with domestic abuse); WALKER 2ND, *supra* note 34, at x (presenting research focused on "the woman's perceptions in the battering relationship").

[37] *See, e.g.*, SCHNEIDER, *supra* note 32, at 65 (identifying the problems with defining the "problem"); Burke, *supra* note 22, at 555.

[38] Burke, *supra* note 22, at 555–56.

[39] "Battered woman syndrome" is a type of post-traumatic stress disorder experienced by victims of domestic violence after years of repetitive abuse; consequently, women no longer are able to conceptualize a viable escape from the relationship. WALKER 2ND, *supra* note 34, at 1–11. Much of this research was based on the initial work of Martin Seligman and the notion of "learned helplessness." *See* Martin E.P. Seligman & Steven F. Maier., *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256, 256 (1968).

[40] *See* SCHNEIDER, *supra* note 32, at 113, 122–23, 138–42; *see also* State v. Kelly, 478 A.2d 364, 377 (N.J. 1984). Though these defenses are still sometimes viewed as calling for "special and undeservedly lenient treatment" of women, courts still allow the syndrome as the basis for self-defense claims, expert testimony admissibility, and "special cause of action in tort." SCHNEIDER, *supra* note 32, at 115.

B. The Abuser's Intent and the Pattern of Abuse: A Growing Understanding of Domestic Violence

An abuser's intent is now a crucial and engrained portion of our modern understanding of intimate partner violence. Unlike the original four stages model, the majority of social scientists now view domestic violence more as a pattern of physically and sexually violent actions stemming from an abuser's need to assert "power and control over" his partner.[41] A common tool used to capture this pattern is the Domestic Abuse Intervention Program's "Power and Control Wheel."[42] Use of threats, intimidation, emotional abuse, isolation, economic abuse, children, male privilege, and minimizing, denying, and blaming (the Wheel's spokes) are manifestations of the abuser's power and control (the Wheel's center), and physically and sexually violent acts (the Wheel's rim) hold the mechanism all together.[43]

Current research focuses extensively on what drives a batterer to act in such a manner.[44] Some have examined the retaliatory nature of an abuser's actions as stemming from the abuser's own insecurities[45] or experiences with abuse.[46] Others have focused on comparing the reactions of abusive and nonabusive men to attempts by their female partners' own assertion attempts;[47] notably, this study discovered that the female's assertion attempt, of any kind, against the male led the male to respond with aggression, viewing this attempt as "a

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[41] Burke, *supra* note 22, at 555; *see also* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5 (2007) (arguing a "coercive control" theory where domestic violence is "a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control"); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985–86 (1995). Even the Department of Justice defines domestic violence "as a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner." *Domestic Violence?*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/ovw/domestic-violence [https://perma.cc/CR2U-4DZX].

[42] For a representation of the Wheel, see *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAM, http://www.theduluthmodel.org/pdf/PowerandControl.pdf [https://perma.cc/2E2F-U3UG].

[43] *Id.*

[44] *See generally* LUNDY BANCROFT, WHY DOES HE DO THAT?: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN (2002); DONALD G. DUTTON & SUSAN GOLANT, THE BATTERER: A PSYCHOLOGICAL PROFILE 13 (1995) (arguing that repeated abuse stems from an abuser's addiction to and dependence on abuse to keep his personality whole); EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE (3d ed. 2003) (presenting the differences among batterers and the effect those differences make on the effectiveness of intervention strategies).

[45] BUZAWA & BUZAWA, *supra* note 44, at 33.

[46] DUTTON & GOLANT, *supra* note 44, at i–xii.

[47] NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 63–67 (1998).

loss of face, an assault to his sense of honor."[48] This is particularly important information for advocates of domestic violence victims to know as it means that "leaving the relationship is often the most dangerous phase in an abusive relationship."[49] When advocating for victims of domestic violence, attorneys, psychologists, legislators, and judges often seek to enable women to take assertive steps against male abusers. These steps include obtaining a protection-from-abuse order, seeking custody of the children, or leaving him altogether. While these steps may be vital psychological steps for the woman,[50] advocates may actually be encouraging women to act in a way that could jeopardize their safety. Thus, understanding the psychological motivations and triggers of abusers can provide critical insight for those advising clients, drafting legislation, and issuing judicial decisions for optimal protection of female survivors during this potentially dangerous time.

In addition to the underlying causes of the abuser's desire to assert power and control, research efforts and awareness campaigns have begun to focus on the pervasive effects of nonphysical abuse, including threats, intimidation, and emotional abuse, in intimate partner relationships. These abusive acts may include: (1) threats to harm the victim, their child(ren), or their animal(s), (2) threats to take away their child(ren) or animal(s), (3) repeatedly blaming her for things outside of her control, criticizing her, degrading her, withholding and conditioning information or telling her she is crazy and worthless, and (4) monitoring and stalking her movements, online and in person.[51] Just as physical abuse has negative effects on the victim's health, nonphysical abuse also leads to serious health complications, such as depression.[52] In fact, psychological abuse is a greater predictor than physical abuse for Posttraumatic

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[48] *Id.* at 63–64.

[49] Cynthia Fraser et al., *The New Age of Stalking: Technological Implications for Stalking*, 61 JUV. & FAM. CT. J. 39, 50 (2010).

[50] *See, e.g.*, Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1514–15 (2008) (From the perspective of one victim: "After so long of just taking it and taking it[,] I needed to be able to show myself as much as show him that I was tired of being a victim." (alteration in original)).

[51] *See* BEVERLY ENGEL, THE EMOTIONALLY ABUSIVE RELATIONSHIP: HOW TO STOP BEING ABUSED AND HOW TO STOP ABUSING 11 (2002); *Facts Against Domestic Violence and Psychological Abuse*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/files/Domestic%20Violence%20and%20Psychological%20Abuse%20NCADV.pdf [https://perma.cc/V5M4-U6LW].

[52] *See* WORLD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE 24–25 (2013), http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf?ua [https://perma.cc/K2XW-X83W].

Stress Disorder in the victim.[53] In light of these long-term health consequences to women, as well as the significant financial costs to society[54] and the devastating impact on the couple's children,[55] domestic violence is a national epidemic that has been further complicated by the introduction of digital communications.

C. Domestic Violence and Social Media: The Abuser's New Weapon

With the increased prevalence of digital communications and social media comes a new venue and tool for abusers to assert power and control over their intimate partners. The "use of technologies such as texting and social networking to bully, harass, stalk or intimidate a partner" may take many forms.[56] There are programs that, for less than one hundred dollars, allow abusers to monitor their partner's every keystroke and enable him to read her private documents, communications, and browsing habits.[57] There are online services that exist solely to "get revenge" on exes, which enable abusers to send anonymous texts, calls, and emails to their victims, send offensive packages, and create websites to hurt, cause pain to, and humiliate the victim.[58] The use of social media platforms provides an essential tool to the modern abuser, a free medium with a large audience for the abuser to further assert his control over his victim. For instance, an abuser may post disparaging comments, photos, and videos about his partner online, or use digital means to send

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[53] *Facts Against Domestic Violence and Psychological Abuse*, *supra* note 51.

[54] *See, e.g.*, DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 19 (2003), http://www.cdc.gov/violence prevention/pdf/ipvbook-a.pdf [https://perma.cc/9MW6-QG5W] (finding that, per year, female victims of intimate partner violence lose almost 8 million days of work, which equates to approximately 32,000 full-time jobs); *Intimate Partner Violence: Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/violenceprevention/ intimatepartnerviolence/consequences.html [https://perma.cc/STV3-4D9Z] (estimating that in 1995 the total cost, including health care and lost productivity, of domestic violence was $5.8 billion). In 2013, Forbes reported that the annual cost of domestic violence in the United States had risen to $8.3 billion, a combination of the $5.8 billion in medical costs and $2.5 billion in lost productivity. Robert Pearl, *Domestic Violence: The Secret Killer that Costs $8.3 Billion Annually*, FORBES (Dec. 5, 2013), http://www.forbes. com/sites/robertpearl/2013/12/05/domestic-violence-the-secret-killer-that-costs-8-3-billion-annually/#2715e4857a0b76bba7f83c13.

[55] *See* Marielsa Bernard, *Domestic Violence's Impact on Children*, MD. B.J., May/June 2003, at 10–17.

[56] *Abuse Defined*, THE NAT'L DOMESTIC VIOLENCE HOTLINE, http://www.the hotline.org/is-this-abuse/abuse-defined/#tab-id-6 [https://perma.cc/3AEE-64J9].

[57] Fraser et al., *supra* note 49, at 41. For anecdotal stories about how abusers have used these technologies, see Cynthia Southworth et al., *Intimate Partner Violence, Technology, and Stalking*, 13 VIOLENCE AGAINST WOMEN 842, 844–50 (2007).

[58] *See* GET REVENGE ON YOUR EX, getrevengeonyourex.com [https://perma.cc/ W2EQ-WY56].

negative and threatening communications to his partner.[59] He can use the platforms to spread rumors or share information about her, or even impersonate her.[60] An abuser may also use social media to "keep constant tabs" on his partner by tracking where she has been and who she has been with through posted pictures, status updates, and location "check ins"; he may even require her to do so.[61] He may dictate with whom she can and cannot be "friends" or expand his social media presence to include all of her contacts.[62] Though women can contact the website's host to request removal of the material,[63] much of this behavior "may seem innocuous and random to others" because it "is very specific and targeted to her" as the abuser "knows what will terrify the victim and how to increase the victim's fear."[64] The apparently harmless nature of this behavior can make seeking and enforcing an order of protection difficult. If a judge or police officer has not received training on the power dynamics involved in domestic violence, a Facebook post that does not "tag" the victim, for example, may not seem like threatening contact with the victim in violation of a no contact order.

It is as though technological advances have armed abusers with a "super power," one that many are using as an evil with real consequences.[65] While the current hard data is minimal, it shows that abusers' use of social media to target their partners is now commonplace.[66] Much of the existing data focus on the notion of "cyberstalking";[67] however use of the term "stalking" is too limited as these "technologies are also being used to intimidate and control victims."[68] For instance, Working to Halt Online Abuse reports that, of the 305 victims of online harassment they helped in 2011 and agreed to complete a questionnaire, 70 victims had a

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[59] Fraser et al., *supra* note 49, at 47–48.

