SECTION 875(C): NOT FOR ALL INTENTS AND PURPOSES

Elonis v. United States, 135 S. Ct. 2001 (2015)

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INTRODUCTION

In spring of 2010, Anthony Elonis's wife left him, taking their two children with her.[1] Shortly thereafter, Elonis began posting violent and degrading material, frequently styled as "rap lyrics," on Facebook.[2] After Elonis posted an illustrated diagram depicting his wife's home and provided hypothetical instructions on the best way to "fire a mortar launcher at her house," she sought a protective order.[3] Elonis learned of the order and redirected the focus of his threatening posts to include police officers, FBI agents, and even a kindergarten class.[4]

A grand jury indicted Elonis for five counts of violating 18 U.S.C. § 875(c), a federal statute criminalizing the transmission of "any communication containing any threat . . . to injure the person of another."[5] At trial, Elonis asked the court to instruct the jury that "the government must prove that he *intended* to communicate a true threat."[6] The district

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1. Elonis v. United States, 135 S. Ct. 2001, 2004 (2015).
2. *See id.* at 2004–07.
3. *Id.* at 2005–06.
4. *Id.* at 2006–07.
5. *Id.* at 2007 (alteration in original) (internal quotation marks omitted) (quoting 18 U.S.C. § 875(c) (2012)).
6. *Id.* (emphasis added) (internal quotation marks omitted).

court declined and instead instructed the jury to use an objective, "reasonable person" standard; the jury subsequently found Elonis guilty of four of the five counts against him.[7] Elonis filed an appeal in the U.S. Court of Appeals for the Third Circuit, challenging the district court's jury instruction, but the Third Circuit found no error in the instruction and affirmed the lower court's judgment.[8] In 2014, the U.S. Supreme Court granted certiorari, and in 2015 it reviewed and reversed the Third Circuit's decision.[9] The Court looked to the principles underlying criminal law and statutory construction and concluded a reasonable person standard, by itself, is not enough to justify criminal liability.[10] The Court instead held that a defendant convicted under § 875(c) must have subjective intent to convey a threat.[11] Despite its willingness to require a subjective intent standard, the Court refused to specify which level of intent—recklessness or knowledge—would suffice to violate the statute, nor did it address the apparent First Amendment concerns relevant to the decision.[12] Lower courts must now find their own answers to the intent question and hope that their choice fits within the additional restraints imposed by the First Amendment.

I. HISTORY OF § 875(C)

In its earliest form, § 875(c) criminalized threats mailed with the "intent to extort."[13] Several years after the statute's enactment, Congress revised it to prohibit all threats to injure another person, regardless of whether the threat accompanied an extortion attempt.[14] Although the original statute required "intent" behind the communication, the current version of § 875(c) prohibits "*any* communication containing any

7. United States v. Elonis, 897 F. Supp. 2d 335, 341–42 (E.D. Penn. 2012), *aff'd*, 730 F.3d 321 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015). In full, the court instructed the jury that:

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

Id. at 341 n.5.

8. United States v. Elonis, 730 F.3d 321, 327, 335 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015).

9. *Elonis*, 135 S. Ct. at 2008, 2012.

10. *See id.* at 2009–11.

11. *Id.*

12. *See id.* at 2012.

13. Pub. L. No. 76-76, § 1(c), 53 Stat. 742 (1939).

14. 18 U.S.C. § 408d(b) (1940).

threat."[15] The disappearance of the statute's intent element received little attention or explanation,[16] and courts slowly began applying the statute's plain language—requiring only that the defendant "knowingly" transmitted the communication.[17]

The Supreme Court confirmed Congress's authority to regulate threats in *Watts v. United States*.[18] In *Watts*, the Court considered the constitutionality of a statute that prohibited "any person from 'knowingly and willfully [making] any threat'" to kill or injure the President.[19] The Court acknowledged that the country has a valid interest in protecting its President from the fear and interference caused by threats, but tempered its finding with the warning that courts must interpret any statute criminalizing pure speech within the bounds of the First Amendment.[20] With this ruling, the Court established an exception to the First Amendment for "true threats" and implicitly confirmed the constitutionality of other federal threat statutes, including § 875(c).

