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NOTES

THE TRUTH WILL SET YOU FREE (UNLESS IT'S A THREAT): EXAMINING THE MENS REA REQUIRED IN TRUE THREATS

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NOTES

THE TRUTH WILL SET YOU FREE (UNLESS IT'S A THREAT): EXAMINING THE MENS REA REQUIRED IN TRUE THREATS

Marie H. Feyche[*]

ABSTRACT

Case precedent has left questions unanswered regarding the required level of intent to support a conviction under 18 U.S.C. § 875(c), "Interstate Communications"—specifically, whether a mens rea of "recklessness" is sufficient to support a conviction. This Note will differentiate between two similar statutes: 18 U.S.C. § 875(c), "Interstate Communications," which prohibits true threats conveyed in interstate commerce against any person, and 18 U.S.C. § 871(a), "Threats Against the President and Successors to the Presidency," which prohibits true threats against the President of the United States and successors to the Presidency. The specified mens rea of "knowingly and willfully" in § 871(a) will be studied against the absence of a specified mens rea in § 875(c). This Note will examine the absence of required mens rea in the recent prosecutions of various individuals who were charged under § 875(c) for conveying true threats in interstate commerce during and surrounding the January 6, 2021, insurrection at the Capitol. Further, this Note will analyze the need for a heightened mens rea to protect innocent individuals who are unknowingly engaging in an unconstitutional conveyance of language without actual intent to attempt the threatened conduct and balance it with

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the need to accomplish the broader protections § 875(c) and § 871(a) are intended to achieve.

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INTRODUCTION

Eighteen U.S.C. § 875(c), "Interstate Communications," and 18 U.S.C. § 871(a), "Threats Against President and Successors to the Presidency," both enacted in 1948, are similar statutes pertaining to true threats.[1] True threats are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[2]

True threats in general are covered under 18 U.S.C. § 875(c). This section provides in relevant part: "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."[3]

In contrast, true threats specifically conveyed against the President and other government officials are prohibited under § 871(a):

> Whoever *knowingly and willfully* . . . threat[ens] to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect . . . shall be fined under this title or imprisoned not more than five years, or both.[4]

A political hyperbole is not a true threat under this statute.[5]

Although § 875(c) and § 871(a) are vastly similar, this Note focuses on a fundamental difference: under § 871(a), true threats against the President require the mens rea of "knowingly and willingly," whereas under § 875(c), true threats against any other person do not have a specified mens rea that must be met in order for an individual to be convicted of conveying such a threat.[6] Additionally case precedent

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[1] *See* 18 U.S.C. §§ 875(c), 871(a).

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

[3] 18 U.S.C. § 875(c).

[4] 18 U.S.C. § 871(a) (emphasis added).

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

[6] *See* 18 U.S.C. §§ 875(c), 871(a).

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has not yet established a specified mens rea to apply to § 875(c).[7] The absence of mens rea in both the language of § 875(c) and in case precedent has left judges, attorneys, and citizens with a lack of clarity regarding what speech amounts to a true threat under § 875(c).[8] This situation is further exacerbated by a discrepancy in the mens rea applied in past cases under § 875(c).[9]

I. THE FIRST AMENDMENT AND UNPROTECTED SPEECH

The First Amendment guarantees the right to freedom of speech through its clear words that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[10] Justice Louis D. Brandeis's concurring opinion in *Whitney v. California* encapsulates the traditional rationales provided for protecting freedom of speech: (1) marketplace of ideas, (2) promoting democracy, (3) advancing individual autonomy, (4) promoting social tolerance, and (5) safety valve.[11]

There are limits, however, to what speech is protected. Unprotected speech places content-based restrictions on speech, making certain speech unconstitutional through the application of strict scrutiny.[12] The government may regulate categories of speech, including defamation, child pornography, and true threats, among others.[13]

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[7] *See* Ruan v. United States, 142 S. Ct. 2370, 2381 (2022) (citing Elonis v. United States, 575 U.S. 723, 732 (2015)) ("In *Elonis*, for example, we considered the mental state applicable to a statute that criminalized threatening communications but contained no explicit *mens rea* requirement.").

[8] *See infra* Part IV for a discussion on the various mentes reae in the charging documents, indictments, and convictions under 18 U.S.C. § 875(c), all stemming from true threats conveyed surrounding the January 6, 2021 insurrection at the Capitol.

[9] *See infra* Part IV for a discussion on the various mentes reae in the charging documents, indictments, and convictions under 18 U.S.C. § 875(c), all stemming from true threats conveyed surrounding the January 6, 2021 insurrection at the Capitol.

[10] U.S. CONST. amend. I.

[11] 274 U.S. 357, 375 (1927) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.") (Brandeis, J., concurring).

[12] Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015).

[13] United States v. Stevens, 559 U.S. 460, 468, 471 (2010); Watts v. United States, 394 U.S. 705, 708 (1969).

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The Constitution requires "that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality."[14] As such, true threats are unprotected speech because they lack value and may prove costly to society.[15] Threats must generally be taken seriously, as overlooking a valid threat can result in the harm or death of civilians or government officials. Still, an individual may use words in a threatening manner with no true intent to do harm. In that situation, it may be unjust to prosecute the innocent individual for unknowingly using unprotected speech.[16] Courts and law enforcement struggle with determining an individual's true intent.[17]

II. TRUE THREATS UNDER § 875(C) AND § 871(A) PRE-*ELONIS*

For First Amendment purposes, the Supreme Court defines a true threat as "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[18] Different analyses, tests, and requirements have been present in various decisions through the years.[19]

In *Watts v. United States*, decided in 1969, the Supreme Court examined whether a Vietnam War protester, Watts, conveyed a true threat by stating, "[i]f they ever make me carry a rifle the first man I want to get in my sights is [Lyndon B. Johnson]."[20] Because the statement conveyed threatening language against the

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[14] Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (citation omitted).

[15] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), *superseded by statute*, ALA. CODE § 13A-11-8 (amended 1996), *as recognized in* Fallin v. City of Huntsville, 865 So. 2d 473, 475 (Ala. Crim. App. 2003).

[16] *See* Elonis v. United States, 575 U.S. 723, 740 (2015) ("Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state."); Torres v. Lynch, 578 U.S. 452, 467 (2016) ("In general, courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense.").

[17] *See* 3D CIR. MODEL CRIM. JURY INSTRUCTIONS § 5.01 (COMM. ON MODEL CRIM. JURY INSTRUCTIONS 3D CIR. 2021) (explaining that a state of mind may not be proved directly because one cannot read another's mind).

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

[19] *See id.* (setting forth categories of true threats under 18 U.S.C. § 875(c)); United States v. Turner, 720 F.3d 411, 420, 426 (2d Cir. 2013) (applying an objective standard when convicting defendant under 18 U.S.C. § 875(c)); Jeffries v. United States, No. 3:10-CR-100, 2018 WL 910669, at *4 (E.D. Tenn. Feb. 15, 2018) (vacating defendant's conviction because he was convicted under an objective standard and holding that a subjective standard should have been applied).

[20] 394 U.S. 705, 706 (1969).

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President, the Court applied § 871(a).[21] The statutory language requires that the threat be conveyed "knowingly and willfully."[22] Addressing the requirement of "willfulness," the Court referred to the majority of courts which find that "the willfulness requirement [is] met if the speaker voluntarily uttered the charged words with 'an *apparent* determination to carry them into execution.'"[23] Under this analysis, the Court held that Watts's statement did not constitute a true threat because it was a political hyperbole, and although the statement was "crude" and "offensive," it was merely a statement of political opposition.[24]

In 2003, the *Virginia v. Black* Court provided a definition for true threats under § 875(a) that can be broken down into three components.[25] The *Black* defendants were convicted for violating a Virginia statute prohibiting the burning of a cross with the intent of intimidating a person or group of persons.[26] One defendant burned a cross at a Ku Klux Klan rally in an open field off a public highway, and another defendant attempted to burn a cross on a Black individual's next-door neighbor's yard.[27] The Virginia statute included language that "burning of a cross shall be prima facie evidence of an intent to intimidate a person or a group of persons."[28] The defendants did not address whether or not their conduct was objectively threatening, instead they argued that the Virginia statute was facially unconstitutional under the First Amendment.[29] The Court vacated the defendants' convictions because the jury had not found that there was intent to intimidate, and it was not enough that the

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[21] *Id.* at 705.

