

**THE CONUNDRUM LEFT IN ELONIS' WAKE:
DID CONGRESS INTEND FOR A
SUBJECTIVE READING OF 18 U.S.C. §
875(C)?**

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INTRODUCTION

The right to engage in the free exchange of ideas and speak one's mind free from government interference is a fundamental right granted by the First Amendment.¹ However, this right is not absolute.² There are certain categories of speech that the government is free to regulate.³ The focus of this Note will examine the true threat doctrine exception⁴ and its codification under 18 U.S.C. § 875(c), which criminalizes the act of sending threatening messages through interstate commerce.⁵ This Note

¹ U.S. CONST. amend. I.

² See *Virginia v. Black*, 538 U. S. 343, 347–48 (2003).

³ See *id.* A state may also punish those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 359. The Court has also held that fighting words—“those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction”—are generally subject to prohibition without violating the First Amendment. *Cohen v. California*, 403 U.S. 15, 20 (1971). Furthermore, “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁴ “True threats’ encompass 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.” *Virginia*, 538 U.S. at 359. The speaker does not need to actually intend to carry out the threat. Rather, the purpose for the prohibition on true threats “protect[] 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.* at 359–60.

⁵ “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,

will also examine the Supreme Court's recent decision in *Elonis v. United States*,⁶ and discuss the two important questions that still remain. First, whether section 875(c) can be satisfied with a showing of recklessness, and second, whether Congress intended to include a requirement for the speaker to intend to threaten.

Congress enacted 18 U.S.C. § 875(c) to criminalize the use of the mail system to transmit threats in interstate commerce; however, as technology developed the statute was subsequently amended to include other methods of conveying threats.⁷ The amendments shifted the statute's purpose from only deterring the use of the mail system to transmit threats to also protect potential recipients from receiving threats through any medium.⁸ The main issues with the statute are the lack of a specific *mens rea*⁹ and ambiguity on whether the actor must act with the intent to threaten.¹⁰

Part II discusses 18 U.S.C. § 875(c) and its origins as well as some of the inherent problems based on its construction.¹¹ Part III discusses the standard set forth by the Supreme Court in *Elonis*, specifically the absence of a uniform constitutional standard following the decision.¹² Part IV discusses the mental culpability of 18 U.S.C. § 875(c)¹³ and explores the use of recklessness as a culpable mental state.¹⁴ Part IV also addresses whether section 875(c) is best interpreted as a crime of general intent or specific intent. The distinction is imperative to the court's application because a crime of specific intent has a heightened mental state requirement.¹⁵ Part V evaluates the court's current constitutional analysis of section 875(c) and discusses several problems raised by the courts' interpretation. Part VI discusses some of the various concerns outlined by the courts and the legal community with the current application and

or both." 18 U.S.C. § 875(c) (2015).

⁶ *Elonis v. United States*, 135 S. Ct. 2001 (2015).

⁷ See *infra* Part II.

⁸ Thomas "Tal" DeBauche, *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, 995–96 (2014).

⁹ See BLACK'S LAW DICTIONARY 1137 (4th ed. 1968) (defining *mens rea* as "a guilty mind; a guilty or wrongful purpose; a criminal intent.").

¹⁰ See 18 U.S.C. § 875(c).

¹¹ See *infra* Part II.

¹² See *infra* Part III.

¹³ See *infra* Part IV A.

¹⁴ See *infra* Part IV B.

¹⁵ See *infra* Part V.

interpretation of 18 U.S.C. § 875(c).

I. PART ONE: 18 U.S.C. § 875(C)

18 U.S.C. § 875(c) can be traced back to Public Law 72-274, which was first enacted in 1932.¹⁶ The original purpose of the law was to prevent people from using the mail to transmit threats in interstate commerce.¹⁷ In 1934 the law was modified so that it applied to any threat made in interstate commerce regardless of the means of communication.¹⁸ The modified law recognized that criminals were taking advantage of new technologies, such as the telephone and telegraph, to send threatening messages.¹⁹ Along with these changes, the law was also modified to include a penalty based whether the actor sent the threat with intent to extort.²⁰ In 1939, the law was further expanded to include a penalty if the actor sent the threat with non-extortionate intent.²¹ These new modifications required the court to look at the actor's mental state to determine if the threats were made with or without a specific intent so that the court could apply the proper penalty.²² The statute's history shows that Congress intended the court to apply the statute as a specific intent crime based on the presence of separate penalties for extortionate and non-extortionate intent, rather than a flat penalty irrespective of the actor's intent.²³ However, based on the current language, the heightened requirement has been lost despite its earlier presence.²⁴

Despite Congress' intent, the current language of section 875(c)²⁵ does not specify or require that an actor possess intent to threaten, nor does the language make clear the level of mental

¹⁶ 18 U.S.C. § 875(c).

¹⁷ DeBauche, *supra* note 8, at 995–96.

