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True Threats and the Limits of First Amendment Protection

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Abstract

The federal circuit courts of appeals disagree over the correct mens rea *requirement necessary to prove a violation of the federal threat statute. The Supreme Court of the United States will have the opportunity this term to settle that disagreement in* Elonis v. United States. *That case involves the conviction of Anthony Elonis for the crime of transmitting in interstate communications a threat to injure someone else, in violation of Section 875(c) of Title 18 of the U.S. Code. The case directly concerns what intent the statute requires for conviction and whether that proof is sufficient under the First Amendment's Free Speech Clause. Ultimately, there is a reasonable argument that, as a matter of statutory construction, Section 875(c) should require proof of a subjective intent.*

> "The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."
>
> —*Sandra Day O'Connor*[1]

The First Amendment guarantees every person the right of free speech, but that right is not absolute. Some words "by their very utterance" cause injury or incite an immediate breach of peace, and they do not receive constitutional protection.[2] Among the category of unprotected speech are "true threats," statements in which a speaker expresses a "serious" intent "to commit an act of unlawful violence to a particular individual or group of individuals."[3] Even though statutes that punish unprotected speech have "never been thought to raise any Constitutional problem"[4] and Congress has

Key Points

- The federal circuit courts of appeals disagree over the correct *mens rea* requirement necessary to prove a violation of the federal threat statute.
- In its upcoming term, the U.S. Supreme Court will have the opportunity to settle this disagreement in *Elonis v. United States*, a case involving the conviction of Anthony Elonis for the crime of transmitting in interstate communications a threat to injure someone else, in violation of Section 875(c) of Title 18 of the U.S.Code.
- The Free Speech Clause of the First Amendment must inform this debate over the correct *mens rea* requirement necessary to prove a violation of the federal threat statute.
- Ultimately, there is a reasonable argument that, as a matter of statutory construction, Section 875(c) should require proof of a subjective intent.

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made it a crime to use interstate communications facilities to make "threats," the law governing this subject has been unclear.[5]

The federal circuit courts of appeals disagree over the correct *mens rea* requirement necessary to prove a violation of the federal threat statute. A majority of those courts require the government to prove only that the defendant knowingly made a statement that "was not the result of mistake, duress, or coercion" and that a "reasonable person" would regard as threatening.[6] Other courts have required a different, stricter standard—one that requires the government to prove not only that the defendant knowingly made a statement reasonably perceived as threatening, but also that he subjectively intended for his communication to be threatening.[7]

In other words, the majority view is that a defendant can be found guilty of communicating a threat, even if he did not intend that his words be taken in that manner, as long as a reasonable person would have understood his words as threatening. By contrast, the minority view requires not only that a speaker's words be reasonably perceived as a threat, but also that the speaker intended that his words be seen or heard in precisely that way. The distinction is an important one because the majority rule could lead to the conviction of a defendant who intended to utter a joke, but whose words were perceived by others as a threat.

The Supreme Court of the United States will have the opportunity this term to settle that disagreement. The issue arises in the case of *Elonis v. United States*. That case involves the conviction of Anthony Elonis for the crime of transmitting in interstate communications a threat to injure someone else, in violation of Section 875(c) of Title 18 of the U.S. Code.[8] The case directly concerns what intent the statute required for conviction and whether that proof is sufficient under the First Amendment's Free Speech Clause.

The Facts of *United States v. Elonis*

In May 2010, Anthony Elonis's wife moved out of their home with their two young children. Frustrated by his situation, Elonis began posting on his Facebook page descriptions of how he wanted to kill his wife. The series of posts soon included his desire to kill a female coworker at his job at Dorney Park & Wildwater Kingdom, an amusement park. One post, referring to his wife, stated: "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 Creek, and made it look like a rape and murder."[9] Based on these and other