[22] *Id.*; 18 U.S.C. § 871(a).

[23] *Watts*, 394 U.S. at 707 (quoting Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918)). Justice Marshall, who joined the majority in *Watts*, wrote a concurring opinion in *Rogers v. United States* which reviewed Rogers' conviction of knowingly and willfully threatening to kill or inflict bodily harm upon the President. Rogers v. United States, 422 U.S. 35, 42 (1975) (Marshall, J., concurring). Expressing concern with the use of an objective test in cases involving 18 U.S.C. § 871(a), Justice Marshall wrote "[w]e have long been reluctant to infer that a negligence standard was intended in criminal statutes; we should be particularly wary of adopting such a standard for a statute that regulates pure speech." *Id.* at 47 (citation omitted).

[24] *Watts*, 394 U.S. at 708.

[25] 538 U.S. 343, 359 (2003).

[26] *Id.* at 348–50.

[27] *Id.* at 348.

[28] *Id.* (quoting VA. CODE § 18.2-423 (1950)).

[29] *Id.* at 351.

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defendants' acts were *objectively* threatening.[30] As such, the plurality held that the "prima facie evidence" part of the statute was facially unconstitutional because it "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning [wa]s intended to intimidate."[31]

Under the Court's analysis, true threats include three components: (1) a serious expression of (2) intent to commit an unlawful act of violence (3) against a particular, identifiable, definable person or group of persons.[32] In short, the Court held that a true threat is made when the speaker intends "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or a group of individuals."[33] The speaker need not intend to attempt or complete the conduct threatened in the statement.[34] Moreover, the speaker is not even required to have the means or capacity to carry out the threatened conduct for the statement to be a true threat under *Black*'s analysis.[35] The requirement is simply that the threat creates "a pervasive fear in victims that they are a target of violence."[36] The absence of a requirement for capacity to carry out the threat addresses the fear created by the threat and protects against this fear.[37] It also protects against the possibility of the threat being carried out.[38]

In *United States v. Carrier*, the Second Circuit held that "whether words used are a true threat is generally best left to the triers of fact."[39] However, there is a lack

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[30] *See id.* at 364–67.

[31] *Id.* at 367.

[32] *Id.* at 359.

[33] *Id.*

[34] *Id.* at 360.

[35] United States v. Dutcher, 851 F.3d 757, 761, 763 (7th Cir. 2017) (citing *Black*, 538 U.S. at 360) (finding defendant Dutcher guilty of knowingly and willfully conveying a true threat against the President of the United States in violation of 18 U.S.C. § 871(a) and rejecting the defendant's argument that the mens rea of "knowingly and willfully" requires the defendant to know that the conduct is illegal).

[36] *Black*, 538 U.S. at 360.

[37] *Id.*

[38] *Id.*

[39] 672 F.2d 300, 301–02, 306 (2d Cir. 1982) (reversing the dismissal of an indictment charging defendant Carrier with knowingly and willingly making a verbal threat to "blow the head off the President of the United States" because the indictment was a plain statement of facts regarding the offense charged, and the triers of fact were to determine whether the defendant's words amounted to a true threat under 18 U.S.C. § 871(a)).

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of clarity as to how the jury should be instructed to determine if the required intent has been met, as case precedent has developed different tests and has not specified the required level of intent to support a conviction under § 875(c).[40]

A. *Shift from Objective Test to Subjective Test for Intent Under § 875(c) in* Elonis v. United States

Although *Virginia v. Black* leaned toward a subjective intent requirement for a conviction under § 875(c), courts have struggled with whether to use a subjective or objective standard to construe the statutory language. An objective standard requires that "a reasonable observer would construe [the communication] as a true threat to another."[41] Under a subjective standard, "it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat."[42] In some cases, courts employed an objective test to determine if a defendant's statement constitutes a true threat.[43] For instance, in *United States v. Turner*, the district court's jury instructions were as follows:

> [W]hether a particular statement is a threat is governed by an objective standard. That is, a statement is a threat if it was made under such circumstances that a reasonable person hearing or reading the statement and familiar with its context would understand it as a serious expression of an intent to inflict an injury.[44]

The court of appeals held that the jury instructions were proper.[45] The objective standard set forth in the jury instructions was intended to distinguish true threats from political hyperbole.[46]

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[40] Megan R. Murphy, *Context, Content, Intent: Social Media's Role in True Threat Prosecutions*, 168 U. PA. L. REV. 733, 739 (2020); *see infra* Part IV for a discussion on the various mentes reae in the charging documents, indictments, and convictions under 18 U.S.C. § 875(c), all stemming from true threats conveyed surrounding the January 6, 2021 insurrection at the Capitol.

[41] United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012).

[42] Perez v. Florida, 580 U.S. 1187, 1189 (2017) (Sotomayor, J., concurring in denial of certiorari).

[43] United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013).

[44] *Id.* at 426.

[45] *Id.* at 429.

[46] *Id.* at 421.

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However, after the Second Circuit decided *Turner*, the Supreme Court in *Elonis v. United States* relied on the principles of statutory interpretation to rule that a subjective test was proper for proof of intent to convey a true threat, replacing the objective test set forth in *Turner*.[47] In *Elonis*, defendant Elonis posted rap lyrics on Facebook, threatening his coworkers and the amusement park patrons at the park where he worked.[48] Elonis's posts also made his wife feel "extremely afraid for [her] life."[49] Within the same month, Elonis posted more Facebook entries, including one threatening law enforcement officers[50] and another appearing to threaten to commit a school shooting.[51] FBI agents went to Elonis's house to discuss the threatening language conveyed on Facebook.[52] After the FBI agents left, Elonis again posted on Facebook, this time directing threats toward the FBI agents.[53]

During the trial, Elonis requested that the Government have the burden to prove that Elonis intended to convey a true threat to others through the language he posted

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[47] Elonis v. United States, 575 U.S. 723, 736–37, 740 (2015).

[48] *Id.* at 726–27 (stating that the following lyrics posted to Facebook were the basis for Count One of Elonis's subsequent indictment: "Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark andfoggy [*sic*] to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so f***in' scary?").

[49] *Id.* at 728. Elonis posted an adaption of a sketch, "It's Illegal to Say . . . ," which explains that it is illegal for an individual to state that he wants to kill the President, but it is not illegal to explain the illegality of those words. *Id.* Elonis's adaption substituted his wife for the President. *Id.* at 727–28. Elonis posted the accompanying lyrics "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 . . . ." *Id.* at 728. This post was the basis for Count Two of Elonis's subsequent indictment. *Id.*

[50] *Id.* at 729. Elonis posted a link to the Wikipedia article on "Freedom of speech" that was the basis for Count Three of his subsequent indictment. *Id.*

[51] *Id.* Count Four was based on the following post: "That's it, I've had about enough I'm checking out and making a name for myself Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined And hell hath no fury like a crazy man in a Kindergarten class The only question is . . . which one?" *Id.*

[52] *Id.* at 730.

[53] *Id.* at 730–31. Among other threatening language contained in the Facebook post, Elonis posted the following lyrics: "Little Agent lady stood so close Took all the strength I had not to turn the b**** ghost Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner . . . ." *Id.* at 730.