In 2003, the Supreme Court again considered the constitutionality of a threat statute. *Virginia v. Black*[21] involved a Virginia statute "banning cross burning with 'an intent to intimidate a person or group of persons.'"[22] The primary First Amendment concerns arose not from the statute itself but from the instruction to a jury "that the burning of a cross by itself is sufficient evidence from which you may infer the required intent."[23] The Court gave great weight to the intimidation and hatred that have long accompanied cross burnings.[24] However, the plurality reasoned

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15. 18 U.S.C. § 875(c) (2012) (emphasis added).

16. *See* Thomas "Tal" DeBauche, Note, *Bursting Bottles: Doubting the Objective-Only Approach to 18 U.S.C. 875(c) in Light of* United States v. Jeffries *and the Norms of Online Social Networking*, 51 HOUS. L. REV. 981, 996–97 (2014).

17. *See, e.g.*, United States v. Holder, 302 F. Supp. 296, 300 (D. Mont. 1969) ("It is sufficient to establish a specific intent to communicate a threat to injure . . . , i.e. the communication of the threat must be done 'knowingly' and not 'because of mistake or inadvertence or other innocent reason.'"), *aff'd*, 427 F.2d 715 (9th Cir. 1970).

18. 394 U.S. 705 (1969).

19. *Id.* at 705, 707.

20. *Id.* at 707 ("What is a threat must be distinguished from what is constitutionally protected speech.").

21. 538 U.S. 343 (2003) (plurality opinion).

22. *Id.* at 347 (quoting VA. CODE ANN. § 18.2-423 (1996)).

23. *Id.* at 349 (internal quotation marks omitted). The jury instruction was based on a provision from the statute which read: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id.* at 348 (internal quotation marks omitted). The Court explained that the Virginia Supreme Court had never clarified the meaning of that provision. *Id.* at 364.

24. *Id.* at 352–57. For this reason, the plurality concluded that the statute itself was constitutional because a cross burning "with an intent to intimidate" constitutes a "true threat," which the First Amendment does not protect. *Id.* at 359–60. The Court elaborated:

that under some circumstances a cross burning can be "core political speech."[25] Because the First Amendment may, under some circumstances, protect a cross burning, and because the statute expressly required an intent to intimidate, the jury instruction's interpretation of the statute was unconstitutional.[26] The Court vacated Black's conviction because the instruction permitted the jury to ignore "all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate."[27]

Although *Black* was a plurality opinion on a fairly specific construction of a state statute, the circuit courts began hearing arguments that the "intent" reasoning from *Black* should apply to threats in cases brought under § 875(c).[28] Generally, § 875(c) is divided into two elements: first, a communication must be transmitted, and second, the communication must contain a threat.[29] With regard to the first element, courts typically maintained that defendants only needed to have "general intent" to "knowingly" transmit the message to be convicted under the statute.[30] Likewise, the majority of circuits dismissed the possibility that the statute's second element required that defendants have a separate,

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> "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."

Id. (alteration in original) (citations omitted) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

25. *Id.* at 365.

26. *Id.* at 363–64.

27. *Id.* at 367. Note that the Court did not strike down the entire statute. *Id.* Instead, the Court left it to the Virginia courts to determine whether the statute could ever be interpreted in a way that complied with the First Amendment. *Id.*

28. *See, e.g.*, United States v. Martinez, 736 F.3d 981, 985 (11th Cir. 2013) ("Martinez argues that the Supreme Court's decision in *Virginia v. Black* draws the distinction between true threats and protected speech based on the speaker's subjective intent."), *vacated*, 135 S. Ct. 2798 (2015), *to be considered in light of* Elonis v. United States, 135 S. Ct. 2001 (2015).

29. *See* Elonis v. United States, 135 S. Ct. 2001, 2008 (2015). Some interpretations of the statute identify a third, interstate commerce element. *See, e.g.*, *id.* at 2014 (Alito, J., concurring in part and dissenting in part). Any difference between the two tests, however, has no bearing on the discussion within this Comment.