1. Virginia v. Black, 538 U.S. 343, 358 (2003).
2. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("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.").
3. *Black*, 538 U.S. at 359.
4. *Chaplinsky*, 315 U.S. at 571–72.
5. Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1232 (2006) ("Unlike the *Chaplinsky* triumvirate of libel, obscenity, and fighting words, the category of true threats suffers from the lack of a clearly discernable definition.").
6. *See*, *e.g.*, United States v. Hart, 457 F.2d 1087, 1091 (10th Cir. 1972).
7. *See*, *e.g.*, United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005).
8. Section 875 of Title 18 provides as follows:
   (a) Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.
   (b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.
   (c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.
   (d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.
9. United States v. Elonis, 730 F.3d 321, 324 (3d Cir. 2013).

statements, Elonis's wife obtained a Protection from Abuse order against Elonis on November 4, 2010.[10]

The FBI began to monitor Elonis's posts after Dorney Park claimed that Elonis had posted threats against their employee on his Facebook page. FBI Agents questioned Elonis at his home about his Facebook posts. After they left, Elonis posted the following on his Facebook page:

> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?
>
> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all goin'
>
> [BOOM!][11]

As a result of making those statements, Elonis was charged with using the facilities of interstate commerce to communicate a threat to injure the FBI agents who had questioned him, in violation of 18 U.S.C. § 875(c). At trial, Elonis argued that these Facebook posts were inspired by rappers like Eminem and the parody group Whitest Kids U' Know and that he did not subjectively intend to threaten anyone. Not convinced, a jury convicted Elonis on three of the five counts. Elonis was later sentenced to 44 months in prison and three years of supervised release.[12]

Elonis moved to dismiss the indictments against him, contending that under *Virginia v. Black*,[13] his speech was protected by the First Amendment. *Black* was a cross-burning case in which the Supreme Court required the government to prove that a defendant had the intent to threaten when he burned a cross at a Ku Klux Klan rally. The district court denied Elonis's motion to dismiss, holding that even if the subjective intent standard were applied, Elonis's intent was a question of fact for the jury.[14]

Elonis appealed his conviction to the U.S. Court of Appeals for the Third Circuit on the ground that the district court incorrectly instructed the jury on the standard of a true threat. The central claim that Elonis advanced was that a subjective, not objective, intent was required for conviction. The Third Circuit, however, rejected Elonis's argument, stating: "We agree with the Fourth Circuit that *Black* does not clearly overturn the objective test the majority of circuits applied to § 875(c). *Black* does not say that the true threats exception requires a subjective intent to threaten."[15]

Elonis sought review in the Supreme Court. He raised two questions, a constitutional one and a statutory one, that have a common denominator: Can a person be convicted of uttering a threat if he did not intend to communicate one, regardless of how a reasonable person would have perceived his remarks?[16] The Court granted review on both questions, so *Elonis* should resolve the question of how to construe

10. *Id.*
11. *Id.* at 326.
12. *Id.* at 327.
13. 538 U.S. 343 (2003).
14. United States v. Elonis, No. 11-13, 2011 WL 5024284, at 3 (E.D. Pa. Oct. 20, 2011).
15. *Elonis*, 730 F.3d at 331.
16. The two questions in Elonis's certiorari petition read as follows:
(1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and
(2) whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

the federal threat statute. A majority of the federal circuits have adopted an objective intent test,[17] but a growing number of courts have adopted a subjective intent test or are leaning toward endorsing it.[18] Because free speech interests are best served when citizens can engage in public discourse without fearing prosecution, an adoption of the subjective test would punish true threats while preserving room for jokes and figures of speech, even if they are in bad taste and sound menacing, giving free expression the "breathing room needed to survive."[19]

Section 875(c) Requires Proof of Intent

The threshold issue is a matter of statutory interpretation. Section 875(c) prohibits the transmission of "any communication containing … any threat to injure the person of another." Absent from the literal text of the act is any explicit intent requirement. At first blush, Section 875(c) seems to be a strict liability statute, an act that defines "infractions, violations, or crimes that can be committed without any intent to break the law, any knowledge of what the law is, or even any negligence in learning what the law prohibits."[20]

Section 875(c) would seem to fit into that category because it apparently would reach a threat communicated intentionally, recklessly, negligently, or even without any fault on the part of the speaker. Strict liability is disfavored, however, because there is a strong presumption that Congress intends some form of scienter as a requirement for conviction, even if one was not expressed.[21] As the Supreme Court explained in *Morissette v. United States*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[22]