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on Facebook.[54] Instead, the District Court ruled the Government only had the burden at trial to prove that "a reasonable person would foresee that the statement would be interpreted" as a threat.[55] Specifically, to convict the defendant of conveying a true threat, the Government needed to prove that Elonis (1) intentionally conveyed the communication and (2) that the communication was reasonably interpreted as a threat.[56] The Government did not need to prove that Elonis intentionally made a threat.[57]

Upon appeal, the Supreme Court in *Elonis* addressed the question of whether § 875(c) requires proof that the defendant was aware that the communication he conveyed was threatening.[58] The Government again asserted that an objective standard should be used,[59] as an objective standard was used in *Turner*.[60] Under the objective standard, the Government would not need to prove that the defendant had knowledge that the communication he conveyed was threatening.[61]

However, the Supreme Court rejected the Government's argument and held that § 875(c) requires subjective intent.[62] The Court reasoned that if the Government's position were to prevail, it would criminalize '"a broad range of apparently innocent conduct' and swe[ep] in individuals who had no knowledge of the facts that made their conduct blameworthy."[63] Moreover, "[h]aving liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces culpability on the all-important element of the crime to negligence.'"[64] The Court remanded the case because the jury was erroneously instructed that the Government needed to prove that a reasonable person would interpret Elonis's communications as threats without regard to Elonis's mental

[54] *Id.* at 731.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 732.

[59] *Id.* at 733.

[60] United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013).

[61] *Elonis*, 575 U.S. at 731.

[62] *Id.* at 741.

[63] *Id.* at 735 (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).

[64] *Id.* at 738 (quoting United States v. Jeffries, 692 F.3d 473, 484 (6th Cir. 2012)).

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state.[65] "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state," Chief Justice John G. Roberts, writing for the majority, explained.[66] As explained by Justice Sonya Sotomayor in a concurrence following *Elonis*, "it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat."[67]

Section 875(c) does not specify what mental state (knowingly, willfully, negligently, or recklessly) is required for a defendant's conduct to qualify as a true threat;[68] rather, § 875(c) simply prohibits individuals from transmitting in interstate commerce "any communication containing any threat . . . to injure the person of another."[69] Thus, although the Supreme Court indicated that subjective intent is required, the Court has not specified what mental state, such as reckless disregard, would allow a conviction of conveying a true threat.[70]

B. *Objective vs. Subjective Standard Under § 875(c) Post-*Elonis

Due to ongoing confusion regarding the application of the subjective standard after the *Elonis* decision, some lower courts do apply the subjective standard discussed in *Elonis*, while others have continued to apply an objective standard.

The Sixth Circuit, for example, reversed a pre-*Elonis* decision conviction under § 875(c) in 2018.[71] Petitioner Jeffries had been convicted and sentenced for conveying threats of violence, including death, directed at the chancellor assigned to his custody dispute with his child's mother.[72] During his trial in 2010, Jeffries requested that the court apply a subjective intent requirement in the jury

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[65] *Id.* at 740.

[66] *Id.*

[67] Perez v. Florida, 580 U.S. 1187, 1189 (2017) (Sotomayor, J., concurring in denial of certiorari).

[68] *Elonis*, 575 U.S. at 732.

[69] *Id.* (quoting 18 U.S.C. § 875(c)).

[70] Ruan v. United States, 142 S. Ct. 2370, 2381 (2022) (citing *Elonis*, 575 U.S. at 732) ("In *Elonis*, for example, we considered the mental state applicable to a statute that criminalized threatening communications but contained no explicit *mens rea* requirement.").

[71] Jeffries v. United States, No. 3:10-CR-100, 2018 WL 910669, at *2 (E.D. Tenn. Feb. 15, 2018).

[72] *Id.* at *1.

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instructions.[73] The district court instead applied an objective intent requirement in alignment with the law in the circuit at that time.[74] Jeffries filed a 28 U.S.C. § 2255 Motion to Vacate a Sentence after the Supreme Court granted certiorari for *Elonis* and then filed a brief in support of the motion after the *Elonis* decision was issued.[75] Jeffries asserted that *Elonis* held that § 875(c) requires proof of a defendant's subjective intent to convey a threat, and that his conviction was based only on how his speech would have been interpreted by a reasonable person.[76]

As such, subjective intent was relevant when deciding if Jeffries' speech violated § 875(c), and his conviction should not stand because "there was no proof of his intent and the jury was instructed that his intent was irrelevant . . . ."[77] The district court granted Jeffries' motion to vacate his conviction.[78] The court explained that "*Elonis* must have retroactive effect" because it "reversed long-standing precedent in eight circuits, including [the Sixth Circuit]."[79] The court concluded that it was "clear that if [Jeffries] today made the threats he made in 2010 and then was charged with a violation of § 875(c), the government would be required to prove beyond a reasonable doubt that he *intended* to convey a 'true' threat, and this court would be obliged to instruct the jury accordingly."[80]

In a similar vein, the Seventh Circuit distanced itself from use of an objective test.[81] In *United States v. Khan*, decided four years after *Elonis*, the Seventh Circuit Court of Appeals explained that the circuit previously used an objective standard

[73] *Id.*

[74] *Id.* The trial court held that "the government does not have to show that the defendant specifically intended to threaten another but, instead, must prove that a 'reasonable person [would] consider the statement to be a threat' based on 'the surrounding facts and circumstances.'" United States v. Jeffries, No. 3:10-CR-100, 2010 WL 4923335, at *5 (E.D. Tenn. Oct. 22, 2010) (quoting United States v. DeAndino, 958 F.2d 146, 148 (6th Cir. 1992)).

[75] *Id.* at *2.

[76] *Id.*

[77] *Id.*

[78] *Id.* at *4.

[79] *Id.* at *3.

[80] *Id.*

[81] *See* United States v. Parr, 545, F.3d 491, 500 (7th Cir. 2008) ("It is . . . likely, however, that an entirely objective definition [of true threats] is no longer tenable.").

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when deciding whether speech constitutes a true threat.[82] The court explained that now "we and other courts have wondered whether speech only qualifies as a true threat if the speaker subjectively intended his words to be threatening."[83] In *Khan*, defendant Khan posted online that he planned to "purchase a [G]o[P]ro camera, strap it to [his] chest or forehead, record the killings, and upload them onto Facebook for everyone around the world to see the grisly footage of death."[84] Khan also posted, "[I swear] to Allah and everything I hold dear that I will resort to murder in the next 30 days."[85] Khan was indicted for violating § 875(c) because his Facebook posts conveyed a specific threat, specific targets, a specific location, a specific method, the reasoning behind the threat, and when he planned to commit the mass murder.[86]

Khan argued that his posts were "artistic," "[f]acetious," "hyperbole," and he did not intend for other people to read his posts—rather, he was using Facebook as a "free notebook."[87] Therefore, Khan asserted that he was protected under the First Amendment.[88] Khan challenged jury instructions that included the requirements that the defendant "knowingly transmitted" the threat and the defendant "intended it to communicate a true threat or knew that the communication would be viewed as a true threat."[89] Rejecting his argument, the Seventh Circuit found that Khan's posts constituted true threats.[90] In its opinion, the court reasoned that "a true threat does not need to be communicated directly to the intended victim."[91] Therefore, distancing itself from the objective standard, the court held that a true threat can exist even if there is no fear of imminent harm due to the lack of potential victim awareness of the threat.[92] Moreover, the circuit court found that the jury instructions aligned with

[82] 937 F.3d 1042, 1055 (7th Cir. 2019).

[83] *Id.* (quoting *Parr*, 545 F.3d at 499–500).

[84] *Id.* at 1046.

[85] *Id.* at 1047.

[86] *Id.* at 1046, 1050.

[87] *Id.* at 1049.

[88] *Id.*

[89] *Id.* at 1050.

[90] *Id.* at 1055–56.

[91] *Id.* at 1051.

[92] *Id.* at 1052.