30. *See, e.g.*, United States v. White, 670 F.3d 498, 508 (4th Cir. 2012) (finding § 875(c) to be a "general intent crime"), *abrogated by* 810 F.3d 212 (4th Cir. 2016); United States v. Stewart, 411 F.3d 825, 827 & n.2 (7th Cir. 2005) ("When the word knowingly is used in these instructions, it means that the Defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance or mistake or accident.").

subjective intent to make a threat.[31] Whether the message constituted a "true threat," and thus was not entitled to First Amendment protection, hinged on how an objective, reasonable person would interpret the statement.[32] Because the threatening nature of a message was determined without reference to the defendant's intention or understanding, there was little room for defendants to challenge the second element. Thus, defendants were only able to introduce somewhat subjective evidence to challenge the first element. For example, a defendant could attempt to defend himself by arguing that he sent the message by mistake.[33]

By 2015, only two circuits—the Ninth and Tenth Circuits—had adopted an additional requirement that a defendant have subjective intent to make a threat.[34] The Model Penal Code lists four levels of intent, from greatest to least culpability: purpose, knowledge, recklessness, and negligence.[35] Of these categories, only purpose, knowledge, and recklessness require "subjective intent."[36] Thus, courts applying a subjective test ask whether the defendant communicated a message with the purpose of making a threat, was "practically certain" the recipient would view the message as a threat, or consciously disregarded a "substantial and unjustifiable risk" the recipient would understand the message as a threat.[37] While the Tenth Circuit requires *some* subjective

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31. *See* United States v. Clemens, 738 F.3d 1, 9–12 (1st Cir. 2013); United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 49 (2014); United States v. Elonis, 730 F.3d 321, 327, 330 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015); United States v. Nicklas, 713 F.3d 435, 440 (8th Cir. 2013); *Martinez*, 736 F.3d at 988; *White*, 670 F.3d at 508; United States v. Jeffries, 692 F.3d 473, 477–79 (6th Cir. 2012); *Stewart*, 411 F.3d at 828; Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004). The U.S. Court of Appeals for the District of Columbia did not decide the issue before the Supreme Court decided *Elonis*.

32. *See, e.g.*, United States v. Stock, 728 F.3d 287, 293 n.5 (3d Cir. 2013) ("A statement or communication is a threat if it was made under such circumstances that a reasonable person hearing or reading the statement or receiving the communication would understand it as a serious expression of an intent to inflict injury."). The majority of circuits used an objective test that looked to the reaction of the reasonable *recipient*, but a few courts used an alternative test that weighed the reasonable defendant's ability to foresee that the recipient would view the message as a threat. *See* United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (reviewing the various objective standards employed by other circuit courts).

33. *See Fulmer*, 108 F.3d at 1493 (instructing the jury that the defendant "knowingly" transmitted the message if he "did not act out of ignorance, mistake, or accident").

34. *See* United States v. Heineman, 767 F.3d 970, 978 (10th Cir. 2014); United States v. Twine, 853 F.2d 676, 680 (9th Cir. 1988).

35. *See* MODEL PENAL CODE § 2.02(2)(a)–(d) (2015).

36. *See* Karen Rosenfield, Note, *Redefining the Question: Applying a Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 CARDOZO L. REV. 1837, 1842–43 (2008). Negligence, however, is an objective test which typically only considers whether a reasonable person—not the defendant—"should be aware" of the risk. MODEL PENAL CODE § 2.02(2)(d).

37. MODEL PENAL CODE § 2.02(2)(a)–(c).

intent, it has declined to identify which level of intent § 875(c) requires.[38] The Ninth Circuit requires at least "knowledge" that the recipient will view the communication as a threat.[39]

The subjective intent element does not replace either of the tests required by the majority of circuits, rather, it is included as an additional analysis under the statute's second, true threat element.[40] Subjective intent determinations turn on more than the defendant's explanations of their intentions—juries may consider the entire context of the defendant's statements, including the tone of the statements, the defendant's relationship with people mentioned in the statements, the defendant's prior warnings regarding threatening statements, and any other relevant circumstances.[41] Subjective intent also potentially allows for additional defenses that are not available under objective or general intent analyses, including the lack of requisite intent due to intoxication or diminished capacity.[42]