[60] *Id.*

[61] I observed such behavior as a legal intern with Sanctuary for Families in the summer of 2015 in New York City.

[62] *See supra* note 61; Fraser et al., *supra* note 49, at 47–48.

[63] Fraser et al., *supra* note 49, at 48.

[64] *Id.* at 49.

[65] Lois D. Fasnacht & Tracy Griffith, *Using Technology to Stalk And Harass*, MIDDPENN MATTERS, Sept. 2008, at 6, http://www.midpenn.org/keynotes/Vol18No3 September2008.pdf [https://perma.cc/NBU9-5FVF].

[66] *See* Press Release, Dep't of Justice, 3.4 Million People Report Being Stalked in the United States (Jan. 13, 2009), https://www.bjs.gov/content/pub/press/svu spr.pdf [https://perma.cc/SCV8-TYWA] (reporting that, of the 3.4 million people who identified as having been stalked between 2005 and 2006, 1 in 4 had been stalked through cyberstalking).

[67] "The term cyberstalking has been used to describe a variety of behaviors that involve (a) repeated threats and/or harassment, (b) by the use of electronic mail or other computer-based communication, (c) that would make a reasonable person afraid or concerned for his or her safety." Southworth et al., *supra* note 57, at 843 (emphasis omitted).

[68] *Id.* at 844.

romantic relationship with their harasser and 41% of all harassment victims knew their harasser.[69] A survey conducted by the National Network to End Domestic Violence in 2012 revealed that of the 759 domestic violence agencies surveyed, almost 90% of agencies had had victims report being threatened through technology; one third of those threats occurred on social media[70] and Facebook.[71] And the problem of abusers hacking their partners' computers is prevalent enough for the organization to have created an "Internet and Computer Safety" guide.[72] When a woman seeks a protection-from-abuse order—a huge step for her in many regards—there is an increased likelihood of an abuser taking further measures to assert power over her as he feels his control over her is slipping.[73] Given how frequently abusers follow through with their threats, the combination of his internal psychological mechanisms and the ease with which sites can enable him to reassert that control can be a deadly combination for victims of domestic violence, especially those who assert back in any way.

Abusers' direct threats are "reliable predictors of physical violence."[74] More than half of those who threaten physical violence against an intimate partner follow the threat with a

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[69] WORKING TO HALT ONLINE ABUSE, 2011 CYBERSTALKING STATISTICS 1 (2011), http://www.haltabuse.org/resources/stats/2011Statistics.pdf [https://perma.cc/EJW2-XUG9]. *But see* SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, STALKING VICTIMS IN THE UNITED STATES—REVISED (2012) (finding seven in ten victims of stalking were acquainted with their stalker in some way).

[70] Brief of Amici Curiae the Nat'l Network to End Domestic Violence, et al. in Support of Respondent at 14, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983).

[71] NAT'L NETWORK TO END DOMESTIC VIOLENCE, A GLIMPSE FROM THE FIELD: HOW ABUSERS ARE MISUSING TECHNOLOGY 1, 4 (2014), http://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/54e3d1b6e4b08500fcb455a0/1424216502058/NNEDV_Glimpse+From+the+Field+-+2014.pdf [https://perma.cc/F2P3-KVNJ].

[72] *Internet and Computer Safety: If You Are in Danger, Please Try to Use a Safer Computer that Someone Abusive Does Not Have Direct or Remote (Hacking) Access to*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, http://nnedv.org/internetsafety.html [https://perma.cc/Q4TU-9DXP].

[73] *See* JACOBSON & GOTTMAN, *supra* note 47, at 62–67 (discussing the stages of an argument between a batterer and victim and explain that the batterer is unable to accept any assertion by the woman and the argument does not end until the batterer feels he has regained a sense of control).

[74] Brief of Amici Curiae the Nat'l Network to End Domestic Violence, et al. in Support of Respondent, *supra* note 70, at 9; *see* JILL M. DAVIES & ELEANOR LYON, DOMESTIC VIOLENCE ADVOCACY: COMPLEX LIVES/DIFFICULT CHOICES 118–19 (2d ed. 2014) (describing the research on risk and femicide predictive factors); Mary P. Brewster, *Stalking by Former Intimates: Verbal Threats and Other Predictors of Physical Violence*, 15 VIOLENCE & VICTIMS 41 (2000) (conducting a survey of 187 female stalking victims to determine that an independent and statistically significant correlation exists between the verbal threats of a former intimate partner and subsequent acts of violence); Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003) (finding that abusers threats with a weapon and threats to kill were substantially correlated with acts of femicide).

significant act of violence.[75] One in three women will experience an assault by an intimate partner, while "[o]ne in twelve women will be stalked by an intimate partner."[76] And one of the predictive factors of intimate partner femicide is the male making prior threats to kill or threats with a weapon.[77] Not only are these threats predictions of a woman's risk of femicide, but research shows women can accurately gauge the risk the threats pose to their own safety.[78]

The predictive effect of threats combined with women's accuracy in perceiving this risk is particularly significant then for the judicial system to recognize. Take the risk that victims face after they obtain orders of protection or, as understood through the abuser's psychological motivations, make an attempt to shift the power and control away from the abuser.[79] Exertion of technological control becomes critical to an abuser after a victim has obtained an order of protection that proscribes physical contact with the victim.[80] Social media may often be his only remaining means of contact and thus control over the victim if the order does not expressly prohibit such contact or the judge or police officer enforcing the order does not consider social media a violation of the order. The legal system should be taking these electronic threats, and women's fear of the risk the threats pose, more seriously.

As mentioned above, there have been significant legal developments in the last thirty years of domestic violence law that recognize violent acts between intimate partners as criminal and not merely an internal family problem.[81] However, considering the more recent data on the role of threats in an abuser's need to assert dominance and correlation of threats to actual injury in intimate partner abuse, it is time for the law to

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[75] Patricia Tjaden, *Prevalence and Characteristics of Stalking*, *in* STALKING: PSYCHOLOGY, RISK FACTORS, INTERVENTIONS, AND LAW 1-1–1-16 (Mary P. Brewster ed., 2003).

[76] Brief Amici Curiae the Nat'l Network to End Domestic Violence, et al. in Support of Respondent, *supra* note 70, at 9 n.17; Tjaden, *supra* note 75, at 1–9.

[77] Campbell et al., *supra* note 74, at 1092.

[78] *See* DAVIES & LYON, *supra* note 74, 118–19 (describing the research on risk and femicide predictive factors).

[79] *See* Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 199 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (finding that 48.8% of 668 victims were reabused by their abusers within two years of getting a protection-from-abuse order).

[80] Laurie L. Baughman, *Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites by Domestic Violence Perpetrators*, 19 WIDENER L.J. 933, 941 (2010).

[81] *See supra* Part I; *see generally* Burke, *supra* note 22 (explaining how law enforcement treated domestic violence as a mere nuisance).

be able to capture the repetitive nature and breadth of conduct that constitute domestic violence.

D. The Developments and Remaining Gaps in Domestic Violence Law: The Inadequacies of Using Transaction-Bound Statutes

The changing awareness around the prevalence and pervasiveness of domestic violence has sparked jurisdictions around the nation to address the problem through a variety of ways; however, these efforts, and the other available judicial programs in place, are inadequate. Nationally, in 1994, Congress enacted the Violence Against Women Act (VAWA),[82] in part to prosecute perpetrators and protect female victims of domestic violence. The first federal law of its kind, Congress has expanded and reauthorized the Act four times.[83] Through the expansions of the Act and other statutes, federal law now protects victims from many of the interstate actions of their batterers.[84] Such expansions have been made to federal firearm laws[85] to limit abusers' access to firearms, as well as additional statutes to deter the commission of and to ensure the safety of victims of domestic violence, including giving orders of protection from one state full faith and credit in another state.[86]

The federal government has also attempted to address some of the specific harms of cyber communications through the

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[82] Violence Against Women Act of 1994, Pub L. No. 103-332, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701–14040 (2012)); Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. §§ 40001–703 (1994).

[83] *Violence Against Women Act*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, http://nnedv.org/policy/issues/vawa.html [https://perma.cc/NEY4-XLRQ].

[84] *See e.g.*, 18 U.S.C. § 2261 (2012); *id.* §§ 2261A, 2262. Due to the Supreme Court's decision in *United States v. Morrison*, which found certain portions of VAWA unconstitutionally beyond the scope of Congress' Commerce Clause power, the federal government may only prohibit domestic violence conduct that is "directed at the instrumentalities, channels, or goods involved in interstate commerce." United States v. Morrison, 529 U.S. 598, 615–18 (2000) (finding the government's evidence of the impact on interstate commerce unconstitutionally "attenuated").

[85] *See e.g.*, 18 U.S.C. § 922(g)(8) (2012) (possession of firearm while subject to order of protection); *id.* § 922(d)(8) (transfer of firearm to person subject to order of protection); *id.* § 922(d)(9) (transfer of firearm to person convicted of a misdemeanor crime of domestic violence); *id.* § 922(g)(9) (possession of firearm after conviction of misdemeanor crime of domestic violence). Just last term, the Supreme Court upheld the constitutionality of the prohibition on possessing a firearm after conviction of a misdemeanor domestic violence crime. Voisine v. United States, 136 S. Ct. 2272, 2278–82 (2016) (finding conviction of a reckless domestic violence assault sufficiently meets the misdemeanor requirement for prosecution under the statute).

[86] 18 U.S.C. § 2265 (full faith and credit to orders of protection); *see, e.g.*, Amendment of the Brady Statement, 18 U.S.C. § 922(s) (2012); *id.* § 2263 (detailing victim's right to speak at defendant's bail hearing); 42 U.S.C. § 10607 (services to victims); 18 U.S.C. § 2264 (restitution to victims); 8 U.S.C. § 1154 (2012) (self-petitioning for battered immigrant women and children).