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the requirements for a conviction under § 875(c) provided in *Elonis*, which were "reflected almost verbatim in the instructions Khan challenge[d]."[93]

The Tenth Circuit has also recognized a subjective intent required for true threat convictions following *Elonis*, holding that "a defendant can be constitutionally convicted of making a true threat only if the defendant *intended* the recipient of the threat to feel threatened."[94] Similarly, the Ninth Circuit explained that "the First Amendment allows criminalizing threats only if the speaker intended to make 'true threats.'"[95]

On the other hand, keeping with the objective test, the Fourth Circuit explained that "*Elonis* [did] not affect [its] constitutional rule that a 'true threat' is one that a reasonable recipient familiar with the context would interpret as a serious expression of an intent to do harm."[96] In 2020, the Eighth Circuit affirmed jury instructions applying an objective standard.[97]

Some circuits apply a subjective standard whereas others adhere to an objective standard. In January 2023, the Supreme Court granted certiorari on a case directly examining if, in order to establish that a statement is a true threat, the government has the burden to prove that the speaker subjectively knew or intended the threatening nature of the statement, or if the government only has the burden to prove that an objectively "reasonable person" would interpret the statement as a threat of violence.[98]

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[93] *Id.* at 1051.

[94] Derosier v. Balltrip, 149 F. Supp. 3d 1286, 1295 (D. Colo. 2016) (quoting United States v. Heineman, 767 F.3d 970, 978 (10th Cir. 2014)).

[95] United States v. Bachmeier, 8 F.4th 1059, 1064 (9th Cir. 2021) (alteration in original). *See also* United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005) ("[O]nly *intentional* threats are criminally punishable consistently with the First Amendment." (alteration in original)).

[96] United States v. White, 810 F.3d 212, 220 (4th Cir. 2016) ("[T]he Court's holding in *Elonis* was purely statutory; and, having resolved the question on statutory grounds, the Court declined to address whether a similar subjective intent to threaten is a necessary component of a 'true threat' for purposes of the First Amendment.") (alteration in original).

[97] United States v. Ivers, 967 F.3d 709, 720–21 (8th Cir. 2020) ("[T]he government was not required to prove that Ivers subjectively intended his statement to be a threat . . . .").

[98] Counterman v. Colorado, 143 S. Ct. 644 (2023).

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C. *The Application of* Elonis *and the Subjective Standard on § 871(a)*

The subjective standard applied in *Elonis* has been applied to cases involving § 875(c) and continues to be present in cases in which an individual is charged with violating § 871(a).[99] Whereas there is no level of required mens rea specified in § 875(c) or addressed in *Elonis*, § 871(a) specifies that the required mens rea is "knowingly and willfully."[100] The two statutes are so similar, in fact, that although a mens rea of "knowingly and willfully" has not yet been adopted by § 875(c) from § 871(a), the subjective test put forth in *Elonis* has been utilized in cases involving convictions under § 871(a).[101]

For instance, exemplifying the importance of context and the impact of online speech, in *United States v. Dutcher*, the Seventh Circuit held that a true threat was made under § 871(a) because the defendant "knowingly and willfully" conveyed threats against the President, and willfulness was not based solely on others' interpretation of his statements.[102] Dutcher was convicted of knowingly and willfully threatening to assassinate President Obama when he posted on Facebook, "Thursday I will be in La Crosse. hopefully I will get a clear shot at the pretend president. killing him is our CONSTITUTIONAL DUTY!"[103] Dutcher traveled to La Crosse, Wisconsin, where Obama was scheduled to speak.[104] The Seventh Circuit affirmed the district court's finding that Dutcher knowingly and willfully threatened to take Obama's life.[105] The court reasoned that there was evidence to support the finding that the defendant knowingly and willfully conveyed the threats, even though he did not have the capacity to carry out the threat due to his lack of a ticket to the speech and lack of weapons, aside from a high-powered slingshot.[106] When the United States

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[99] *See* United States v. Dutcher, 851 F.3d 757, 763 (7th Cir. 2017).

[100] *See* 18 U.S.C. §§ 875(c), 871(a).

[101] *See, e.g.*, *Dutcher*, 851 F.3d at 763; United States v. Wright-Darrisaw, 617 F. App'x 107, 108 n.2 (2d Cir. 2015).

[102] 851 F.3d at 763. For an explanation of the reliance on context when evaluating the requirements of "knowingly" and "willfully," see *infra* Part III(A). For a discussion on the impact of the increase in frequency of online speech, see *infra* Part III(C).

[103] *Dutcher*, 851 F.3d at 760.

[104] *Id.*

[105] *Id.* at 763.

[106] *Id.* at 760–61.

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Secret Service interviewed Dutcher, he asserted that he believed he could kill a person with a slingshot, and that he had used his slingshot to hunt small animals.[107] Dutcher also told the Secret Service, among others, that he had posted threats on Facebook and informed them of his plan to assassinate Obama.[108] Moreover, comments on Dutcher's Facebook post indicated that the posts were taken seriously by the audience.[109]

Further, the circuit court held that the jury instruction on "willfulness" was permissible.[110] The instruction was "that Dutcher acted 'willfully' if he 'either actually intended his statement to be a true threat, or that he knew that other people reasonably would view his statement as a true threat but he made the statement anyway.'"[111] Dutcher argued that this instruction on "willfulness" allowed an objective rather than subjective willfulness, which did not align with the subjective test set forth in *Elonis*.[112] But, the court found the jury instruction to be permissible because the jury's finding on willfulness was not *solely* based on an objective understanding that others reasonably viewed the statements as a threat against the President.[113] Per the court, the language "that he knew" other people would interpret his post as a threat implies a subjective understanding that the statement would be interpreted as a true threat.[114]

Additionally, Dutcher argued that the mens rea of "knowingly and willfully" in § 871(a) sets forth that the defendant must have knowledge that the conveyance of the statement is illegal.[115] This heightened proof requirement, however, is generally reserved for "highly technical [criminal] statutes that present[] the danger of

[107] *Id.* at 760, 762.

[108] *Id.* at 760.

[109] *Id.* at 762. One Facebook user commented on the post and encouraged Dutcher to "[t]ry voting" and wrote "how will killing the [President] change anything then??" Another Facebook user commented on one of Dutcher's follow-up posts, "Stay calm my friend. Please!"

[110] *Id.* at 762.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 763.

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ensnaring individuals engaged in apparently innocent conduct."[116] Threats against the President are distinguishable from highly technical statutes.[117] The Court in *Elonis* "expressly rejected the notion that the threat statute there, [§ 875(c)], required the government to show that the defendant knew that his conduct was illegal[]"[118] instead asserting that "ignorance of the law is no excuse."[119] Therefore, the court in *Dutcher* asserted that the safety of the President does not depend on a defendant's familiarity with § 871(a).[120]

Moreover, the Second Circuit also held that "the subjective element is satisfied in [§ 871(a)] by the use of the terms 'knowingly and willfully.'"[121] The court acknowledged that *Virginia v. Black* and *Elonis v. United States* both "might be read" to require subjective intent.[122] Although *Black* and *Elonis* focused on § 875(c) rather than § 871(a), the court included the subjective element in jury instructions in § 871(a) cases, applying the "knowingly and willfully" requirement to the acts of communicating and threatening.[123] As such, *Elonis* has already made an impact on decisions addressing § 871(a), even though the subjective element is already written into the statute through the "knowingly and willfully" requirement.

D. Lack of Clarity Regarding the Mens Rea Requirement for True Threats Under § 875(c)

Generally, prosecutors must prove a guilty mind for each element of a crime.[124] If a statute does not contain in its language a demand that the defendant possess a mens rea for each element of the crime, courts still require that a guilty mind for each

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[116] Some examples of highly technical criminal statutes include those pertaining to taxes and financial transactions. *Id.* (quoting Bryan v. United States, 524 U.S. 184, 194 (1998)). The heightened proof requirements are reserved for highly technical criminal statutes, such as statutes pertaining to taxes and financial transactions. *Id.* (citing *Bryan*, 524 U.S. at 194).