II. *ELONIS V. UNITED STATES* AND A FAILURE TO CLARIFY INTENT

The Supreme Court's holding in *Elonis v. United States*[43] rejected the position of nine circuit courts and determined that § 875(c) requires that a defendant subjectively intended to communicate a threat.[44] The Court began its evaluation of the statutory requirements with a reading of the statute's plain language.[45] The Court rejected both parties' arguments for inferring a mental state from the statutory language and concluded that,

38. *See Heineman*, 767 F.3d at 973 & n.2; *see also id.* at 983 (Baldock, J., concurring in judgment only) (indicating that the court declined to decide the appropriate level of intent).

39. *See Twine*, 853 F.2d at 680; *see also* United States v. King, 122 F.3d 808, 811 (9th Cir. 1997) (Farris, J., concurring) (clarifying that the *Twine* court held that specific intent required knowledge or purpose). Interestingly, the Ninth Circuit reached this conclusion based on its own precedent, long before *Virginia v. Black* raised the subjective intent issue.

40. *See* United States v. Wheeler, 776 F.3d 736, 743 n.3 (10th Cir. 2015) ("This court's recent decision in *Heineman* does not alter this standard. *Heineman* dealt solely with the mens rea required under § 875(c) and does not alter the objective, reasonable person standard for determining what constitutes a true threat."); United States v. Vaksman, 472 Fed. Appx. 447, 448 (9th Cir. 2012). Requiring a subjective *and* objective test again ensures that triers of fact only convict those defendants whose communications are understood as threats. Logically, if a defendant intends to make a threat, but no other reasonable person would understand the statement as a threat, there is no harm.

41. *See Vaksman*, 472 Fed. Appx. at 449.

42. *See Twine*, 853 F.2d at 679–81.

43. 135 S. Ct. 2001 (2015).

44. *Id.* at 2011.

45. *Id.* at 2008–09.

on its face, the statute does not require any intent.[46] However, the Court decided that it would not view the absence of express intent as an intentional omission by Congress, stating, "We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'"[47] To the contrary, principles of criminal law generally favor inclusion of some intent in order to distinguish the innocent from the guilty.[48]

The Court carefully noted that when implying an intent requirement, "we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.'"[49] The district court's jury instruction, which permitted conviction based solely on a reasonable person's interpretation of his statements, bore a striking similarity to a negligence standard and could not have distinguished innocent from wrongful conduct because it failed to take into account Elonis's reasons for making the statements.[50] Beyond holding that negligence is insufficient to satisfy § 875(c), the Court refused to decide which level of intent—knowledge or recklessness—would support a conviction, on the grounds that the parties had not briefed the issue and there was no current circuit split.[51] The Court further declined to address any attendant First Amendment issues, because it had already determined the jury instruction conflicted with principles of criminal law requiring subjective intent.[52]

Both Justice Samuel Alito's concurrence and Justice Clarence Thomas's dissent took issue with the majority's refusal to clarify the requisite level of intent, predicting the opinion would lead to confusion and inconsistency in the circuit courts.[53] Justice Alito, in particular, went

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46. *Id.*; *see also* 18 U.S.C. § 875(c) (2012). Note that the Court used terms such as "mental state," "*mens rea*," and "scienter" interchangeably to indicate what this Comment refers to as "intent."

47. *Elonis*, 135 S. Ct. at 2009 (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)).

48. *Id.* In support of this finding, the Court cited five cases in which it imputed, to a variety of statutes, an additional intent requirement. *See id.* at 2009–10. What is notable about the cited precedent is that in each case the Court applied an additional *knowledge* requirement. *See id.*

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

50. *See id.* at 2011.

51. *See id.* at 2012–13.

52. *See id.* at 2012. On the basis of its determination that the jury instruction was improper, the Court reversed the defendant's conviction and remanded the case for consideration of whether the defendant had the requisite subjective intent. *Id.* at 2013.