Interstate Communications Statute and the Interstate Stalking Statute; these statutes serve as two of the most effective currently available tools for federally prosecuting perpetrators of viral intimate partner violence.[87] The Interstate Communications Statute was at issue in *Elonis* and will be discussed in greater detail through the course of this analysis. The Interstate Stalking Statute makes it illegal for someone to cross state lines intending to "kill, injure, [or] harass" another person, and the person or a member of the person's family is placed in fear of serious bodily injury or death because of or during that travel.[88] In 2006, Congress revised the statute to also proscribe an intent to harass and conduct that causes substantial emotional stress.[89] While several defendants have challenged the facial constitutionality of the statute due to overbreadth,[90] to date, only one district court has found the statute unconstitutional as applied.[91] Even assuming the facial validity of this statute, the underlying problem of these statutes, as well as the similar efforts of states, is the use of transaction-bound statutes to prosecute perpetrators of domestic violence.

States have also made similar changes to combat intimate partner violence, though their attempts are broader given that the scope of their power is not confined to the regulation of interstate activity. All fifty states allow warrantless arrests when officers have probable cause in domestic violence cases and have antistalking or harassment laws on the books.[92] As of 2014, twenty-one states had mandatory arrest statutes for perpetrators of domestic violence[93] Additionally, some states have gone further by making changes to their evidence rules to secure more

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[87] 18 U.S.C. § 875(c); *id.* § 2261A.

[88] *Id.* § 2261A.

[89] *See* 18 U.S.C. § 2261A (2006).

[90] United States v. Sayer, 748 F.3d 425, 434–36 (1st Cir. 2014); United States v. Osinger, 753 F.3d 939, 943–44 (9th Cir. 2014); United States v. Matusiewicz, 84 F. Supp. 3d 363, 365 (D. Del. 2015).

[91] United States v. Cassidy, 814 F. Supp. 2d 574, 587–88 (D. Md. 2011) (determining that it did not need to undertake an analysis of facial constitutionality after finding a statute invalid as applied).

[92] Beth Bates Holiday, Annotation, *Validity, Construction, and Application of Provisions of Federal Interstate Stalking Statute, 18 U.S.C.A. § 2261A*, 50 A.L.R. Fed. 2d 189 (2010); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859 (1996).

[93] Amy M. Zelcer, Note, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with a Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 AM. CRIM. L. REV. 541, 546 (2014) (whereas twenty-nine states mandate arrest when an individual has violated a protection from abuse order); *see also Domestic Violence Arrest Policies By State*, ABA COMM'N ON DOMESTIC VIOLENCE (Nov. 2007), http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.authcheckdam.pdf [https://perma.cc/9623-XVPY].

prosecutions of abusers.[94] Four states have even gone as far as to enact separate criminal offenses for domestic violence.[95] Unfortunately, "there is little that is truly 'separate' about the[ir] defined offenses."[96] This "separation" entails either (1) grouping the existing transaction-based statutes that are already used for intimate partner violence and adding an intimate partner relationship as an element, or (2) regurgitating the elements of the existing transaction-bound statutes, such as "assault" or "harassment," without using the names of the transaction-bound statutes, but also without adding any unique elements.[97]

Another tool states have implemented to combat domestic violence are holistic court models. One example of such a model is Integrated Domestic Violence (IDV) court, where one judge hears a family's criminal and family court matters.[98] IDV courts are economically efficient for all and can be better for the victim, for example, by sparing the victim further trauma from needing to repeatedly testify.[99] New York has implemented IDV courts throughout the state.[100] New York City's holistic model, however, goes beyond typical IDV courts, providing domestic violence victims a safe place away from their abusers to wait or meet with their attorneys, or law enforcement, while at any criminal or family court in all five boroughs.[101] Moreover, the Mayor's Office to Combat Domestic Violence developed Family

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[94] For instance, some states have removed marital communications and adverse testimonial privileges, compelling victims of domestic violence to testify against their abusive spouses against their will. *See* Malinda L. Seymore, *Against the Peace and Dignity of the State: Spousal Violence and Spousal Privilege*, 2 TEX. WESLEYAN L. REV. 239, 240–41 (1995).

[95] These states include Alabama, Idaho, Mississippi, and Nebraska. *See* ALA. CODE § 13 A-6-130-32 (2000); IDAHO CODE ANN. § 18-918 (West 2017); MISS. CODE ANN. § 97-3-7(3) (West 1972); NEB. REV. STAT. ANN. § 28-323(7) (West 2004).

[96] Burke, *supra* note 22, at 561.

[97] *Id.* at 561–63.

[98] Integrated Domestic Violence Courts enable one judge to hear the criminal, family, and matrimonial claims of a family combating domestic violence. *Integrated Domestic Violence Courts*, CTR. FOR COURT INNOVATIONS, http://www.courtinnovation.org/project/integrated-domestic-violence-court [https://perma.cc/BF3C-6HSF].

[99] Streamlining these proceedings, where the judge still applies the procedural and substantive law that would have applied in a traditional proceeding, conserves court and litigant resources and improves "information flow" between all parties, helping to ensure all involved obtain the best outcome. *Integrated Domestic Violence Courts (IDV)*, N.Y. UNIFIED COURT SYS., https://www.nycourts.gov/courts/family-violence/idv/home.shtml [https://perma.cc/8RNM-754N]; *see Integrated Domestic Violence Courts*, *supra* note 98.

[100] *Integrated Domestic Violence Courts*, *supra* note 98.

[101] Safe Horizon Centers also provide assistance with family and criminal court proceedings in all five boroughs, including providing a safe place for survivors to wait and supervision of their children during hearings. *Legal & Court Help*, SAFE HORIZON, http://www.safehorizon.org/page/court-programs-73.html [https://perma.cc/X5UB-3WDN].

Justice Centers in every borough to "provide criminal justice, civil legal, and social services all in one location for victims of domestic violence."[102]

Despite of these progressive programs in New York, the state is still failing to address the breadth of the problems present in intimate partner violence. While these programs are critical improvements, the state is still missing the central issue surrounding domestic violence prosecution: transaction-bound statutes do not properly codify the offense. Until jurisdictions cease to use transaction-bound statutes, holistic reform efforts will continue to have limited redressability value.

Transaction-bound statutes are those that are bound by a "constricted temporal frame" and center around a singular incident of harm-producing behavior.[103] Statutes like assault, battery, and sexual assault are transaction-bound statutes in that they criminalize one violent act that produced one primary injury. However, even statutes like harassment and stalking—while no longer temporally constrained as they criminalize more than one incident—are nevertheless transaction-bound in their scope, as they focus on only one type of conduct. Use of transaction-bound offenses is deeply problematic for the prosecution of perpetrators of domestic violence. Transaction-bound statutes "isolat[e] and atomiz[e]" the violence in abusive intimate partner relationships, thus "render[ing] context meaningless."[104] Without contextual elements in a statute, evidence of the intimate partner's abusive relationship beyond the singular incident is irrelevant to conviction.[105] Fundamentally, these statutes fail to penalize what is illegal about the act of committing intimate partner violence: the pattern of abuse and control asserted over another person—that is what we should be seeking to condemn when, as a society, we choose to prosecute someone for committing domestic violence.[106]

The comparison of two factually similar incidents of cyber communications illustrates the problems of prosecuting domestic violence with transaction-bound offenses. In New York, the State can prosecute perpetrators of domestic violence who make threats on social media using two criminal offenses:

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[102] *Family Justice Centers*, N.Y.C. MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, http://www1.nyc.gov/site/ocdv/programs/family-justice-centers.page [https://perma.cc/2U4F-GCQ3].

[103] *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 972 (2004).

[104] *Id.* at 973.

[105] *Id.* at 974.

[106] Burke, *supra* note 22, at 594–95.

(1) Harassment in the Second Degree[107] and (2) Stalking in the Fourth Degree.[108] Suppose a man repeatedly posted disparaging and threatening comments on social media about his sister-in-law sufficient to establish "a course of conduct . . . which alarm[s] or seriously annoy[s] such other person and which serve[s] no legitimate purpose."[109] These posts, while repetitive, are but one type of conduct that alarms or seriously annoys the sister-in-law. The sister-in-law only needs to present evidence of these posts to obtain a conviction and she only needs relief from those posts; similarly, the man only needs to be held responsible for those posts. In contrast, a battered woman who is experiencing disparaging and threatening posts on social media by her abusive partner needs more than just relief from these posts on Facebook. As a victim of domestic violence, by definition, she is also experiencing some combination of other threats, intimidation, and emotional abuse, as well as possible physical, sexual, and emotional acts on a frequent basis.[110] To get sufficient relief and hold the abuser accountable for *all* abusive behavior, she may need to bring in additional contextual factors to explain why the

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[107] Harassment in the Second Degree, N.Y. PENAL LAW § 240.26 (McKinney 1992). The statute reads in full:

> A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:
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> 1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
>
> 2. He or she follows a person in or about a public place or places; or
>
> *3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.*

Id. (emphasis added).

[108] Stalking in the Fourth Degree, N.Y. PENAL LAW § 120.45 (McKinney 1999). The relevant portion of the statute reads:

> A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and *knows or reasonably should know that such conduct*:
>
> 1. is *likely to cause reasonable fear of material harm* to the physical health, safety or property of such person, a member of such person's immediate family or a third party with whom such person is acquainted; or
>
> 2. causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or *initiating communication or contact with such person*, a member of such person's immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct; or . . . .

Id. (emphasis added).

[109] N.Y. PENAL LAW § 240.26 (McKinney 1992).

[110] *See Wheel Gallery*, DOMESTIC ABUSE INTERVENTION PROGRAMS, http://www.theduluthmodel.org/training/wheels.html [https://perma.cc/A6CQ-E6GU].

otherwise innocuous posts are actually disparaging and threatening given her relationship with her partner. Transaction-bound statutes however, fail to criminalize the repetitive pattern of abuse and assertion of power and control over another that makes domestic violence criminal behavior; current domestic violence statutes are thus failing at two of the primary purposes of criminalizing behavior: deterrence and retribution.[111]

If statutes are ineffective at prosecuting criminal behavior, then abusers are not deterred from continuing the abuse and abused women do not receive the vindication they deserve from the criminal justice system. As the next section will demonstrate, however, there is a fine line between balancing protecting victims from these threats and the abuser's First Amendment rights. With a greater understanding of an abuser's intent, the increasing prevalence of social media, and the inadequacies of existing domestic violence law, the legal landscape desperately needs and is ready for a national domestic violence law.