[117] *See id.*

[118] *Id.* (quoting Elonis v. United States, 575 U.S. 723, 734 (2015)).

[119] *Id.*

[120] *Id.*

[121] United States v. Wright-Darrisaw, 617 F. App'x 107, 108 n.2 (2d Cir. 2015).

[122] *Id.*

[123] *Id.*

[124] Elonis v. United States, 575 U.S. 723, 734 (2015) (citing United States v. Balint, 258 U.S. 250, 251 (1922)); Torres v. Lynch, 578 U.S. 452, 467 (2016) ("[C]ourts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense.").

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element be proven.[125] Courts typically interpret the statute broadly when it does not specify a required mens rea.[126] The court may require a defendant to "know the facts that make his conduct fit the definition of the offense" rather than know that the conduct is illegal.[127] Ultimately, unless Congress expressly provides that there should not be a mental state, courts infer that Congress intended there to be a mental state requirement.[128]

Whereas § 871(a) includes the mens rea of "knowingly and willfully" in its statutory language, § 875(c) does not specify what levels of mens rea constitute a true threat, and the Court in *Elonis* did not clarify this ambiguity.[129] Justice Samuel Alito and Justice Clarence Thomas dissented in *Elonis*, criticizing the majority's decision for not providing an answer to whether a mens rea of "recklessness" supports liability under § 875(c).[130] Justice Thomas began by explaining that eleven circuits have held that § 875(c) only requires proof of general intent, requiring "no more than that a defendant knew he transmitted a communication . . . and understood the ordinary meaning of those words in the relevant context."[131]

The remaining two circuit courts, the Ninth and Tenth Circuits, concluded that proof of an intent to threaten was required to convict a defendant.[132] Justice Thomas criticized the majority for failing to rule on the appropriate mental state, as the Court adopted the Ninth and Tenth Circuits' conclusion that proof of intent is necessary for a conviction under § 875(c), emphasizing that the opinion "carefully leaves open the possibility that recklessness may be enough."[133] The dissent stressed the broad impact this lack of clarity will have, stating that the failure to establish a required

[125] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994).

[126] *Elonis*, 575 U.S. at 734 (citing *X-Citement Video, Inc.*, 513 U.S. at 70).

[127] *Id.* (quoting Staples v. United States, 511 U.S. 600, 608 n.3 (1994)).

[128] *E.g.*, *Torres*, 578 U.S. at 467.

[129] 18 U.S.C. §§ 871(a), 875(c); Ruan v. United States, 142 S. Ct. 2370, 2381 (2022) (citing *Elonis*, 575 U.S. at 732) ("In *Elonis*, for example, we considered the mental state applicable to a statute that criminalized threatening communications but contained no explicit *mens rea* requirement.").

[130] *Elonis*, 575 U.S. at 742, 750 (Alito, J., concurring in part and dissenting in part; Thomas, J., dissenting).

[131] *Id.* at 750 (Thomas, J., dissenting).

[132] *Id.*

[133] *Id.*

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mental state for conviction "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty."[134]

III. THE MENS REA OF "KNOWINGLY" AND "WILLFULLY," AS USED IN § 871(A), SHOULD BE APPLIED TO § 875(C)

A mens rea of "knowingly and willfully" should be required for a conviction under § 875(c), just as it is under § 871(a). Section 875(c) and § 871(a) are very similar in that both prohibit true threats, both were enacted in 1948, and both have the same punishment written into the statute: a fine or imprisonment of not more than five years, or both.[135] Moreover, the subjective standard discussed in *Elonis* under § 875(c) has been referenced in cases applying to § 871(a), so it would be reasonable to apply the explicitly stated "knowingly and willfully" mens rea from § 871(a) to § 875(c) to clarify the currently unspecified mens rea.[136] Additionally, utilizing the mens rea of "knowingly and willfully" for § 875(c) would help to ensure that only wrongful conduct results in conviction, would diminish ambiguities faced by attorneys, judges, and citizens, and would account for the expansion of online speech.

A. Defining "Knowingly" and "Willfully"

The Third Circuit has held that a state of mind, such as knowledge or willfulness, often cannot be proven directly because one cannot read another's mind.[137] Jury instructions therefore provide that a "[defendant's] state of mind can be proved indirectly from the surrounding circumstances."[138] As such, context is essential.[139]

The Third Circuit Jury Instructions state that an individual acted "knowingly" if the person "was conscious and aware of the nature of [his] actions and of the surrounding facts and circumstances . . . ."[140] That definition of "knowingly" was

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[134] *Id.*

[135] 18 U.S.C §§ 871(a), 875(c).

[136] *Elonis*, 575 U.S at 734–35; *see, e.g.*, United States v. Dutcher, 851 F.3d 757, 763 (7th Cir. 2017).

[137] THIRD CIR. MODEL CRIM. JURY INSTRUCTIONS § 5.01 (COMM. ON MODEL CRIM. JURY INSTRUCTIONS 3D CIR. 2021).

[138] *Id.*

[139] *See infra* Section III(C).

[140] THIRD CIR. MODEL CRIM. JURY INSTRUCTIONS § 5.02 (COMM. ON MODEL CRIM. JURY INSTRUCTIONS 3D CIR. 2021).

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upheld by the Third Circuit in *United States v. Maury*, with the court noting that "a person acts 'knowingly' if that person acts voluntarily and intentionally and not because of mistake or accident or other innocent reason."[141] In contrast, "willfully" requires that the defendant "acted with a purpose to disobey or disregard the law."[142]

"Knowingly" and "willfully" can be distinguished because knowingly does not require the defendant to know his conduct is illegal.[143] The "knowingly" requirement only "requires proof of knowledge of the facts that constitute the offense."[144] Willfully, on the other hand, when applied to certain statutes, requires that the defendant acted with knowledge that his conduct was illegal.[145] In *United States v. Cheeseman*, the court rejected a defendant's argument that he did not knowingly violate 18 U.S.C. § 922(g)(3), which is required for the forfeiture of firearms under 18 U.S.C. § 924(d)(1), because "knowingly" only requires "that the act be voluntary and intentional and not [to require] that a person knows he is breaking the law."[146]

Regarding the meaning of "willfully" when applied to § 871(a) and § 875(c), a defendant does *not* need to have knowledge that his or her conduct was illegal under the specific statute because, as the court in *Dutcher* explained, the heightened proof requirement is generally reserved for "highly technical [criminal] statutes that present[] the danger of ensnaring individuals engaged in apparently innocent conduct."[147] Therefore, it is proper to instruct a jury to find the defendant guilty if the defendant knew the statement was a true threat or would be interpreted as a true threat, rather than if the defendant knew his conduct was illegal under the statute.[148]

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[141] *Id.* § 5.02 cmt. (quoting United States v. Maury, 695 F.3d 227, 261 (3d Cir. 2012)). Knowingly is "normally associated with awareness, understanding, or consciousness." *Id.* (citing Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005)).

[142] *Id.* § 5.05. "'Willfully' has been defined in various ways in different statutory contexts and, as such, is a word of notoriously elusive meaning." *Id.* § 5.05 cmt.

[143] *Id.* § 5.02.

[144] *Id.* § 5.02 cmt. (citing Bryan v. United States, 524 U.S. 184, 193 (1998)).

[145] *Id.* (citing United States v. Starnes, 583 F.3d 196, 210 (3d Cir. 2009)).

[146] *Id.* (citing United States v. Cheeseman, 600 F.3d 270, 281 (3d Cir. 2010)).

[147] United States v. Dutcher, 851 F.3d 757, 763 (7th Cir. 2017) (citing *Bryan*, 524 U.S. at 194).