53. *See id.* at 2013 (Alito, J., concurring in part and dissenting in part); *id.* at 2018 (Thomas, J., dissenting). Justice Thomas's dissent proceeded upon the understanding that common law obligated the majority to apply a "default rule" of general intent, in the absence of an express indication of Congress's intent to "dispense with" a required mental state. *See id.* at 2019. This

into great detail explaining why the majority could have, and should have, gone further with its holding. He disagreed with the Court's claim that the parties had not addressed their preferred level of intent and pointed to the parties' responses at oral argument to queries regarding a recklessness standard.[54] Justice Alito, while agreeing with the majority's general finding that § 875(c) requires subjective intent, built on the opinion by declaring recklessness the appropriate level of intent.[55] He reasoned that a recklessness standard would identify culpable conduct while stopping short of intruding on Congress's legislative authority.[56]

Justice Alito continued with an explanation of why a recklessness standard, if adopted, would not infringe on the First Amendment.[57] He reiterated the lack of First Amendment protection for true threats, emphasizing their negligible social value and their serious emotional, and potentially physical, harms.[58] He also highlighted an important paradox that persists in all threat jurisprudence: Any threat—whether the result of mistake, ill-attempted humor, or the worst of intentions—causes the same distress.[59] Justice Alito concluded his constitutional discussion by asserting that a recklessness standard would not have an untenable "chilling effect"[60] on constitutional speech.[61]

As suggested by Justice Alito, the *Elonis* majority unnecessarily bypassed an opportunity to resolve the intent question and provide lower courts with a clear standard to apply in future § 875(c) cases. The reasons offered by the Court for avoiding a specific intent standard as well as a First Amendment analysis were not compelling. First, at the time the

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Comment assumes the majority was correct in concluding § 875(c) requires some degree of specific, subjective intent and thus will not discuss the dissent's reasoning at length.

54. *Id.* at 2014 (Alito, J., concurring in part and dissenting in part). Specifically, the Government argued that recklessness would be suitable, while Elonis argued for a higher standard. *See id.* Justice Alito reasoned that if the Court desired additional discussion of the intent level, it could request supplementary briefing or further argument, rather than deferring an answer to a question it was capable of resolving. *Id.*

55. *Id.* at 2014–15.

56. *See id.* at 2015.

57. *See id.* at 2016.

58. *See id.* Elonis's contentions that his "rap lyrics" were "works of art" apparently did not impress Justice Alito. *See id.* Justice Alito dismissed the idea that "amateurs" who post on social media are entitled to the same protections as professional musicians, particularly considering the vastly different contexts of direct threats made online and threats made during a public performance. *Id.* Justice Alito further questioned the innocence of Elonis's motives, considering evidence that Elonis posted the threats so that his wife would see them. *See id.* at 2017.

59. *See id.* at 2016.

60. *See generally* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1639–40 (2013) (discussing and criticizing the chilling effect in First Amendment cases).

61. *Elonis*, 135 S. Ct. at 2017 (drawing a parallel to civil and criminal liability for libel).

Court decided *Elonis*, there was, arguably, the beginning of a circuit split between the Ninth and Tenth Circuit on the exact issue facing the Court—whether § 875(c) requires a reckless or knowing level of intent.[62] Thus, the Court could have resolved the emerging split without exceeding its authority. Second, as repeatedly stated in Supreme Court precedent, courts must interpret any statute regulating pure speech within the bounds of the First Amendment.[63] Thus, even though the Court's holding was derived solely from principles of criminal law and statutory construction, because it altered the interpretation of a statute restricting pure speech, the Court should have at least confirmed that the changes were consistent with First Amendment precedent.

In light of the Supreme Court's consistent line of precedent on *mens rea* inferences, as well as the numerous existing sources upon which the Court could have based its reasoning,[64] it is surprising that the *Elonis* Court deferred a decision on the level of intent required for § 875(c). As noted above, the precedent cited in support of the Court's ability to infer intent strongly suggests an additional conclusion—when the Court imputes a statutory *mens rea* requirement, it nearly always requires knowledge.[65] In the context of § 875(c), a subjective intent of knowledge fits well with principles of statutory construction, is easily applied by circuit courts, and satisfies constitutional demands.