The legislative history of the statute reinforces that conclusion. In 1932, responding to the kidnapping of Charles Lindbergh's son,[23] Congress enacted the predecessor to the current version of Section 875 to make extortion a federal offense.[24] That law made it a crime to send any communication "with intent to extort … money or any thing [*sic*] of value."[25]

Seven years later, when Congress added Section 875(c) in 1939, the discussion during its enactment was replete with themes of intention.[26] As Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit noted in his separate opinion in *United States v. Jeffries*,[27] "[f]rom the beginning, the communicated 'threat' thus had a subjective component to it. Nothing changed when Congress added a new 'threat' prohibition through § 875(c) in 1939."[28]

17. *See* United States v. Clemens, 738 F.3d 1 (1st Cir. 2013); United States v. Kosma, 951 F.2d 549 (3d Cir. 1991); United States v. White, 670 F.3d 498 (4th Cir. 2012); United States v. Jeffries, 692 F.3d 473 (6th Cir. 2012); United States v. Mabie, 663 F.3d 322 (8th Cir. 2011); United States v. Martinez, 736 F.3d 981 (11th Cir. 2013).
18. *See* Adrienne Scheffey, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After* Virginia v. Black, 69 U. Miami L. Rev. (forthcoming fall 2014) ("[T]he Second, Seventh, and Sixth Circuits appear disposed to abandon the purely objective test."), http://goo.gl/eUJZa6.
19. United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012).
20. Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol'y 1065, 1067 (2014) (footnote omitted).
21. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994); Staples v. United States, 511 U.S. 600, 606 (1994); Liparota v. United States, 471 U.S. 419, 426 (1985); United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.").
22. Morissette v. United States, 342 U.S. 246, 250 (1952).
23. *See* United States v. Baker, 890 F. Supp. 1375, 1383 (E.D. Mich. 1995).
24. *See* Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649.
25. Pub. L. No. 76-76, 53 Stat. 742 (1939).
26. *Threatening Communications: Hearing Before the H. Comm. on the Post Office & Post Rds.*, 76th Cong. 7, 9 (1939) (statement of William W. Barron, Criminal Division, Department of Justice).
27. 692 F.3d 473 (6th Cir. 2012).
28. *Id.* at 484 (Sutton, J., dubitante).

There is no indication that Congress intended the statute to be a strict liability crime.[29]

Other courts that interpreted Section 875(c) affirmed this principle. In *United States v. Bozeman*, an early case involving the conviction of a defendant for making threatening statements over the telephone, the court stated that "a conviction under [the statute] requires proof that the threat was made knowingly and intentionally."[30] Likewise, in *United States v. Twine*,[31] a case involving threats made by mail and telephone, the court emphasized that Section 875(c) did not create a strict liability crime: "[I]ntent is a 'vital issue' in a prosecution under that section."[32] The courts have consistently held that Section 875(c) is not a strict liability statute.[33]

What "Intent" Is Necessary?

The conclusion that *some* intent is required does not answer the question of precisely *what* intent is necessary. Scienter comes in several varieties. In increasing order of strictness, a person can act negligently, recklessly, knowingly, intentionally, or willfully. Which one best serves the purposes of Section 875(c)?

The federal courts of appeals have provided differing answers to that question. As the Fifth Circuit noted in *United States v. Myers*, the "absence of any explicit *mens rea* requirement from § 875(c)'s text appears to have produced some confusion in the courts."[34] The circuits all require that a person intentionally utter a statement, and they all require that the statement be seen as threatening by a reasonable person. Where the circuits diverge is over the issue of whether a person must intend to place someone else in fear of harm in order for his communication to amount to a "threat" for purposes of this statute.

The courts of appeals have answered that question in two different ways. The first approach is called the "objective" test. Under it, all that the government must prove is that the speaker intentionally made a statement that a reasonable person would perceive as a threat. The government need not prove that the speaker intended his remarks to serve as a threat.[35] The focus of that standard is on the listener, not the speaker.