II. TRUE THREAT DOCTRINE: DEFINITION, CASE LAW, AND AN UNRESOLVED STANDARD

> "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?"[112]

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech"; however, "true threats" are one of the limited categories of speech that the guarantee does not include.[113] The other categories of speech unprotected by the First Amendment are: speech essential to criminal conduct,[114] defamation,[115] incitement of violence ("'fighting' words"[116] or panic),[117] fraud,[118] and obscenities.[119] As

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[111] Burke, *supra* note 22, at 588, 595.

[112] Posted by Anthony Douglas Elonis on Facebook. Brief for the United States, *supra* note 5, at 7.

[113] U.S. CONST. amend. I.; *see* Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam); *see also* R.A.V. v. St. Paul, 505 U.S. 377, 388 ("[T]hreats of violence are outside the First Amendment."); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994); Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 373–74 (1997) (applying *Madsen* holding).

[114] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[115] *See* Beauharnais v. Illinois, 343 U.S. 250, 255–56 (1952) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, [and] the libelous . . . .").

[116] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (stating that a state may ban speech "which by [its] very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace").

the Supreme Court explained, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[120] Thus, what makes these categories of speech fall outside of First Amendment protection is that they create some sort of harm to society, one from which the Government has an interest in protecting its citizens.[121] The Court has also made it clear that the unique qualities of the internet[122] do not "qualify" speech made on the medium; internet speech is subject to the same protection "of First Amendment scrutiny" that all other types of speech receive.[123] Thus, if the government cannot establish that a speaker's internet speech is a true threat, that speech is afforded full First Amendment protection and he cannot be prosecuted for those words. However, when the Court defined "true threats" as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual,"[124] it did not clarify what standard of intent the government must prove to qualify that speech as a true threat.

This lack of clarity regarding the requisite mens rea is significant in any criminal prosecution because of the crucial role intent plays in establishing guilt of a crime. A "general rule" of criminal law "is that a guilty mind is 'a necessary element

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[117] *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[118] *See* Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (opining that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake").

[119] *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding "that obscenity is not within the area of constitutionally protected speech or press"); Aily Shimizu, Recent Development, *Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116, 132 (2013).

[120] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[121] *See infra* Section II.A.

[122] Reno v. ACLU, 521 U.S. 844, 863 n.30 (1997) ("First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.").

[123] *Id.* at 870; Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 790 (2011) (opining that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears.") (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)); *see also* Shimizu, *supra* note 119, at 131–32.

[124] Virginia v. Black, 538 U.S. 343, 359 (2003).

in the indictment and proof of every crime.'"[125] The government cannot prosecute someone by merely establishing actus reus,[126] rather, a "wrongdoing must be conscious to be criminal."[127] But that level of "consciousness" varies. Criminal statutes can require either two types of mens rea:[128] general or specific intent. An individual had "general intent" to commit a crime if she intended to commit the act itself.[129] Mr. Elonis had the general intent to post comments on Facebook, he did not do so by accident, or unknowingly. In contrast, a person has "specific intent" when she not only intended to commit the act, but intended to commit the act with which she was later charged.[130] Importantly, to have specific intent, the defendant "need not know *that* those facts make his conduct illegal."[131] For Mr. Elonis to have had specific intent, he must not just have intended to post a comment to Facebook, but to have intended to communicate a threatening message—he did not have to know that communicating the message was illegal.

At issue in *Elonis*—and the still-unresolved question in true threat cases—is how much does someone have to intend for speech to be a threat for it to constitute a "true threat." There are varying levels of intent that one may have to be culpable: purposeful,[132] knowing,[133] reckless,[134] and negligent.[135] Many

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[125] Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (quoting United States v. Balint, 258 U.S. 250, 251 (1922)).

[126] Defined as "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability." *Actus Reus*, BLACK'S LAW DICTIONARY, *supra* note 7.

[127] Morissette v. United States, 342 U.S. 246, 252 (1952).

[128] Defined as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." *Mens Rea*, BLACK'S LAW DICTIONARY, *supra* note 7.

[129] *General Intent*, *in Intent*, BLACK'S LAW DICTIONARY, *supra* note 7.

[130] *Specific Intent*, *in Intent*, BLACK'S LAW DICTIONARY, *supra* note 7.

[131] Elonis v. United States, 135 S. Ct. 2001, 2019 (2015) (Thomas, J., dissenting).

[132] With respect to one of the material elements of an offense, a defendant acts purposely:

> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

MODEL PENAL CODE § 2.02(2)(a) (2015).

[133] With respect to one of the material elements of an offense, a defendant acts knowingly

> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id. § 2.02(2)(b).

statutes are clear as to the level of specific intent needed to be guilty of the crime; for instance, one of the statutes frequently used to prosecute true threat cases makes it a crime to "knowingly and willfully" make a threat to injure or take the life of the President of the United States by mail;[136] the Interstate Communications Act is not such a statute. All agree that even though the statute lacks an express intent level, a purposeful or knowing issuance of a threat constitutes an unprotected "true threat."[137] Thus, the issue before the Court in *Elonis* was when a statute is silent as to intent, what level of intent, if any, must the government establish to convict someone of a true threat.

A. True Threats: Why They Are Not Protected First Amendment Speech

True threats fall outside of First Amendment protection because they create a harm to society from which the government has an interest in protecting its citizens. One type of harm true threats produce is a fear of violence.[138] The government has an interest in protecting people from that fear, from the disruption to their lives that fear fosters, and from the societal costs it creates.[139] As described in the previous section, victims of domestic violence can experience significant disruption to their lives as a result of these threats.[140] Emotionally, they may end

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[134] With respect to one of the material elements of an offense, a defendant acts recklessly

> when he 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.

Id. § 2.02(2)(c).

[135] With respect to one of the material elements of an offense, a defendant acts negligently

> when he should be aware of 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 the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Id. § 2.02(2)(d).

[136] 18 U.S.C. § 871 (2012).

[137] Elonis v. United States, 135 S. Ct. 2001, 2012, 2019 (2015).

[138] Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 290 (2002).

[139] *Id.* at 290–91.

[140] *See supra* Section I.B.

up staying with their abuser or not seeking protection from the state out of fear of what the consequence for doing so may be to her, or her child(ren); these are coerced actions that have significant short- and long-term psychological consequences.[141] Financially, the threats may cause her to take time off of work to seek a protection-from-abuse order, pay for additional childcare while she works with the judicial system, hire legal counsel, or in some cases, relocate her family for safety.[142] These threats also cost taxpayers money. Think of the Pennsylvania state resources spent for Tara to obtain her initial protection-from-abuse order, for police officers and the FBI to investigate Mr. Elonis's posts, and the aggregate legal costs to taxpayers in prosecuting and appointing an attorney from the federal public defender's office to represent Mr. Elonis.[143]

Further, the government has two additional interests that make true threats fall outside of protected First Amendment speech. First, the government has a legitimate interest in ensuring people are not being coerced to act in a manner against their will.[144] There is a very real, coercive effect of threats; they can be "situation-altering," meaning that the threatened person abstains from acting or partakes in a course of behavior he or she would not have undertaken were it not for the threat.[145] For example, a woman should not be forced to stay with an abusive partner, prevented from seeking employment or from seeing her family out of fear for her life or that of her children; speech that burdens women this way should not be afforded First Amendment protection.[146] And second, the government has an interest in "incarcerat[ing] people who have identified themselves as likely to carry out a threatened crime before they have the opportunity to perpetrate the crime."[147] Given the research regarding how predictive abusers' threats are to violent episodes,[148] the state has a legitimate interest in creating "a mechanism for protecting them prior to the commission or attempt of a violent act."[149] With all of this said, courts must

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[141] *See* WORLD HEALTH ORG., *supra* note 52, at 2, 5, 7–8 fig.1.

[142] According to Forbes, the annual cost of domestic violence in the United States had risen to $8.3 by 2013, a combination of the $5.8 billion in medical costs and $2.5 billion in lost productivity. Pearl, *supra* note 54.

[143] Docket at 3, United States v. Elonis, No. 5:11-cr-00013-LS (E.D. Pa. 2011).

[144] Rothman, *supra* note 138, at 290–91.

[145] KENT GREENAWALT, SPEECH, CRIME, & THE USES OF LANGUAGE 67 (1989).

[146] See the examples of such situations provided in Brief of Amici Curiae the Nat'l Network to End Domestic Violence, et al. in Support of Respondent, *supra* note 70, at 4–7; *see also* Rothman, *supra* note 138, at 292–93.

[147] Rothman, *supra* note 138, at 290.

[148] *See supra* notes 74–75 and accompanying text.

[149] Rothman, *supra* note 138, at 292.

straddle the fine line between when a threatening statement is protected First Amendment "pure" speech or a prosecutable "true threat."

B. True Threats: The Case Law—When Striking a Constitutional Balance, Intent, Context, and Societal Value of the Speech Matter

Examination of true threat case law reveals how the judiciary has been striking the balance between citizens' First Amendment rights and the government's protection interests when it comes to threatening speech. This balance occurs by analyzing the objective and subjective intent of the speaker, the speech's context, and the societal value of the speech. In attempting to strike a balance, however, the Court has made the analysis murky.

1. The Early True Threat Doctrine

In the first true threat case before the Supreme Court, the Court used an objective, reasonable person standard for prosecution of a true threat without express mention of a specific-intent requirement. During the Vietnam War, while participating in a small discussion group at a political rally, a man was convicted for violating a federal law proscribing "knowingly and willfully" making threats against the president.[150] The man said "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[151] In *Watts v. United States*, the Supreme Court was confronted for the first time with the issue of "whether or not [a] 'willfullness' requirement of [a] statute implie[s] that a defendant must have intended to carry out his 'threat.'"[152] In holding, per curiam, that the man's statement was "political hyperbole," not a "true threat," and thus protected First Amendment speech, the Court stated the government must prove the threat is "true," without much further elaboration.[153] However, the Court did not avoid the intent issue entirely, as it did list the "reaction of the listeners" as one of the factors it used to determine whether the speech constituted a true threat.[154] In addition to the "reaction of the listeners" and the

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[150] Watts v. United States, 394 U.S. 705, 705–06 (1969) (per curiam) (citing 18 U.S.C. § 871(a) (1962)).

[151] *Id.* at 706.

[152] *Id.* at 707.