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62. *See supra* notes 38–39 and accompanying text. As mentioned above, the Ninth and Tenth Circuits, although both requiring subjective intent, have somewhat different approaches. The Ninth Circuit has established knowledge as the proper intent level, while the Tenth Circuit has yet to choose either knowledge or recklessness. While perhaps not precisely the typical "circuit split," the two circuits' differing approaches certainly indicate some level of uncertainty already existed in the lower courts when *Elonis* was decided.

63. *See* Watts v. United States, 394 U.S. 705, 707 (1969); *see also* Virginia v. Black, 538 U.S. 343, 363 (2003) (plurality opinion).

64. For example, as Justice Alito argued in his concurrence, the majority had at its disposal the parties' existing argument and could have requested additional arguments or supplemental briefs to consider the intent issue in greater depth. *See* Elonis v. United States, 135 S. Ct. 2001, 2014 (2015) (Alito, J., concurring in part and dissenting in part). Moreover, the Court could have given greater consideration to the arguments raised by Justice Alito in favor of a recklessness standard and perhaps weighed his reasoning against the Ninth Circuit's basis for selecting a knowledge standard. Even the Model Penal Code offers a recommendation on selecting a degree of "culpability" when a statute is silent on the subject. *See* MODEL PENAL CODE § 2.02(3). In sum, the Court could have relied on any or all of these sources to gain sufficient knowledge and reach an informed opinion on the proper level of intent.

65. *See supra* note 48; *see also* Rosenfield, *supra* note 36, at 1865 ("Knowledge is a common denominator in the Supreme Court cases which considered a statute silent on the mens rea requirement.").

III. KNOWLEDGE IS THE LIKELY STANDARD FOR § 875(C) VIOLATIONS

Preliminarily, it is interesting to note the Court's tendency to ascribe a knowledge requirement when Congress fails to expressly provide for a particular *mens rea* requirement. To support its decision in *Elonis*, the majority cited at least five cases where the Court imputed a *mens rea* requirement and in each case, knowledge was the chosen standard.[66] Although such a small sample of cases certainly cannot predict which standard will ultimately prevail in § 875(c), the reasoning used in the cited cases is remarkably similar to that which decided *Elonis*. In each case, the majority emphasized the traditional requirement of an "evil-meaning mind" to support a criminal conviction.[67] The Court was careful to distinguish between public welfare offenses, which require no subjective intent for conviction and receive light punishment, and the criminal offense at issue in each case, which carried harsher penalties.[68] Notably, most of the offenses in the cited cases involve prohibited use, possession, or sale of certain items.[69] Only one case, *X-Citement Video*, involved arguable First Amendment concerns.[70] It is reasonable to believe that the Court will retain a similar, if not heightened, interest in identifying truly guilty conduct when assessing § 875(c), which runs a higher risk of proscribing constitutionally protected speech.

A knowledge standard is also consistent with the majority's expressed aim of selecting the level of intent that best separates the innocent from the morally culpable.[71] Distinguishing between innocence and guilt in the context of threats is particularly difficult because, as implied by Justice Alito's concurring opinion, the harm resulting from threats is often the same, regardless of the speaker's intent.[72] Thus, contrary to what some commentators suggest, it is unhelpful to measure "wrongfulness" relative

66. *See Elonis*, 135 S. Ct. at 2009–10 (citing Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Staples v. United States, 511 U.S. 600 (1994); Liparota v. United States, 471 U.S. 419 (1985); Morissette v. United States, 342 U.S. 246 (1952)).

67. *E.g.*, *Morissette*, 342 U.S. at 251.

68. *Id.* at 253–56. A violation of a public welfare offense often will "result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize." *Id.* at 256. Violations of these regulations generally result in relatively minor punishments. *Id.* In contrast, § 875(c) carries a penalty of up to five years of imprisonment. 18 U.S.C. § 875(c) (2012).