[148] *Id.*

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As the Court in *Elonis* asserted, "ignorance of the law is no excuse."[149] The mens rea of "knowingly and willfully" inherently apply a subjective standard.[150]

B. *Extending a Mens Rea of "Knowingly and Willfully" from § 871(A) to § 875(C) Will Help Provide Judicial Clarity*

The target of the threatening language at issue is the root difference between § 871(a) and § 875(c), as the President, or successor to the Presidency, must be the target of the language under § 871(a), and anyone can be the target of the language under § 875(c).[151] Besides the differing target, the two statutes are nearly identical, sharing overlapping language, the same year of enactment, and even the same punishment.[152] Cases centering around § 871(a) have been cited and applied to cases addressing § 875(c) and vice versa.[153] Due to the close relation and prominent similarities between the two statutes, the mens rea of "knowingly and willfully" contained in the statutory language of § 871(a) should be applied to § 875(c).

The Supreme Court has defended the inclusion of "willfulness" in § 871(a), explaining that the language Congress chose for the statute must be interpreted "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."[154] The safety of government officials and citizens should not depend on a defendant's understanding of a certain statute—rather, the focus when determining guilt should depend on the defendant's understanding and intent behind the language conveyed.[155]

Importantly, there is a need to account for the individual who is unknowingly and unintentionally engaging in illegal conduct so that only wrongful conduct results in conviction. Courts have historically required that "wrongdoing must be conscious

[149] Elonis v. United States, 575 U.S. 723, 735 (2015).

[150] United States v. Wright-Darrisaw, 617 F. App'x 107, 108 n.2 (2d Cir. 2015).

[151] 18 U.S.C. §§ 871(a), 875(c); Watts v. United States, 394 U.S. 705, 708 (1969) ("[Section 871(a)] initially requires the Government to prove a true 'threat.'").

[152] 18 U.S.C. §§ 871(a), 875(c).

[153] *See infra* Section II(C).

[154] *Watts*, 394 U.S. at 708 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[155] *See* United States v. Dutcher 851 F.3d 757, 763 (7th Cir. 2017) (citing Elonis v. United States, 575 U.S. 723, 734 (2015)).

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to be criminal" so citizens can "choose between good and evil."[156] A mens rea requirement in general helps to "separate wrongful conduct from 'otherwise innocent conduct,'" and here, a mens rea requirement of "knowingly and willfully" helps to separate protected speech from unprotected speech.[157]

Accompanying the need to protect the individual innocently conveying a threat is the need to protect the community exposed to the threat, as they may experience fear, and the need to protect the target of the threat for their physical safety. As the Supreme Court noted in *R.A.V. v. City of St. Paul*, true "threats of violence are outside the [First Amendment]" because laws prohibiting true threats "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[158] Additionally, keeping in mind the Supreme Court's shift in recent years to a subjective test, applying a subjective test rather than an objective test may make true threat cases more difficult to prosecute and therefore, can make it more challenging for victims to obtain protection because it may be more burdensome to prove the defendant's mindset.[159]

Although the argument addressing the higher burden on the prosecution may be conveyed with intent to support an objective test and a lower required mens rea, the purpose of criminal law is to "prohibit conduct society finds worthy of punishment."[160] The First Amendment and case precedent explain that "the burden on the prosecutor should be heightened when the regulation of pure speech is involved."[161] Ultimately, "the government may not regulate speech based on its substantive content or the message it conveys."[162]

As Justice Louis D. Brandeis wrote in his concurring opinion in *Whitney v. California*, encapsulating the traditional rationales for protecting freedom of speech,

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[156] *Elonis*, 575 U.S. at 734 (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)).

[157] *Id.* at 736 (quoting Carter v. United States, 530 U.S. 255, 269 (2000)).

[158] 505 U.S. 377, 388 (1992).

[159] Rebecca Dussich, *True Threats and the First Amendment: Objective vs. Subjective Standards of Intent to Be Revisited in Elonis v. United States*, U. CIN. L. REV. (Jan. 8, 2015), https://uclawreview.org/2015/01/08/true-threats-and-the-first-amendment-objective-vs-subjective-standards-of-intent-to-be-revisited-in-elonis-v-united-states/.

[160] Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1273 (2013).

[161] *Id.*

[162] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

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suppressing unpopular speech may be more dangerous than allowing it.[163] Just as the subjective test may be supported because it protects individuals who thought they were innocently engaging in conduct from being convicted, specifying a mens rea of "knowingly and willfully" can accomplish this as well. Ultimately, the ideal solution for § 875(c) would be to utilize the subjective standard and apply the mens rea expressly stated in a nearly identical statute, § 871(a), to achieve protection of First Amendment rights as well as protect individuals who are victims of such language.

The specificity of mental state required for conviction under § 875(c) would allow courts to apply requirements of proof in true threat cases far more consistently. Attorneys, judges, and citizens currently do not have a clear expectation of what the level of mens rea is required under the statute, creating confusion and uncertainty.[164] The Supreme Court explained, "[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material . . . ."[165] This risk of self-censorship creates "a potential for extraordinary harm and a serious chill upon protected speech."[166] Therefore, applying the mens rea of "knowingly and willfully" from § 871(a) to § 875(c) may alleviate the ambiguity of required mens rea for burden of proof.

C. *Mens Rea of "Knowingly and Willfully" Accounts for Online Speech*

Importantly, adding a specified mens rea to § 875(c) can provide an adequate remedy to counter the inherent ambiguities of online speech. The law must adapt to changing times, and in recent years, the Internet has become a major forum for public debate and dialogue.[167] One may argue that the establishment of intent, often difficult to prove, can be examined in the light of modern technology and the prominent use of social media, as social media may provide insight into objective and subjective

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[163] 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[164] *Elonis*, 575 U.S. at 750 (Thomas, J., dissenting). *See infra* Part IV for a discussion of the various required mentes reae in cases under 18 U.S.C. § 875(c) surrounding the Capital Insurrection.

[165] Mishkin v. New York, 383 U.S. 502, 511 (1966); *see also* Ashcroft v. ACLU, 542 U.S. 656, 658 (2004) ("[S]peakers may self-censor rather than risk the perils of trial.").

[166] *Ashcroft*, 542 U.S. at 671.

[167] *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband; Packingham v. North Carolina, 582 U.S. 98, 104 (2017) ("[T]he the most important places . . . for the exchange of views . . . is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular . . . .") (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).

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intent.[168] Social media websites are "powerful mechanisms available to a private citizen to make his or her voice heard[,] . . . allow[ing] a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'"[169] Context is used to establish the state of mind of the defendant.[170] Just as speech may be posted carelessly, it also may be posted with conscious knowledge of how the public audience will receive the statement. Comments on posts may shed light onto the reactions of individuals, including whether they are interpreting the statement as a threat. For example, in *Dutcher*, other Facebook users' comments on Dutcher's threatening posts indicated that the other users interpreted the language as a threat, supporting a finding that Dutcher subjectively intended to create a true threat.[171]

On the other hand, language conveyed on the Internet has a greater likelihood of being misunderstood, and there may be a lack of context. Social medial posts are open to misinterpretation, especially if they are taken out of context.[172] Online speakers may not know, or may not have control over, who will see their speech. If someone is conveying offline speech, he or she might have greater knowledge and control over who he or she is speaking to. In contrast, online speech may be accessible by countless other people. As the audience grows, the likelihood that one audience member will interpret the speech as threatening increases. By using a subjective intent, specifically "knowingly and willfully," speech remains protected because it requires a consideration of the speaker's intended message, motive, and awareness of the perception of the statement rather than the interpretation of the statement by an unfamiliar audience lacking context.[173]

The need to protect both innocent individuals unknowingly conveying threatening language and individuals who are exposed to or targeted by threats must be balanced while addressing the application of the First Amendment in modern times. Objective tests and lowered requirements for mens rea may allow for greater prosecution of true threats, adhering to the need to protect targeted individuals and others exposed to the threat, whereas subjective tests and the heightened mens rea of

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[168] Murphy, *supra* note 40, at 747.