[153] *Id.* at 708.

[154] *Id.*

speech being "hyperbole," the Court provided some guidance as to characteristics that could help with the determination, specifically the "context" of the speech and the "expressly conditional nature of the statement."[155] For the *Watts* Court, the context of the "political arena," where speech is "often vituperative, abusive, and inexact," was of particular importance to finding the speech to be protected by the First Amendment.[156] Political speech is one of the purest and most protected forms of speech, not just because it was initially the abstract principle behind the First Amendment right, but because of the great societal value it brings with it.[157] Further examination of the case law reveals that when speech has such value, the Court tends toward concluding the speech is protected.

The Court's determination that speeches made by prominent activist Charles Evers during the Civil Rights Movement did not constitute true threats further illustrates the importance of a speech's societal value in true threat analysis.[158] During his "lengthy [public] addresses," Mr. Evers, the NAACP field secretary in Mississippi, used "strong language" with the specific intention of inciting the approximately 8000 African American residents of Claiborne County into boycotting white businesses.[159] In one such speech, Mr. Evers stated that all "'[U]ncle [T]oms' who broke the boycott would 'have their necks broken' by their own people."[160] Mr. Evers made this speech with a specific intent-to-threaten, to do harm to particular people and their businesses, and to coerce specific individuals to relinquish their rights to visit an establishment of their choosing or die.[161] Yet the Court found Mr. Evers's speech to be protected.[162] Rather than address whether Mr. Evers's speech was a true threat, the Court sidestepped the issue, referenced its *Watts* decision with a mere footnote, and then concluded that to rule any other way would be to ignore the "'profound national commitment' that 'debate on public issues should be uninhibited,

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[155] *Id.*

[156] *Id.*

[157] The abstract principle underlying the First Amendment was the framers' and ratifiers' fear of the Federal Government stifling and punishing speech regarding dissatisfaction with the Federal Government. Mills v. Alabama, 384 U.S. 214, 218 (1966) (As Justice Black said, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

[158] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982).

[159] *Id.* at 890, 900 n.28, 928.

[160] *Id.* at 900 n.28.

[161] *See id.*

[162] *Id.* at 907–15.

robust, and wide-open.'"[163] Thus, when the Court deems speech "valuable" to society, it appears that certain forms of coercion such as strikes, threatening to file lawsuits, and boycotting even when enforced through intimidation—are protected speech.[164] It was not until 2003 that the Supreme Court took advantage of an opportunity to decide the requisite intent of a prosecutable true threat.

2. True Threat Doctrine and Requisite Intent

In *Virginia v. Black*, the Court addressed whether, under the First Amendment, statutes that criminalize true threats require a subjective intent standard.[165] A majority of the Court held that, in accordance with the First Amendment, a state could "ban cross burning carried out with the intent to intimidate"; however, the Virginia statute, as-written, made cross-burning prima facie evidence of intent-to-threaten, thereby violating the First Amendment.[166] In doing so, the Court provided an example of how to strike the constitutionally necessary balance of a state protecting its citizens from intimidation and a citizen's First Amendment right to express an ideological message.

As Justice O'Connor opined, a state "may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence" but only when the state can show that it was done with an intent-to-threaten.[167] Of particular significance to a potential domestic violence statute, however, is the differentiation the *Black* Court made between this statute and the one it found unconstitutional in *R.A.V. v. City of St. Paul*.[168] At issue in *R.A.V.* was a St. Paul statute that banned any "bias-motivated" display. The Court held that the statute was facial, content-based discrimination by targeting those who "provoke violence 'on the basis of race, color, creed, religion or gender.'"[169] Read together then, there are some types of content-based banning—like

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[163] *Id.* at 928–29 & n.71 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[164] For examples, see Rothman, *supra* note 138, at 293.

[165] *See* Virginia v. Black, 538 U.S. 343, 347–48 (2003).

[166] *Id.*

[167] *Id.* at 363.

[168] R.A.V. v. St. Paul, 505 U.S. 377 (1992).

[169] *Id.* at 381, 387, 391. The St. Paul's Statute banned a "bias-motivated" display that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380–81 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990)).

burning a cross to intimidate another—that do not have a "significant danger of idea or viewpoint discrimination."[170]

The most significant contribution of the opinion, however, came in its definition of a "true threat." Going farther than the *Watts* Court, the plurality defined "true threats" as "statements where the *speaker* means to communicate a serious expression of an intent to commit an act of unlawful violence."[171] While this definition by the Court would seem to signal a subjective intent-to-threaten standard for the government in a true threat statute, based on the Court's true threat case law and conceptualization of mens rea[172] in criminal law, only the Ninth Circuit has consistently interpreted the definition in this capacity; the remaining circuits split as to how to interpret this new language.

C. True Threats: Black's "Additional" Subjective-Intent Standard or Merely Guidance on the Type of Objective Standard to Use?

Prior to *Elonis*, the Ninth (and Tenth)[173] Circuits were the only circuits to have read an *additional* subjective intent-to-threaten standard into true threat cases.[174] That is, the circuits interpreted the Supreme Court's "true threat" definition in *Black* to require that the prosecution prove the subjective intent of a declarant to threaten for any declarant prosecuted under any threat statutes "that criminalize pure speech."[175] In effect then, even if a statute textually calls for an objective determination, a court must also conduct a subjective analysis.[176] The Ninth Circuit's decision in *United States v. Bagdasarian* illustrates this interpretation as the circuit wrote it specifically to "clear[] up" any confusion of the elements necessary for the government to establish a true threat.[177]

In *United States v. Bagdasarian*, the Ninth Circuit overturned the conviction of a man who threatened to kill then-

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[170] *Black*, 538 U.S. at 361–62 (citing *R.A.V.*, 505 U.S. at 388).

[171] *Id.* at 344 (emphasis added).

[172] *See supra* Section II.A.

[173] Mere months before the Supreme Court decided *Elonis*, the Tenth Circuit concluded that the First Amendment requires that the government establish a speaker's intent-to-threaten for the speech to be a true threat. United States v. Heineman, 767 F.3d 970, 976, 982 (10th Cir. 2014). However, this is the circuit's only use of a subjective standard; the circuit's true threats case law features disjointed and inconsistent standards. Fuller, *supra* note 14, at 59–61.

[174] *See* Fuller, *supra* note 14, at 38–39 & n.9, 69–70.

[175] United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011).

[176] Fuller, *supra* note 14, at 70.

[177] *Bagdasarian*, 652 F.3d at 1116–17.

presidential candidate Barack Obama by posting anonymously to a Yahoo Finance message board, because the message lacked the *subjective* requisite intent-to-threaten, in addition to not meeting the requisite objective, reasonable person standard.[178] The circuit court relied in particular on context factors to establish that no reasonable person would hear Bagdasarian's expression and consider it a serious threat to kill or injure the presidential candidate.[179] These factors included: the financial character of the message board, that only one user reported the message, and that the post was anonymous.[180] The circuit court then held that the defendant did not intend "that the statement be understood as a threat."[181] It was critical for the circuit court that the defendant did not have anything in his possession to indicate he had a means to carry out the threat, and that the defendant had no pattern of harm following the Internet communications.[182]

This blended approach, in light of the *Elonis* Court's negligence holding and absent a domestic violence statute, can help advocates of victims of domestic violence better advocate for their clients, knowing that, "absent directly threating language or factual context indicating that the defendant controls and plans to use certain means to carry out a threat," cases will likely be unsuccessful.[183] Thus, advocates *must* inquire about *both* the subjective and objective factors prior to prosecution. Examination of the other circuits' *Black* interpretations provides further insight for a domestic violence statute.

Unlike the Ninth and Tenth Circuits, the rest of the circuits read the definition of a "true threat" provided in *Black* as still merely requiring an objective standard to true threat analyses; however, the circuits differ as to whether the standard is that of a reasonable listener or speaker. The Second, Fourth, Sixth, and Eighth Circuits apply a "reasonable listener" standard, like that of the Ninth Circuit, where no reasonable person would hear the expression and consider it a serious threat to kill or injure the presidential candidate.[184] Other circuits, like the

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[178] *Id.* at 1115, 1123–24. The first message read "Re: Obama fk the niggar, he will have a 50 cal in the head soon" and the second "shoot the nig." *Id.* at 1115.

[179] *Id.* at 1118.

[180] *Id.* at 1120.

[181] *Id.* at 1118.

[182] *Id.* at 1119–20 n.19. *But see* Planned Parenthood v. Am. Coal. of Life Activists, 41 F. Supp. 2d 1130, 1154 (D. Or. 1999), *aff'd in part and remanded*, 290 F.3d 1058, 1088 (9th Cir. 2002).

[183] *See* Fuller, *supra* note 14, at 71.

[184] For instance, the Sixth Circuit, has held that a speaker's subjective intent "had nothing to do with" the true threat analysis. United States v. Jefferies, 692 F.3d 473, 479 (6th Cir. 2013), *cert. denied* 134 S. Ct. 59 (2013). Rather, the circuit stated *Black* was

Third, Tenth, and Eleventh, interpret *Black* as saying the First Amendment requires a "reasonable speaker" standard instead.[185] Under the "reasonable speaker" standard, a true threat exists "when a reasonable speaker would foresee the statement would be interpreted as a threat."[186] *Elonis* did not clarify whether circuits should use a reasonable listener or speaker standard. Thus, in addition to leaving an unanswered question as to the level of "additional" intent-to-threaten an abuser must have, *Elonis* also left lower courts without guidance as to the objective standard it should use.

This lack of clarity is of particular importance to domestic violence law. To be better equipped to prosecute abusers, both standards would need to be able to include contextual factors that transform the inquiry from being a "reasonable speaker" to a "typical abuser" and from a "reasonable listener" to "a reasonable domestic violence victim." Having to prove what a "typical abuser" foresees as threatening requires the state to put on a very different case than needing to establish how the speech constitutes a threat to a reasonable domestic violence victim. Thus, having never heard a case about true threats in the context of social media or between intimate partners, the Supreme Court was presented with a massive, and critical, opportunity to clarify the federal standard in *Elonis*.