69. *See, e.g.*, *Liparota*, 471 U.S. at 420 (food stamps); *Posters 'N' Things*, 511 U.S. at 515 (drug paraphernalia); *X-Citement Video*, 513 U.S. at 66 (child pornography); *Staples*, 511 U.S. at 602 (automatic weapons).

70. *X-Citement Video*, 513 U.S. at 71–72.

71. *See Elonis*, 135 S. Ct. at 2010.

72. *See id.* at 2016 (Alito, J., concurring in part and dissenting in part).

to the harms the threat statute seeks to prevent.[73] Instead, it makes more sense to focus on which level of intent seems most clearly culpable, considering the typical circumstances that would fall under each level of intent. For example, a defendant who attempts to delete any "friends" who could view his posts before commanding his "religious followers" to "kill cops" might evidence recklessness.[74]This behavior would typically be reckless because the statements are more general in nature, and most defendants would be aware of the substantial risk that posts on social media will become public, even after taking steps to make the post private. On the other hand, conduct like Elonis's almost certainly qualifies as knowing.[75] There was no suggestion that Elonis deleted Facebook friends or added privacy settings before posting threatening "lyrics," many of which directly referenced specific people who would likely become aware of the posts.[76] Comparing the two examples, the facts supporting knowing intent are much more evidently "wrongful" than those supporting recklessness. Thus, a knowledge requirement comports best with the Court's stated intention to separate the innocent from the morally culpable.

As a practical matter, the Ninth Circuit's lengthy history of using a knowledge standard for § 875(c) will provide helpful guidance for other courts applying the standard for the first time. The Ninth Circuit's cases are particularly instructive on which fact patterns may call for different treatment under the new standard. For example, as noted above, a knowledge requirement, which requires that a defendant is "practically certain" his message would be interpreted as a threat, may—unlike a recklessness standard—be defeated by a lack of requisite intent, for reasons including intoxication or diminished capacity.[77] Another possible defense that was previously unavailable is that a defendant did not intend that anyone receive the message, because if the defendant did not mean to share the statement, then he could hardly be practically certain it would

73. *See* Leading Case, *Federal Threats Statute—Mens Rea and the First Amendment*—Elonis v. United States, 129 HARV. L. REV. 331, 337 (2015).

74. *See infra* note 78 and accompanying text. It is unlikely that a trier of fact could construe the same circumstances as rising to the level of knowing intent, which would require that the defendant was "practically certain" a recipient would interpret his posts as a threat. MODEL PENAL CODE § 2.02(2)(b) (2015). It is also important to note that a case involving these facts would not be defeated through the "knowing transmission" requirement, because the defendant intentionally posted the statements.

75. *See Elonis*, 135 S. Ct. at 2004–07; *see also id.* at 2016 (Alito, J., concurring in part and dissenting in part) (implying that Elonis may have even posted the statements with the purpose of threatening his wife).

76. *See id.* at 2004–07 (majority opinion).

77. *See* United States v. Twine, 853 F.2d 676, 679–81 (9th Cir. 1988).

be understood as anything, much less a threat.[78] A more complicated scenario will require a jury to evaluate a defendant's knowing transmission of a threat when the defendant was making the statements to a confidante.[79] Courts, however, may be reluctant to apply a heightened knowledge standard, fearing it will hinder convictions of guilty parties. But outside of the fairly limited fact patterns discussed immediately above, the new subjective intent requirement is unlikely to substantially interfere with the ability to indict and convict defendants guilty of making threats.[80]

A knowledge standard is also more likely than a recklessness standard to uphold the principles of the First Amendment. Although the *Elonis* majority seemed willing to set aside constitutional considerations, the First Amendment will undoubtedly factor in to any future clarification of § 875(c)'s requisite intent. In selecting a standard, the Court will be careful to draw a clear line between threats and protected speech.[81] Although Justice Alito suggested in his concurrence that a recklessness standard would not offend the First Amendment, his conclusions seemed rooted more in discussion of the harms of threats than in identifiable precedent.[82] He did, however, point to libel as an area of speech regulation that only requires a recklessness standard.[83] Likewise, Justice Thomas's dissent also condemned any inclusion of a heightened level of intent, arguing that providing additional safeguards would "make threats one of the most protected categories of unprotected speech."[84] Justice

78. *See, e.g.*, United States v. Wheeler, 776 F.3d 736, 739–41, 746 (10th Cir. 2015) (discussing the defendant's contention that he believed he deleted all his Facebook friends before making the alleged threatening posts, then reversing and remanding the case for retrial due to the trial court's refusal to instruct the jury that the defendant subjectively intended his Facebook posts to be threatening).