[169] *Packingham*, 582 U.S. at 107 (quoting *Reno*, 521 U.S. at 870).

[170] *Id.* at 104.

[171] *Dutcher*, 851 F.3d at 762. One Facebook user commented on the post and encouraged Dutcher to "[t]ry voting" and wrote "how will killing the [President] change anything then??" Another Facebook user commented on one of Dutcher's follow-up posts, "Stay calm my friend. Please!" *Id.*

[172] Murphy, *supra* note 40, at 734.

[173] *See* United States v. Twitty, 641 F. App'x 801, 805 (10th Cir. 2016).

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"knowingly and willfully" may lead to greater protection of innocent individuals who unknowingly conveyed a threat outside of First Amendment protection. Ultimately, an ideal solution would be to utilize the recent subjective test and apply the mens rea expressly stated in a nearly identical statute to achieve protection of First Amendment rights as well as protect individuals who are victims of such language.

IV. EXAMINING TRUE THREATS SURROUNDING THE JANUARY 6, 2021 INSURRECTION AT THE CAPITOL

On January 6, 2021, rioters stormed the U.S. Capitol and disrupted a joint session of the U.S. Congress during the formal certification process affirming the election results from the 2020 presidential election.[174] Rioters breached police lines and security barriers, broke into the Capitol building, and entered the House and Senate chambers.[175] The Capitol building and nearby locations were put on lock down, and the House and Senate were evacuated.[176] Since the insurrection, the Government has been investigating and prosecuting the individuals responsible for the attack.[177] By January 2022, one year after the insurrection, more than 725 defendants have been arrested for their role in the insurrection.[178] The charges cover a variety of crimes, including assaulting, resisting or impeding officers or employees, entering or remaining in a restricted federal building or grounds, corruptly obstructing, influencing, or impeding official proceedings, and, most relevant to this Note's analysis, interstate threats.[179]

Regarding the investigation of individuals who conveyed interstate threats surrounding the insurrection, Attorney General Merrick B. Garland reaffirmed that the U.S. Department of Justice will continue to protect those who serve the public

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[174] *One Year Since the Jan. 6 Attack on the Capitol*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol (last updated Dec. 30, 2021).

[175] JURIST Staff, *Pro-Trump Rioters Storm US Capitol as Violent Lawlessness Disrupts Congressional Electoral Count*, JURIST (Jan. 6, 2021, 3:58 PM), https://www.jurist.org/news/2021/01/pro-trump-rioters-storm-us-capitol-as-violent-lawlessness-disrupts-congressional-electoral-count/.

[176] *Id.*

[177] U.S. DEP'T OF JUST., *supra* note 174.

[178] *Id.*

[179] *Id.*

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from threats of violence by investigating illegal threats and holding perpetrators accountable.[180] Attorney General Garland explained that:

> In a democracy, people vote, argue, and debate—often vociferously—in order to achieve the policy outcomes they desire. But in a democracy, people must not employ violence or unlawful threats of violence to affect that outcome. Citizens must not be intimidated from exercising their constitutional rights to free expression and association by such unlawful conduct.[181]

While the investigations and prosecutions are ongoing, numerous individuals have been charged under § 875(c).[182] Some individuals have been charged with "knowingly and willfully" violating § 875(c),[183] some with "knowingly" violating § 875(c),[184] and some with no mens rea specified regarding the violation of § 875(c).[185] The cases are heavily related because they all involve a violation of the same statute, surrounding the same event, and the majority are in the D.C. Circuit.[186] The prosecutors are not at fault for conveying the various mentes reae in these prosecutions because there is no established mens rea to apply.[187] The disparity in mens rea for the same charge, surrounding the same event, in the same circuit,

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[180] *Attorney General Merrick B. Garland Delivers Remarks on the First Anniversary of the Attack on the Capitol*, U.S. DEP'T OF JUST. (Jan. 5, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-first-anniversary-attack-capitol.

[181] *Id.*

[182] *See, e.g.*, Indictment at 2, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Mar. 9, 2021); Criminal Complaint at 2, United States v. Stoll, No. 1:21-MJ-030 (S.D. Ohio Jan. 14, 2021); Statement of the Offense at 2, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2021); Indictment at 3, United States v. Miller, No. 1:21-MJ-117 (D.D.C. Feb. 12, 2021).

[183] *See* Indictment at 2, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Mar. 9, 2021).

[184] *See* Criminal Complaint at 2, United States v. Stoll, No. 1:21-MJ-030 (S.D. Ohio Jan. 14, 2021); Statement of the Offense at 2, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2021).

[185] *See* Indictment at 3, United States v. Miller, No. 1:21-MJ-117 (D.D.C. Feb. 12, 2021).

[186] *See, e.g.*, Indictment at 2, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Mar. 9, 2021); Criminal Complaint at 2, United States v. Stoll, No. 1:21-MJ-030 (S.D. Ohio Jan. 14, 2021); Statement of the Offense at 2, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2022); Indictment at 3, United States v. Miller, No. 1:21-MJ-117 (D.D.C. Feb. 12, 2021).

[187] Ruan v. United States, 142 S. Ct. 2370, 2381 (2022) (citing Elonis v. United States, 575 U.S. 723, 732 (2015)) ("In *Elonis*, for example, we considered the mental state applicable to a statute that criminalized threatening communications but contained no explicit *mens rea* requirement.").

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highlights the need to fairly and consistently apply the same mens rea—"knowingly and willfully"—to all defendants.[188]

For example, Troy Anthony Smocks pled guilty to the charge of threats in interstate commerce.[189] The affidavit and indictment both specifically allege that Smocks "knowingly and willfully" transmitted the threats in interstate commerce.[190] Smocks threatened law enforcement officers on January 6, 2021, when he posted the following language on the Parler social media service, viewed at least 60,926 times:

> Today, January 6th, 2021, We Patriots by the millions have arrived in Washington, DC, carrying banners of support for the greatest President the World has ever known. But if we must . . . Many of us will return on January 19th, 2021, carrying our weapons in support of Our nation's resolve, to which the world will never forget. We will come in numbers that no standing army or police agency can match. However, the police are NOT our enemy, unless they choose to be! All who will not stand with the American Patriots . . . or cannot stand with us, then, that would be a good time for you to take a few vacation days. -The American Patriot.[191]

Additionally, Smocks threatened politicians and executives in the technology industry on January 7, 2021, when he posted the following language on Parler, which was viewed more than 54,000 times:

> So over the next 24 hours, I would say lets get our personal affairs in order. Prepare our weapons, and then go get'em. Lets hunt these cowards down like the Traitors that each of them are. This includes RINOS, Dems, and Tech Execs. We now have the green light. [All] who resist US are enemies of Our Constitution, and must be treated as such. Today, the cowards ran as We took the Capital. They

[188] *See Elonis*, 575 U.S. at 750 (Thomas, J., dissenting) (explaining that the failure to establish a required mental state for conviction of true threats under 18 U.S.C. § 875(c) "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.").

[189] Plea Agreement at 1, United States v. Smocks, No. 1:21-CR-00198 (D.D.C. Sept. 9, 2021).

[190] Indictment at 2, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Mar. 9, 2021); Affidavit in Support of a Criminal Complaint at ¶ 2, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Jan. 14, 2021).

[191] Affidavit in Support of a Criminal Complaint at ¶ 12, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Jan. 14, 2021) (alteration in original).