D. The Missed Opportunity of Elonis v. United States*: Still Not the Whole Solution for Domestic Violence Law*

Rather than provide the circuits guidance as to the applicable standards when determining what constitutes a "true threat," the Supreme Court in *Elonis v. United States* merely announced that negligence is not sufficient to sustain a conviction for transmitting threats through interstate commerce.[187] Though this indicates that some specific intent is necessary, the Court declined to rule that establishing a defendant's recklessness would be sufficient for a true threat conviction because the parties did not brief the issue.[188] Instead, the

simply decided on the "overbreadth" of the Virginia statute, and not what the First Amendment requires the government establish in all threat statutes. *Id.* at 480. See also Fuller, *supra* note 14, at 63–69 for a thorough presentation of each circuit's reasonable listener case law.

[185] See Fuller, *supra* note 14, at 55–63 for a thorough presentation of each circuit's reasonable speaker case law.

[186] United States v. Elonis, 730 F.3d 321, 323 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015).

[187] Elonis v. United States, 135 S. Ct. 2001, 2011–13 (2015).

[188] *Id.* at 2012–13. The Court explained that it is "wrong" to state that the decision does not clarify "confusion in the lower courts" because no court of appeals has

majority limited its guidance for lower courts to the following: use "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[189]

Since his initial motion to dismiss, Mr. Elonis had argued the First Amendment mandates the government prove he "subjectively intended to convey a threat to injure" others when making these posts to convict him of interstate communication of threats; his posts were protected "pure speech" and did not constitute "true threats."[190] The Eastern District of Pennsylvania, however, convicted Mr. Elonis of interstate communication of a threat,[191] reasoning that "true threats" require an objective, reasonable person standard—that is, whether a reasonable person would regard the communication as a threat.[192] The Supreme Court disagreed.

To separate innocent from criminal conduct, under 18 U.S.C. § 875(c), the government argued it needed to prove whether Elonis "himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats."[193] However, the majority clarified that the inquiry is "whether a defendant knew the *character* of what was sent, not simply its contents and context."[194] Thus, to be guilty of transmitting an interstate communication of a threat, Mr. Elonis must have "know[n] the threatening nature" of his Facebook posts; that a reasonable person would view the speech as threatening cannot itself support a conviction for the transmission of a threat through interstate commerce.[195] Consequently, even though Mr. Elonis repeatedly posted comments that a reasonable person would find threatening, the Court found the government had not established that he possessed the requisite intent for his speech to be prosecutable.[196]

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yet examined the question of whether recklessness suffices; consequently, the majority "decline[d] to be the first appellate tribunal to do so." *Id.* at 2013.

189 *Id.* at 2010 (citing Carter v. United States, 530 U.S. 255, 269 (2000)).

190 Motion to Dismiss Indictment at 2–3, United States v. Elonis, No. 5:11-cr-00013-LS (E.D. Pa. 2011); *see supra* Part II.

191 The jury convicted Mr. Elonis of four of the five charged counts. Brief for the United States, *supra* note 5, at 12. The jury acquitted on the charge for the posts regarding the employees and patrons of his former employer. *Id.* The court then sentenced Mr. Elonis to forty-four months in jail, of which he served three years. Barnes, *supra* note 14.

192 *See supra* Section II.B.

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

194 *Id.* at 2012.

195 *Id.*

196 *Id.*

Since the decision, lower courts have interpreted this requisite "knowledge" to mean a variety of things. Some courts read the *Elonis* holding as limited to 18 U.S.C. § 875(c)[197] and have yet to really expand it beyond true threat analysis under the statute.[198] A district court in Virginia, however, concluded that "the Fourth Circuit's objective approach [to intent-to-threaten] remains undisturbed" because the Supreme Court decided *Elonis* on narrow "statutory interpretation grounds."[199] But the choice between a subjective or an object intent-to-threaten standard "reflects a false dichotomy" as the Constitution requires both analyses.[200] That a district court still views the standard as an either-or option illustrates how critical of a misstep the Supreme Court took when it failed to make these true threat standards clear in its *Elonis* holding. With that said, such a clarification still would not have resolved the fundamental problems with domestic violence prosecutions.

The root of the difficulty in prosecuting abusers does not stem from the lack of clarity in the true threat doctrine, no matter how much domestic violence advocates may want it to. The problem underlying prosecuting perpetrators of domestic violence online is not with the doctrine of true threats; "[i]t is settled that the Constitution does not protect true threats."[201] The issue is also not with the government's need to establish a specific intent-to-threaten requirement. While the Court would not go as far as to declare this level of intent a requirement of the First Amendment,[202] a foundational goal of freedom of speech is to have a "free trade in ideas."[203] To achieve that, the First Amendment *must* protect speech and ideas that add value to society, even when "the overwhelming majority of people might find [the speech] distasteful or discomforting."[204] This

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[197] United States v. Fitzgerald, No. 5:15-cr-55-01, 2015 WL 9582144, at *1 (D. Vt. Dec. 30, 2015) (examining the crime of threatening a public official in violation of 18 U.S.C. § 115(a)(1)(B) (2012)); United States v. Wright-Darrisaw, 617 F. App'x 107, 108 (2d Cir. 2015) (analyzing threatening to kill the President of the United States in violation of 18 U.S.C. § 871(a) (2012)).

[198] United States v. White, 810 F.3d 212, 220–21 (2016) (finding that, given *Elonis*, an instruction to the jury on the intent level necessary to convict a husband of sending threatening communications to his wife via email under 18 U.S.C. § 875(c) was error, but harmless); United States v. Houston, 792 F.3d 663, 669–70 (6th Cir. 2015) (reversing defendant's conviction under 18 U.S.C. § 875(c)).

[199] Doe v. Rector & Visitors of George Mason Univ., 132 F. Supp. 3d 712, 729 n.22 (E.D. Va. 2015).

[200] United States v. Bagdasarian, 652 F.3d 1113, 1116–17 (9th Cir. 2011).

[201] Elonis v. United States, 135 S. Ct. 2001, 2016 (2015).

[202] *Id.* at 2012 (stating it is "not necessary to consider any First Amendment issues" given the Court's "disposition").

[203] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[204] Virginia v. Black, 538 U.S. 343, 358 (2003).

means the First Amendment must afford offensive or disagreeable speech that adds value to society the fullest protection of law.[205]

Because the First Amendment affords stringent protection to pure political speech, many of the statements Mr. Elonis made, such as those he made about law enforcement and the government, must be protected speech.[206] The objective and subjective intent of Mr. Elonis, the "rap lyrics" context, and the societal value of portions of his posts render them protected speech under First Amendment jurisprudence. For instance, after a female FBI agent visited his home to investigate his Facebook posts, Mr. Elonis posted:

> You know your s***'s ridiculous when you have the FBI knockin' at yo' door . . .
>
> . . . .
>
> So the next time you knock, you best be serving a warrant . . .
>
> . . . .
>
> Are all the pieces comin' together? S***, I'm just a crazy sociopath that gets off playin' you stupid f***s like a fiddle . . .
>
> . . . .
>
> Cause I'm just an aspiring rapper who likes attention who happens to be under investigation for terrorism cause y'all think I'm ready to turn the Valley into Fallujah . . .
>
> . . . .
>
> And if you really believe this s*** I'll have some bridge rubble to sell you tomorrow
>
> [BOOM!] [BOOM!] [BOOM!][207]

Here, Mr. Elonis's speech is comparable to the "political hyperbole" of the *Watts* Vietnam protester.[208] Although not phrased conditionally like the *Watts* speech, as discussed above, disclaimers run throughout the post, such as "if you really believe this" and reference to his rapping aspirations.[209]

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[205] Texas v. Johnson, 491 U.S. 397, 414 (1989) (supporting the Court's extensive modern First Amendment case law).

[206] *See* Brief for the United States, *supra* note 5, at 5–6. See *supra* Section II.B.1 for a discussion of the expansive First Amendment protection of political speech in opposition to the government and its officials.

[207] *Elonis*, 135 S. Ct. at 2007 (quoting United States v. Elonis, 730 F.3d 321, 336 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015)).

[208] Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

[209] Compare Watts's speech, *id.*, with that of Elonis, *see* Elonis v. United States, 135 S. Ct. 2001, 2007 (2015) (e.g., "Cause I'm just an aspiring rapper who likes the attention.").

Facebook can be used as a modern "political arena," where speech is "often vituperative, abusive, and inexact."[210] And, like the defendant in *Bagdasarian*, Mr. Elonis did not have anything in his possession, such as a bomb, that would enable him to carry out the "threat."[211] Similarly, he had no history of following up his social media posts about government officials with acts of violence.[212] Additionally, Mr. Elonis posted about warrant requirements, terrorism, and police interrogation; these are all issues surrounding the relationship between the government and its citizens, discussion of which adds value to society. But while discussion of "public issues should be uninhibited, robust, and wide-open,"[213] the same cannot be said regarding the speech Mr. Elonis made about his ex-wife.

Because the Supreme Court in *Elonis* held that some level of intent, not negligence, is required in proving a communication violation, the issue domestic violence victim advocates need to address is *how* to establish that Mr. Elonis *knew* the threatening nature of his posts about Tara. That solution will not come from the Court, or from clarification to true threat intent requirements, but from having a statute that will enable the government to prosecute true threats separately from protected First Amendment speech. The solution is a statute that is able to criminalize the harm of domestic violence, one that balances the First Amendment rights of the abuser with the government's interest in protecting victims of domestic violence.

III. A DOMESTIC VIOLENCE STATUTE: WHY WE CAN AND SHOULD MOVE FROM USING EXISTING TRANSACTION-BOUND OFFENSES TO A DOMESTIC VIOLENCE SPECIFIC OFFENSE

> Fold up your PFA [protection-from-abuse order] 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

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[210] *See generally Watts*, 394 U.S. at 708.

[211] United States v. Bagdasarian, 652 F.3d 1113, 1119–20 nn.19–20 (9th Cir. 2011). *But see* Planned Parenthood of Columbia/Willamette v. Am. Coal. of Life Activists, 41 F. Supp. 2d 1130, 1155 n.1 (D. Or. 1999), *aff'd in part and remanded*, 290 F. 3d 1058, 1088 (9th Cir. 2002) (stating that the speaker's actual intention to carry out the threat is immaterial to the subjective intent-to-threaten determination).

[212] *Bagdasarian*, 652 F.3d at 1123.