As the court in *United States v. Darby* held, a person violates Section 875(c) if the person intentionally makes a statement that a reasonable person would perceive as threatening, even if the speaker intended simply to make a crude joke. Just as it is irrelevant whether a speaker carries out his threatening remarks, it also is irrelevant whether he intended his words to serve as a threat.[36] Making a threat, therefore, essentially becomes a crime of negligence, because the focus is on how a reasonable person would perceive the communication.[37]

The alternative approach is called the "subjective" test. Courts that favor a stricter *mens rea* standard have adopted that standard. There, the government must prove that the speaker intended to make a statement *and* that he intended his remarks to serve as a threat. The Ninth Circuit adopted that test in *United States v. Cassel*.[38] The court emphasized the requirement that "communication itself be intentional, but also the requirement that the speaker intended for his language to threaten the victim."[39]

The courts that have followed a subjective intent approach have relied on Justice Thurgood Marshall's concurring opinion in *Rogers v. United*

29. *Id.* ("In prohibiting non-extortive threats through the addition of § 875(c), Congress offered no hint that it meant to write subjective conceptions of intent out of the statute.").
30. 495 F.2d 508, 510 (5th Cir. 1974).
31. 853 F.2d 676 (9th Cir. 1988).
32. *Id.* at 680.
33. *See* United States v. Dutsch, 357 F.2d 331, 333 (4th Cir. 1966); Seeber v. United States, 329 F.2d 572, 577 (9th Cir. 1964).
34. 104 F.3d 76, 81 (5th Cir. 1997).
35. Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969).
36. 37 F.3d 1059 (4th Cir. 1994).
37. Rogers v. United States, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring) ("In essence, the objective [threat] interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.").
38. 408 F.3d 622 (9th Cir. 2005).
39. *Id.* at 631.

States.[40] He concluded that only "threats that the speaker intends to be interpreted as expressions of an intent to kill or injure" should be considered true threats.[41]

For some courts, however, the question of which level of intent is required is not limited in scope to statutory interpretation. Because the Supreme Court has reminded us that "[a] statute ... which makes criminal a form of pure speech must be interpreted with the commands of the First Amendment clearly in mind,"[42] some courts have attempted to answer this question in light of the Free Speech Clause. As a general matter, the government can criminalize threatening speech, but it must do so within the bounds of the Constitution.[43] As we shall see, the First Amendment doctrine firmly advances the notion of intent when regulating pure speech.

The Free Speech Clause Must Inform the Debate

One of the earlier cases addressing threats and free speech is *Chaplinsky v. New Hampshire*,[44] in which the Supreme Court first made it clear that certain types of communication fall outside the First Amendment. In 1941, Walter Chaplinsky was arrested for committing a breach of the peace during a Jehovah's Witnesses rally because he verbally assaulted a town marshal, using profanity to label him a "racketeer" and a "fascist," among other things.

Chaplinsky argued that his arrest violated the First Amendment's free speech guarantees, but the Court unanimously ruled against him. Writing for the Court, Justice Frank Murphy stated that the First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[45]

The next case was *Watts v. United States*,[46] which articulated the need to distinguish between mere hyperbole and true threats. In 1969, Robert Watts was charged with violation of a federal law that prohibited threats against the President. During a protest in Washington, D.C., Watts refused induction into the armed forces and stated, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The government contended that this was a direct threat against the President, but the Court focused instead on the expressly conditional nature of Watts's language and reversed his conviction, emphasizing that by their nature, public debates can be "vehement" and "caustic."[47]

Although the Supreme Court in *Watts* distinguished between threats and political hyperbole, it did not define what types of statements constitute "true threats." The Court provided only a framework that focused on the circumstantial background of the communication and the response of the listener. This ambiguity prompted the lower courts to fashion their own tests, which offered varying standards for conviction. It was not until 2003 that the Court readdressed the issue and discussed the definition of true threats in *Virginia v. Black*,[48] a case that addressed the constitutionality of a cross-burning statute.

In *Black*, three defendants were separately convicted of violating a Virginia statute that prohibited "any person or group of persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."[49] The com-

40. 422 U.S. 35 (1975).

41. *Id.* at 47.

42. Watts v. United States, 394 U.S. 705, 707 (1969).

43. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If 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.").