79. *See, e.g.*, United States v. Houston, 792 F.3d 663, 665–68, 670 (6th Cir. 2015) (reversing, for plain error, defendant's conviction due to improper jury instruction on the issue of intent, finding that a jury could view the defendant's statements to his girlfriend as "venting his frustration"). Situations involving statements to a confidante, such as a close friend, romantic partner, or family member, become particularly complex when, like in the *Houston* case, someone who is not part of the conversation becomes aware of the statements. *See id.* at 665. While the confidante may have understood the statements as "venting," and felt no need to report them to the police, an outside observer does not have the same understanding of the defendant's typical behavior and may be more likely to view the statements as threatening.

80. *See, e.g.*, *Elonis*, 135 S. Ct. at 2026 (Thomas, J., dissenting) (noting Government counsel's remark: "I think Congress would well have understood that the majority of these cases probably [involved] people who intended to threaten" (alteration in original) (internal quotation marks omitted)).

81. *See* Watts v. United States, 394 U.S. 705, 707 (1969).

82. *See Elonis*, 135 S. Ct. at 2016–17 (Alito, J., concurring in part and dissenting in part).

83. *See id.* at 2017.

84. *See id.* at 2027 (Thomas, J., dissenting).

Thomas listed additional categories of unprotected speech requiring only general intent.[85] Both of these viewpoints, however, overlook the more compelling example provided by the majority opinion—Supreme Court precedent requires a heightened, knowing intent for conviction under a statute criminalizing the distribution of child pornography.[86] If the Court is willing to provide heightened First Amendment protection for those accused of distributing child pornography, it seems likely the Court will have no trouble applying a similarly heightened knowledge requirement for a conviction under the threat statute.[87]

CONCLUSION

Although the Court passed up the opportunity to reach a clear holding on whether § 875(c) requires reckless or knowing intent and likewise avoided the attendant First Amendment considerations, existing Supreme Court precedent and circuit court opinions provide helpful guidance. Courts can expect that if the Supreme Court reconsiders § 875(c)'s intent requirement in the future, it will almost certainly select a knowledge standard.[88] Proceeding under this reasoning, courts have the benefit of Ninth Circuit case law, which has been applying a subjective, knowing intent element to § 875(c) for nearly thirty years.[89] By relying on the Court's precedent and Ninth Circuit guidance, lower courts may avoid the confusion predicted by Justices Alito and Thomas[90] and have a greater degree of confidence that their chosen standard complies with the demands of the Constitution.

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85. *See id.* (discussing the "fighting words" exception's general intent standard). However, the "fighting words" exception is one of the more archaic—not to mention one of the most criticized—exceptions to the First Amendment. *See generally* Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 444 (2004) ("There is no constitutional basis for denying protection to fighting words . . . ."); Wendy B. Reilly, Note, *Fighting the Fighting Words Standard: A Call for Its Destruction*, 52 RUTGERS L. REV. 947, 949 (2000) (criticizing the development and application of the fighting words standard).

86. *See Elonis*, 135 S. Ct. at 2010 (majority opinion) (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 73 (1994)).

87. *See* Kendrick, *supra* note 60, at 1666 ("The fact that sexual speech receives more protection than production of some public information [in certain defamation cases] makes it all the more difficult to rationalize the existing intent requirements . . . .").

88. *See supra* note 65 and accompanying text.

89. *See, e.g.*, United States v. Twine, 853 F.2d 676, 680 (9th Cir. 1988).

90. *See Elonis*, 135 S. Ct. at 2013 (Alito, J., concurring in part and dissenting in part); *id.* at 2018 (Thomas, J., dissenting).