[213] *Watts*, 394 U.S. at 708 (citing New York Times Co. v. Sullivan, 376 U. S. 254, 270 (1964)).

> Me thinks the Judge needs an education on true threat jurisprudence
>
> And prison time'll add zeros to my settlement
>
> Which you won't see a lick cause 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][214]

There is a significant difference between what domestic violence is and what the government currently prosecutes as domestic violence. The enacted changes to domestic violence law in most jurisdictions are procedural and not substantive; they are a "symbolic" acknowledgment of the problem "[t]o serve the expressive function of punishment."[215] The existing criminal statutes penalize "transaction-based physical violence" and do not recognize the context, frequency, or motivation behind the incidents.[216] In avoiding the "politically [more] difficult—and arguably less pragmatic" task of getting laws on the books that prosecute the true crime of repeatedly asserting power and control over another, prosecutors have been stuck with laws that do not capture that which is criminal about domestic violence.[217] This is so because reformists and activists decided that, for the sake of getting much needed reform passed quickly for victims in desperate need of legal protection, using existing statutes would be the easiest way to make such protection happen.[218] Transaction-bound offenses like "assault" and "harassment" are no longer—and arguably never were—sufficient to prosecute domestic violence offenders as they only recognize some aspects of the criminal actions of an abuser.

A. The Fatal Limitations of Current Federal Statutes for the Prosecution of Perpetrators of Domestic Violence

The federal statutes presently available to prosecute batterers force the government to rely on general, transaction-bound statutes. Not only are these statutes particularly ill-

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[214] Mr. Elonis posted this on Facebook in response to his wife obtaining a protection-from-abuse order. Brief for the United States, *supra* note 5, at 7–8.

[215] Burke, *supra* note 22, at 562–63.

[216] Tuerkheimer, *supra* note 103, at 962.

[217] Burke, *supra* note 22, at 565.

[218] *Id.* at 559, 565.

suited for the confounding novel issues presented by social media and the internet, but they fail to adequately address the context factors that make threats by abusers unique. Consequently, the absence of a "domestic violence statute" forces the government to use the Federal Telephone Harassment Statute,[219] the Federal Interstate Stalking Punishment and Prevention Act,[220] or the Interstate Communications Act—as seen in *Elonis*—to prosecute perpetrators of intimate partner violence. The Interstate Communications Act provides that transmitting "any communication containing any threat . . . to injure the person of another" in interstate or foreign commerce is a federal crime.[221] This means that to prosecute a batterer under the Act, the government must establish (1) a transmission in interstate commerce or foreign commerce, (2) a threatening communication, and (3) a threat to injure or kidnap. Though the text of the statute would not seem to present a significant bar to prosecuting domestic violence perpetrators, the statute is problematic in two ways. First, it runs into the true threat doctrine, as discussed in detail above, often transforming the abusive, prosecutable speech of a perpetrator into protected speech. Second, the limited language of the statute narrows its practical application.

By limiting prosecutable speech to only threats to injure or kidnap, the statute precludes all other forms of threats, threats that have real consequences for a victim of gender-based violence. For instance, speech like "if you do this, I will make sure you are deported," may not be interpreted as an explicit threat to "injure" or to "kidnap." Yet, if the woman is a U.S. citizen through marriage, does not understand the complexities of immigration law, and has children with the abuser, then the threat of deportation is just as serious as a threat to injure or kidnap. Further, it is likely the abuser is consciously choosing to use this particular threat because he knows the effect it will have on his victim. Thus, under transaction-bound statutes, speech that appears as if the abuser only meant to annoy or harass a victim will be protected First Amendment speech because of the statute's narrow language that precludes inclusion of the speech's relevant context.[222]

Rather than continuing to rely on these ineffective transaction-bound statutes, Congress needs to enact a statute,

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[219] 47 U.S.C. § 223 (2012).
[220] 18 U.S.C. § 2261A (2012).
[221] *Id.* § 875(c).
[222] *See* Shimizu, *supra* note 119, at 133.

like Professor Burke's "Coercive Domestic Violence" statute, that captures the true harm of domestic violence. Victims of domestic violence especially need such a statute today because of the increasing use of social media as a weapon-of-choice for batterers.

B. The Coercive Domestic Violence Statute: The Answer to the Problem of Prosecuting Perpetrators of Domestic Violence While Protecting Abusers' First Amendment Rights in a Digital Age

There is a fine line between honoring the constitutionally guaranteed First Amendment rights of abusers and protecting those experiencing intimate partner harm from threats made on social media. However, Professor Burke's Coercive Domestic Violence statute achieves that balance by requiring the government prove an abuser's intent to coerce. With the increased awareness of domestic violence and abusers' intentions,[223] the growing threat of social media to victims of domestic violence,[224] and the publicity around and the shortcomings of the *Elonis* decision,[225] advocates of victims of domestic violence can capitalize on these factors to finally enact this much needed legislation.

1. Professor Burke's Proposed Coercive Domestic Violence Statute: A Viable Model

To be successful, a new intimate partner violence statute must address the recurrent nature of abuse, its coercive dynamic, and allow consideration of the abuser's intent.[226] Further, it must not be redundant but rather "seek to identify, define, and punish a unique wrong: the attempt to limit the autonomy of another person through specified means."[227] Such a law must also recognize both the particular "quantitative and qualitative" features of domestic violence that existing statutes do not embody,[228] while still conforming to "established tenets of criminal law."[229]

Professor Alafair Burke's Coercive Domestic Violence statute is such a statute.[230] It addresses the insufficiencies of

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223 *See supra* Sections I.A, I.B.
224 *See supra* Section I.C.
225 *See supra* Section II.D.
226 Burke, *supra* note 22, at 595–96.
227 *Id.* at 586.
228 *Id.* at 588.
229 *Id.* at 598.
230 *See id.* at 601–02.

the existing criminal statutes used to prosecute domestic violence while affording protection to abuser's First Amendment rights. The proposed statute states that "[a] person commits the crime of Coercive Domestic Violence if the person attempts to gain power or control over an intimate partner through a pattern of domestic violence."[231] The statute goes on to define "intimate partner,"[232] "gain power or control,"[233] and "pattern of domestic violence."[234]

The Coercive Domestic Violence statute expands upon one presented by Professor Deborah Tuerkheimer.[235] As Professor Burke points out, however, Professor Tuerkheimer's proposal has a fatal flaw that Professor Burke's Coercive Domestic Violence statute remedies. Professor Tuerkheimer's "battering" statute fails when it combines language evoking the negligence mens rea—"reasonably should know"—with attempt language—"likely to result,"—since "[o]ne cannot attempt what he does not intend."[236] The effect of this combination would be the possibility for the conviction of someone who only negligently caused a likely coercive act.[237] Thus, while Professor Tuerkheimer attempts to align the law with the social science behind the dynamic of power and control in domestic violence, she "depart[s] from established tenets of criminal law."[238] Constitutionally, a speaker cannot "bear[] the responsibility for all reasonable interpretations of their incendiary posts, regardless of whether the speaker actually intended to threaten."[239]

The Coercive Domestic Violence statute's narrow language and explicit mens rea requirement protect it from being too overinclusive and unconstitutional.[240] This narrowness

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[231] *Id.* at 601.

[232] Defined as "a spouse; a former spouse; persons who have a child in common, whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship." *Id.* at 601–02 (citing NEB. REV. STAT. ANN. § 28-323(8) (West 2005)).

[233] Defined as "to restrict another's freedom of action." *Id.* at 602.

[234] Defined as "the commission of two or more incidents of assault, harassment, menacing, kidnapping, or any sexual offense, or any attempts to commit such offenses, committed against the same intimate partner." *Id.* (footnote omitted).

[235] Under Professor Tuerkheimer's proposed "battering" statute, one would be guilty of the crime of "battering" when "[h]e or she intentionally engages in a course of conduct directed at a family or household member; and [h]e or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member." Tuerkheimer, *supra* note 103, at 1019–20. This statute would require at least two acts of such conduct, and would also constitute the lowest degree of the offense. *Id.* at 1020 & n.321.

[236] Burke, *supra* note 22, at 598 & n.252.

[237] *Id.* at 598.

[238] *Id.* at 596, 598.

[239] Fuller, *supra* note 14, at 76–77.

[240] Burke, *supra* note 22, at 605–06.

also puts abusers on notice; the combination of that notice and more accurate prosecutions should help increase the effectiveness of achieving the societal goals, deterrence and retribution, of criminalizing domestic violence in the first place.

Additionally, while some might "balk at a requirement that intentional mens rea be proven with respect to the exercise of power and control," it is not "understandabl[e]" nor necessary to do so.[241] If a domestic violence statute is going to have any effectiveness whatsoever at prosecuting coercive or threatening speech, then, as the First Amendment demands, prosecutors must establish a batterer's subjective intent.[242] With a proper statute, such prosecution is no longer "practically insurmountable" but becomes the right solution for prosecuting perpetrators of domestic violence.[243] In fact, the strength of the Coercive Domestic Violence statute is that it purposefully imposes a high mental state intent requirement.[244] The statute would finally enable jurors, when determining guilt, to focus not merely on the elements of the crime, but on the intentions of the abuser.[245]

Professor Burke's article uses the successes of the Racketeer Influenced and Corrupt Organizations (RICO) Act and stalking statutes to dispel the potential criticism that criminal law is not suited to address the distinctive features of intimate partner violence.[246] One of the greatest problems of efforts to "target chronic criminal behavior," like the RICO and stalking statutes, is unconstitutional vagueness.[247] The Coercive Domestic Violence statute directly combats this problem by requiring the government prove a "high," "concomitant" mental state of the defendant.[248]

The Coercive Domestic Violence statute accomplishes the statutory necessities in other ways as well. One of the most effective portions of the statute is its definition of "control" and "pattern of domestic violence,"[249] which would play a crucial role in resolving the existing prosecutorial issues. By laying out that a "pattern of domestic violence" means "*two or more incidents* . . . or *any attempts* to commit . . . offenses [of existing crimes like

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241 Tuerkheimer, *supra* note 103, at 1022.

242 *See supra* Section II.D.

243 *See generally* Tuerkheimer, *supra* note 103, at 1022.