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> have it back now, only because We left. It wasn't the building that We wanted . . . it was them![192]

Not only did Smocks acknowledge that he conveyed the threatening language when he pled guilty, but he acknowledged that he conveyed the statements "knowingly and willfully" because he signed a plea agreement confirming that he agrees to the charges without reservation, and the plea agreement directly references the indictment, which uses the "knowingly and willfully" language.[193]

> Whereas the court in Smocks' case specified "knowingly and willfully," the criminal complaint in Justin Stoll's case only specified the mens rea that Stoll "knowingly" violated 18 U.S.C. § 875(c).[194] On January 6, 2021, Stoll asked his viewers in a video posted to a Clapper account if Stoll should wear a black United States flag when he is in Washington, D.C., in reference to the January 6, 2021 breach of the Capitol.[195] Stoll explained in the video that the black flag means: "[N]o enemy combatants will receive aid. You will get no quarters from me. Basically, if you are an enemy combatant, you will be shot on sight . . . I know this is the end-all flag. This is the it's-too-late-to-give-a-s**t flag."[196] A fellow online user commented on Stoll's video, stating "Cool I'm glad I saved this video lol I hope you really went in the capitol bldg. You'll have 10 years of free room and board waiting for you."[197] Stoll verbally responded to the comment in another video, stating: [I]f you ever in your f***ing existence did something to jeopardize taking me away from my family, you will absolutely meet your maker. You can play that for the D.A. in court, I don't care. If you ever jeopardize me, from being with my family, you will absolutely meet your mother f[***]ing maker, and I will be the one to arrange the meeting.[198]

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[192] *Id.* ¶ 14 (alteration in original).

[193] Plea Agreement at 1, United States v. Smocks, No. 1:21-cr-00198 (D.D.C. Sept. 9, 2021); Indictment at 2, United States v. Smocks, No. 1:21-mj-00058 (D.D.C. Mar. 9, 2021).

[194] Criminal Complaint at 2, United States v. Stoll, No. 1:21-mj-030 (S.D. Ohio Jan. 14, 2021).

[195] *Id.* at 5.

[196] *Id.* at 6.

[197] *Id.* at 6–7.

[198] *Id.* at 7 ("S[toll]'s demeanor in the video is serious and aggressive.").

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Justin Stoll has not yet entered a plea regarding the charges.[199]

Cleveland Grover Meredith, Jr. pled guilty to interstate threats to injury or kidnap in violation of § 875(c), and his court filings also provide a mens rea of "knowingly."[200] On January 7, 2021, while Meredith was in Washington, D.C., he sent a text message in interstate commerce to his relative who was in Georgia at the time, threatening that Meredith was "[t]hinking about heading over to Pelosi C**T's speech and putting a bullet in her noggin on Live TV [purple devil emoji]."[201] Meredith's relative viewed the message as a threat, so she told Meredith's mother about the text message.[202] Meredith's mother then contacted the FBI because she was concerned for the safety of Meredith and others.[203] Meredith acknowledged that "he sent it with knowledge that the message would be viewed as a threat."[204] Thus, this acknowledgement fulfills the subjective intent requirement and would satisfy "knowingly" if that were required. Moreover, Meredith's relative's and mother's interpretations of the text message demonstrate an objective intent to convey threatening language.

In contrast to the above cases, Garret Miller was charged with the interstate communication of threats to injury or kidnap in violation of § 875(c), and his court filings do not yet provide a specified mens rea.[205] On January 6, 2021, Miller replied to Congresswoman Alexandria Ocasio-Cortez on Twitter, tweeting "Assassinate AOC."[206] On January 16, 2021, Miller additionally threatened a United States Capitol Police officer, writing in an online chat that "We going to get a hold of [the USCP officer] and hug his neck with a nice rope . . . ."[207] Miller claimed via a Facebook discussion that the officer "deserve[s] to die" "so its [sic] huntin

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[199] Stoll, Justin, U.S. DEP'T OF JUST., https://www.justice.gov/usao-dc/defendants/stoll-justin (last updated Jan. 10, 2022).

[200] Plea Agreement at 1, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2021); Statement of the Offense at 2, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2021).

[201] Statement of the Offense at 1–2, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2021).

[202] *Id.* at 2.

[203] *Id.*

[204] *Id.*

[205] *See, e.g.*, Amended Criminal Complaint at 1, United States v. Miller, No. 1:21-mj-117 (D.D.C. Jan. 1, 2021); Indictment at 3, United States v. Miller, No. 1:21-mj-117 (D.D.C. Feb. 12, 2021).

[206] Criminal Complaint at 8–9, United States v. Miller, No. 1:21-mj-117 (D.D.C. filed Jan. 19, 2021).

[207] *Id.* at 10.

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season."[208] The finding that Miller knowingly and willfully conveyed the threatening language with subjective intent is made stronger by Miller's communication in a Facebook chat on January 15, 2021, where he wrote "that he is 'happy to make death threats so I been just off the rails tonight lol,' and is 'happy to be banned now [from Twitter].'"[209] When another user asked if the police knew Miller's name, Miller responded, "[I]t might be time for me to . . . Be hard to locate."[210] Miller has not yet pled guilty.[211]

The court filings for just these four cases surrounding the Capitol insurrection highlight the need for a specified mens rea of "knowingly and willfully" in § 875(c).[212] While one case—Troy Anthony Smocks—specifies "knowingly and willfully" in the court documents,[213] two cases only specify "knowingly,"[214] and one case has not yet provided a mens rea.[215] Three of the four cases discussed are within the D.C. Circuit.[216] If prosecution faces a heightened mens rea for one defendant, it should not face a different mens rea for other defendants who face the same charge. The prosecutors are not at fault for conveying the various mentes reae in these prosecutions because there is no correct mens rea to apply.[217] In order to give prosecutors, defense attorneys, judges, and citizens clarity and a clear expectation of

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[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Miller, Garret*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-dc/defendants/miller-garret (last updated Jan. 10, 2022).

[212] The four cases discussed are: Indictment at 2, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Mar. 9, 2021); Criminal Complaint at 2, United States v. Stoll, No. 1:21-MJ-030 (S.D. Ohio Jan. 14, 2021); Statement of the Offense at 2, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2021); Indictment at 3, United States v. Miller, No. 1:21-MJ-117 (D.D.C. Feb. 12, 2021).

[213] *See* Indictment at 2, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Mar. 9, 2021).

[214] *See* Criminal Complaint at 2, United States v. Stoll, No. 1:21-MJ-030 (S.D. Ohio Jan. 14, 2021); Statement of the Offense at 2, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2021).

[215] *See* Indictment at 3, United States v. Miller, No. 1:21-MJ-117 (D.D.C. Feb. 12, 2021).

[216] *See* Indictment at 2, United States v. Smocks, No. 1:21-MJ-00058 (D.D.C. Mar. 9, 2021); Statement of the Offense at 2, United States v. Meredith, No. 1:21-CR-159 (D.D.C. Sept. 1, 2021); Indictment at 3, United States v. Miller, No. 1:21-MJ-117 (D.D.C. Feb. 12, 2021).

[217] *See Elonis*, 575 U.S. at 750 (Thomas, J., dissenting) (explaining that the failure to establish a required mental state for conviction of true threats under 18 U.S.C. § 875(c) "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.").

what level of mens rea will be required for a conviction, courts should apply the mens rea of "knowingly and willfully" to § 875(c).

V. MENS REA REQUIRED IN § 875(C) MOVING FORWARD

In order provide judges, attorneys, and citizens with a fair, consistent, and predictable application of § 875(c), the statute should adopt the mens rea of "knowingly and willfully" that is explicitly set forth in the statutory language of § 871(a). Utilizing "knowingly and willfully" as a mens rea aligns with the Supreme Court's reasoning for applying a subjective test under § 875(c), which has also been acknowledged in cases involving § 871(a): the protection of individuals who believe they are merely exercising their First Amendment rights.[218] The heightened mens rea of "knowingly and willfully" balances the need to protect individuals exposed to the threat with the need to protect individuals unintentionally conveying threatening language. The plentiful similarities between § 875(c) and § 871(a) support the adoption of the mens rea from § 871(a) by § 875(c). To achieve consistency, fairness, and proper protections, courts should apply the explicitly stated "knowingly and willfully" mens rea from § 871(a) to § 875(c).

[218] 18 U.S.C. §§ 871(a), 875(c).

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