44. 315 U.S. 568 (1942).

45. *Id.* at 571.

46. 394 U.S. 705.

47. *Id.* at 708 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("For we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'").

48. 538 U.S. 343 (2003).

49. Va. Code Ann. § 18.2-423 (1996).

monwealth charged Barry Black under that statute for burning a cross at a Ku Klux Klan rally and arrested two other defendants, Richard Elliott and Jonathan O'Mara, for burning a cross in their neighbor's yard. In Black's trial, the court instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."[50]

Each defendant was convicted, and each then appealed to the Virginia Supreme Court, arguing that the cross-burning statute was unconstitutional on its face. After consolidating the cases, the court held that the state law was unconstitutional because, by singling out cross burning, the statute contained an impermissible content-based restriction on speech.[51] The court also held that the prima facie evidence provision in the statute was unconstitutionally overbroad because "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech."[52]

On review, the Supreme Court of the United States held that states can ban cross burning but also concluded that "[t]he prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional."[53] By not allowing an examination of the intent behind a cross burning, the Virginia statute failed to pass constitutional scrutiny. Aware of the fact that cross burnings have universally been associated with hate and intimidation, and mindful of the Ku Klux Klan's own special despicable history, the Court nonetheless concluded that the First Amendment required some consideration of the intent of those parties that burned the cross.

As the Court reasoned, there are multiple meanings associated with cross burning, including community solidarity and religious expression. Simply focusing on the effect to the reasonable viewer would ignore important contextual factors pertaining to a party's intent. Justice Sandra Day O'Connor stated, "The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut."[54] Intent must be addressed in speech cases as a matter of constitutional concern.[55]

Burning a cross in order to make it clear that someone, especially an African American, was at risk of physical injury, the Court noted, was not constitutionally protected conduct. The state made it a crime to communicate such a threat. In the Court's words:

> 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." ... Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.[56]

The Court's decision in *Black* indicates that the Supreme Court would not allow someone to be convicted simply because other individuals found the message discomforting or offensive. Governments may ban true threats to preserve the peace and allow citizens to carry on their lives without fear of harm,

50. *Black*, 538 U.S. at 349.

51. Black v. Commonwealth, 553 S.E.2d 738 (Va. 2001), *aff'd in part, rev'd in part, and remanded sub nom.* Virginia v. Black, 538 U.S. 343 (2003).

52. *Id.* at 746.

53. *Black*, 538 U.S. at 367 ("For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face.").

54. *Id.*

55. *See, e.g.*, United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005) ("The Supreme Court's insistence in *Black* on proof of an intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another "prima facie evidence of an intent to intimidate.").

56. *Black*, 535 U.S. at 359–60 (citations omitted).

but leaving out an examination of intent violates the First Amendment and goes against the overwhelming weight of criminal jurisprudence. According to *United States v. Gilbert,* "[t]he element of intent is the determinative factor separating protected expression from unprotected criminal behavior."[57]

Reasons to Adopt a Subjective Test

There is a reasonable argument that, as a matter of statutory construction, Section 875(c) should require proof of a subjective intent. As Judge Sutton noted in *United States v. Jeffries*, every dictionary meaning of the noun "threat" or the verb "threaten," whether in existence when Congress passed the law or today, includes an intent component.[58]

The *Oxford English Dictionary* in 1933 defined a threat as "[t]o declare (usually conditionally) one's intention of inflicting injury upon" a person.[59] *Webster's New International Dictionary* defined a threat in 1955 as "[a]n expression of an intention to inflict loss or harm on another by illegal means, esp. when effecting coercion or duress of the person threatened."[60] *Black's Law Dictionary* in 1999 defined a threat as "[a] communicated intent to inflict harm or loss on another,"[61] and the *American Heritage Dictionary of the English Language* in 2000 defined it as "[a]n expression of an intention to inflict pain, injury, evil, or punishment."[62]

Absent from any of these definitions is an objective component or "one that asks only how a reasonable observer [or speaker] would perceive these words."[63] It is sensible, therefore, to treat Section 875(c) as requiring proof that a speaker subjectively intended to communicate a threat to someone else.