244 Burke, *supra* note 22, at 605.

245 *Id.* at 577.

246 *Id.* at 588–91. For instance, it was ineffective to view stalking behavior in isolated incidents, as such conduct, often, is not in and of itself criminal behavior and had to be defined as "a pattern of conduct . . . where the cumulative effect of seemingly innocuous individual incidents can cause severe emotional distress and fear." *Id.* at 589.

247 *Id.* at 591.

248 *Id.* at 605.

249 *Id.* at 602.

harassment, assault etc.], committed *against the same intimate partner*" the statute facilitates introduction of the contextual factors of domestic violence to establish intent.[250] Further, by defining the "completed offense" as "the mere attempt to gain power or control"[251] the statute protects the agency of a battered partner, something Professor Tuerkheimer's proposed statute also fails to do.[252] By no longer making the victim's credibility central to the narrative integrity, the Coercive Domestic Violence statute protects her from revictimization[253] and makes her psychological state irrelevant to whether the abuser can be charged with the offense.[254] By making their psychological state a nonissue, the statute removes another barrier to prosecution[255] and better incentivizes women's participation in the prosecution of their abusers. [256] All of these effects would alleviate some of the workload of prosecutors, law enforcement, and the courts. In an already overburdened criminal justice system, having such a statute would have critical practical effects in allowing innovative judicial solutions—like IDV courts and Family Justice Centers—to be even more effective.

2. The Coercive Domestic Violence Statute Is Compatible with the True Threat Doctrine, Making Prosecution of Abusers' Social Media Threats Possible

Like cross-burning, sometimes the only message conveyed through a Facebook post is intimidation.[257] The Coercive Domestic Violence statute would facilitate the distinction between the two. When Tara Elonis sought a protection-from-abuse order from her county court, she did so because of the fear she felt from Mr. Elonis's Facebook posts. Prior to Tara leaving him, the police visited the couple's home several times for domestic disturbances.[258] During the federal trial, she testified that "[she] felt like [she] was being stalked. [She] felt extremely afraid for

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[250] *Id.* (emphasis added) (footnote omitted).

[251] *Id.* at 603–04 (emphasis omitted).

[252] *Id.* at 601.

[253] *Id.* at 603.

[254] *See id.* at 605.

[255] *See* BUZAWA & BUZAWA, *supra* note 44, at 187 (explaining that a lack of victim cooperation is a real issue for prosecutors currently).

[256] Burke, *supra* note 22, at 578.

[257] *See* Virginia v. Black, 538 U.S. 343, 357 (2003).

[258] Malone, *supra* note 6.

[her] and [her] children's and [her] families' lives."[259] She went on to testify that the "lyrical" form of these threats did not lessen her perception of their seriousness.[260] Because the government had to prosecute Mr. Elonis under an interstate communications statute rather than a specific domestic violence statute, the government could not distinguish between why Tara's fear was different from the fear of the police officer.

There are substantial differences between the speech within Mr. Elonis's above post,[261] the source of a single charge against Mr. Elonis, and the posts about law enforcement and the government. An effective statute must be able to accurately separate the statements "[f]old up your PFA and put it in your pocket[,] Is it thick enough to stop a bullet?" an example of domestic violence, from "I've got enough explosives to take care of the state police and the sheriff's Department," an example of speech potentially protected by the First Amendment.[262] The Coercive Domestic Violence statute enables this critical separation, while protecting Mr. Elonis's First Amendment rights, and facilitates enough contextual factors to establish the requisite subjective intent to prosecute a true threat.

For example, in October 2010, Mr. Elonis posted on Facebook that:

> There's one way to love ya but a thousand ways to kill ya,
>
> And I'm not gonna rest until your body is a mess,
>
> Soaked in blood and dying from all the little cuts,
>
> Hurry up and die bitch so I can bust this nut,
>
> All over your corpse from atop your shallow grave,
>
> I used to be a nice guy, then you became a slut,
>
> I guess it's not your fault you liked your daddy raped you,
>
> So hurry up and die, bitch, so I can forgive you.[263]

Mr. Elonis defended this post, and his others about Tara, as artistic, therapeutic expressions through "rap lyrics."[264]

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[259] United States v. Elonis, 730 F.3d 321, 352 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015) (quoting Transcript of Trial at 97, United States v. Elonis, 897 F. Supp. 2d 335 (2012) (No. 11-13)).

[260] *Id.*

[261] *See supra* note 214 and accompanying text.

[262] Mr. Elonis posted this on Facebook in response to his wife obtaining a protection-from-abuse order. Brief for the United States, *supra* note 5, at 7–8.

[263] In October 2010, Anthony Elonis posted this to Facebook. *Id.* at 4.

He testified that these posts "help[ed] [him] deal with the pain."[265] In so testifying, however, when viewed contextually with the timing of, the public nature of, and the disclaimers about the posts, Mr. Elonis admitted that he intentionally posted about Tara because of the intimidating effect it would have on her.

Mr. Elonis had a greater awareness than mere negligence in the effect the posts would have on Tara.[266] While one may certainly cathartically and privately compose a poem or rap lyrics, Tara testified that she never once, during their seven years of marriage, saw Mr. Elonis write rap lyrics.[267] The fact that Mr. Elonis began composing these "rap lyrics" *after* Tara left him and removed their children, and on a *public* forum is evidence that this was his attempt to reassert authority and power in their relationship. Had Mr. Elonis used this public form of expression prior to Tara leaving, this conclusion would be illogical. Yet, there was something novel for Mr. Elonis about composing these rap lyrics and posting them at a venue where all of her friends and family could see. There was something that helped him "deal with the pain"[268] about telling Tara, in front of her entire world, that the only way he could "forgive" her, was to kill her, defile her corpse, and publically shame her.[269] Mr. Elonis also repeatedly disclaimed his right to communicate in this manner,[270] not only taunting Tara, but further acknowledging his awareness of the effect that these messages would have on her. When one views all of these contextual factors together, the message is no longer an innocuous, albeit graphic, post venting about the frustrations of a divorce. Rather, the message Mr. Elonis repeatedly and intentionally sent to his intimate partner was an intimidating threat.

Under the Coercive Domestic Violence statute, advocates would be able to use this kind of testimony to prove intent because the statute combines the abuser's intent with the contextual reality of multiple harms that domestic violence victims experience. Abusers abuse, through physical violence, isolation, or posting threatening comments on social media, because of a need to assert power and control over their intimate

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[264] On Facebook, Mr. Elonis explained his threats with "I'm doing this for me. My writing is therapeutic." Elonis v. United States, 135 S. Ct. 2001, 2005 (2015).

[265] *Id.*

[266] *Id.*

[267] *Elonis*, 730 F.3d at 325 (citing Transcript of Trial at 97, United States v. Elonis, 730 F.3d 321, 324 (3d Cir. 2013) (No. 12-3798)).

[268] *Elonis*, 135 S. Ct. at 2005.

[269] Brief for the United States, *supra* note 5, at 4.

[270] *See supra* note 112 and accompanying text.

partner.[271] And their reactions when their victims attempt to regain control—when they feel that control slipping away—are to reassert that control forcefully.[272]

Under the Coercive Domestic Violence statute, Mr. Elonis had the requisite intent necessary for these particular posts to Tara to be deemed an attempt "to gain power or control over an intimate partner through a pattern of domestic violence,"[273] constituting a true threat and thus being prosecutable speech. He would still lack the requisite intent, as currently defined by the Court, to be prosecuted for his posts about his coworkers and government officials. The Coercive Domestic Violence statute would thus *only* criminalize the portion of his speech that was threatening to his intimate partner, striking the necessary constitutional balance between protecting his First Amendment rights and those of Tara. This statute is the solution for resolving the prosecutorial and constitutional difficulties created by the interaction of the Constitution, domestic violence, and social media.

CONCLUSION

Threats—especially those made by an abuser to his intimate partner—cannot have "pride of place among [] protected speech."[274] While *Elonis* could have provided federal courts with much-needed guidance as to what level of mens rea the government must establish and the proper objective and subjective standards to use, the government would still have the same prosecutorial issues underlying domestic violence. The difficulty with prosecuting perpetrators of domestic violence does not stem from the First Amendment or the "true threat" doctrine, but from the use of transaction-bound statutes that were not designed to criminalize what is criminal about domestic violence. Rather, the solution is a reliable, straightforward, narrow statute that specifically prosecutes perpetrators of domestic violence and strikes a balance between an abuser's First Amendment rights and a victim's right to be protected from harm and coercion.

The Coercive Domestic Violence statute is that solution. It prevents an abuser from being able to "hid[e] behind his [internet persona]"[275] yet requires a high enough mens rea to distinguish

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[271] *See Wheel Gallery*, *supra* note 110.

[272] *See* JACOBSON & GOTTMAN, *supra* note 47, at 63–67.

[273] Burke, *supra* note 22, at 601.

[274] Elonis v. United States, 135 S. Ct. 2001, 2028 (2015) (Thomas, J., dissenting).

[275] *See* United States v. Bagdasarian, 652 F.3d 1113, 1131 (9th Cir. 2011).

between a true threat and an abuser's protected speech. Rather than threaten advocacy of victims of gender-based violence, high-profile decisions like *Elonis* have propelled the inadequacies of existing domestic violence laws into the national spotlight. Reformists need to capitalize on that momentum and ride this new "wave of more transformative reform" until Congress enacts the domestic violence specific statute we so desperately need.[276]

Megan L. Bumb[†]

[276] *See* Burke, *supra* note 22, at 612.

[†] J.D., Brooklyn Law School, 2017; B.A., Hamilton College, 2010. Thank you to Kat Arango, Myra Din, Jessica Schneider, Valentina Lumaj, Ryan Gilinson, Lauren Boulbol, and Professor Christina Mulligan, as well as the entire *Brooklyn Law Review*, for your assistance throughout the various stages of this note. I also owe a debt of gratitude to the teachers and professors from whom I have had the opportunity to learn, and to all of the friends and family who loved and supported me in spite of the reclusion this process required; this note, and my success during law school, would not have been possible without you all. I would also like to thank the attorneys and clients I worked with at Sanctuary for Families for not only bringing my attention to these inadequacies of the legal system, but also for your daily efforts to stand up against perpetrators of domestic violence—I dedicate this note to you.