A subjective intent test would protect important public policy goals. When all that the government must prove is that a defendant knowingly made a statement that the listener deemed threatening, the focus shifts to the effect on the listener rather than the intent of the communication. An objective standard could imprison a speaker for negligent statements, regardless of whether he knew how others would interpret his words. Despite the very real problem of true threats in society, courts must distinguish protected speech from statements meant to inflict fear or harm.[64]

A subjective test would also reduce any chilling effect that the objective test might produce. We are increasingly becoming a hyper-connected society with new technologies available to broadcast thoughts and opinions to the entire world. With one click of the mouse, an essay, poem, opinion, or rambling comment can be posted for everyone to read. Should we criminalize every instance of a post that causes the reader to be uncomfortable? If the standard were applied in a way that asked the reader to evaluate the effect of the communication rather than the intent of the writer, would an average citizen feel free to speak his or her mind openly?

This is why the majority wrote in *United States v. Alvarez* that "the Court emphasizes *mens rea* requirements that provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking."[65] A negligence standard for speech is inconsistent with the dictates of the First Amendment.[66]

It also is the case, for better or worse, that our political and social discourses and conversations have

57. 813 F.2d 1523, 1529 (9th Cir. 1987).
58. 692 F.3d 473, 483 (6th Cir. 2012).
59. 11 Oxford English Dictionary 352 (1st ed. 1933).
60. Webster's New Int'l Dictionary 2633 (2d ed. 1955).
61. Black's Law Dictionary 1489 (7th ed. 1999).
62. American Heritage Dictionary of the English Language 1801 (4th ed. 2000).
63. *Jeffries*, 692 F.3d at 484.
64. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").
65. 132 S. Ct. 2537, 2553 (2012).
66. Reno v. ACLU, 521 U.S. 844, 871–872 (1997) ("First, this Court has identified criminal prohibitions on pure speech as 'matter[s] of special concern' under the First Amendment because '[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.'").

become far coarser than they were 50 years ago when the Supreme Court decided *Watts*. George Carlin had "seven dirty words" in 1978, but those words are now heard on television and elsewhere throughout our society. We also have witnessed a far more aggressive use of language. At one time, a team would have "outscored" or "beaten" another. Today, we read and hear that teams regularly "slaughter" or "massacre" each other. The same is true with respect to music. Putting aside the fact that Beethoven's symphonies generally had no accompanying lyrics, the lyrics that appeared in music from the Big Band Era were far tamer than what we hear today on the radio.

The result is that the center of gravity in public discourse today resembles what only Lenny Bruce would have said in the 1950s. Only a subjective intent requirement adequately distinguishes true threats from hyperbole in contemporary speech.

The Court in *Black* rightly observed that a fact-finder must consider "all of the contextual factors ... to decide whether a particular cross burning is intended to intimidate."[67] Likewise, when applying a subjective intent in the context of true threats, the facts and circumstances of the communication must be traced to the speaker to determine liability. While it is fairly simple to attribute intent to a serial killer uttering the words "I will kill you," it is less clear when the speaker is posting his personal thoughts and musings on a Facebook page.

The subjective test would not exculpate defendants who make undeniably threatening statements; it only requires the government to prove that the speaker had the specific intent to instill fear in the listener. Analyzed on this basis, the courts can distinguish a person jokingly pointing his finger and saying "stick 'em up" from a person wearing a mask and holding a gun while making the same statement. The speaker's intent provides a starting point for a true threat analysis, which can be conducted in light of the environment in which it was made.

Conclusion

An ordered society should punish instances where one person is unduly made to feel afraid of physical or psychological abuse by another, but courts must allow for the often-messy discourse that shapes our American culture. As Justice Robert Jackson reminded us, "The very essence of constitutional freedom of press and of speech is to allow more liberty than the good citizen will take. The test of its vitality is whether we will suffer and protect much that we think false, mischievous and bad, both in taste and intent."[68]

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67. *Black*, 538 U.S. at 345.
68. Williamson v. United States, 184 F.2d 280, 283 (2d Cir. 1950) (Jackson, J., in Chambers).