¹⁸ *Id.*

¹⁹ *Id.* Courts have also applied the modern version of § 875(c) to Twitter, YouTube, Facebook, and other forms of online content.

²⁰ *See id.* (stating that the statute still required extortionate intent on the part of the speaker).

²¹ *Id.*

²² *Id.* There were additional minor changes to the law before it was codified as 18 U.S.C. § 875(c) in 1948. *Id.*

²³ DeBauche, *supra* note 8, at 995–96.

²⁴ *Id.*; 18 U.S.C. § 875(c).

²⁵ “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.” 18 U.S.C. § 875(c).

culpability required by the actor i.e. whether the *actus reus* needed to be performed either purposefully, knowingly, or recklessly.²⁶ Instead, when a strict, plain language application is employed, the prosecution need only prove the communication was sent purposefully, knowingly, or recklessly. Such an application would prevent the jury from considering the actor's subjective intent to threaten. Consequently, this approach runs the risk of creating a strict liability standard, potentially criminalizing more speech than intended, which could chill future speech and speakers.²⁷ The better approach would be for the court to adopt a general *mens rea* of either purposefully, knowingly, or recklessly²⁸ and to require the actor to have the specific intent to threaten when sending the communication.²⁹

II: PART TWO: ELONIS V. UNITED STATES

The most recent landmark case addressing the court's approach to section 875(c) is *Elonis v. United States*.³⁰ The case originated in the Eastern District of Pennsylvania and was subsequently appealed to both the Third Circuit Court of Appeals, and the United States Supreme Court.³¹

Anthony Elonis was arrested on December 8, 2010 and charged with transmitting communications in interstate commerce, which contain a threat to injure the person of another in violation of 18 U.S.C. § 875(c).³² These charges were based on a series of graphic, violent, and derogatory comments posted on his Facebook social media page.³³ A grand jury indicted Elonis on

²⁶ *Id.*; 18 U.S.C. § 875(b), (d) (2014) (18 U.S.C. § 875(b), (d) both require an "intent to extort.").

²⁷ See Alison Grande, *Justices Say Facebook Posts Can't Be Threats Without Intent*, LAW 360 (June 1, 2015, 10:32 AM), <http://www.law360.com/articles/630067/justices-say-facebook-posts-can-t-be-threats-without-intent> (discussing teenager's speech being lumped together with prohibited speech despite the speaker's intent).

²⁸ See *infra* note 73.

²⁹ See, e.g., *United States v. Bagdasarian*, 652 F.3d 1113, 1115–16 (9th Cir. 2011) (for one court's application of section 875(c) with consideration of the actor's intent to threaten).

³⁰ 135 S. Ct. 2001 (2015).

³¹ *Id.*

³² *United States v. Elonis*, 730 F.3d 321, 326 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014), *rev'd and remanded*, 135 S. Ct. 2001 (2015).

³³ See, e.g., *id.* at 324 ("There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then

five counts of transmitting threatening communications in interstate commerce.³⁴ A jury convicted Elonis on four of the five counts and he was sentenced to 44 months imprisonment followed by three years supervised release.³⁵ The Third Circuit Court of Appeals affirmed the conviction and Elonis petitioned for *certiorari* to the United States Supreme Court.³⁶

The certified question when *certiorari* was granted was whether *Virginia v. Black* required an actor to have subjective intent to threaten when the communication was made, and whether such intent must be read into all threat statutes.³⁷ The Supreme Court determined that “at a minimum, [18 U.S.C.] § 875(c) requires an objective showing: The communication must be one that a reasonable observer would construe as a true threat to another.”³⁸ Accordingly, the court reversed the convictions and remanded the case because the jury instructions informed the jury that it did not need to consider the *mens rea* of the actor in order to convict.³⁹ The instructions instead allowed the jury to infer 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.⁴⁰

These allowed the jury to find a true threat irrespective of the actor's mental state when the statement was made.⁴¹ The instructions essentially allowed the jury to infer a threat

you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.”)

³⁴ The content of these communications varied, but nearly all of the communications directed a threat specifically towards someone who had recently caused Elonis grief in his life such as his ex-wife or the F.B.I. agents he spoke with prior to his arrest. *Id.* at 324–26.

³⁵ *Id.* at 327.

³⁶ *Id.*

³⁷ *Elonis v. United States*, 134 S. Ct. 2819 (2014), *Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015).

³⁸ *Elonis*, 135 S. Ct. at 2019 (2015) (dissent Alito, J.). The court also stated that the statements made by Elonis clearly met this objective standard and such an inquiry would not be needed. *Id.*

³⁹ *Id.* at 2012 (“The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's [sic] communications as threats, and that was error.”).

⁴⁰ *Id.* at 2007.

⁴¹ *Id.*

premised on whether the hearer would have received the statement as a threat.⁴² The Court based its decision on the principle that a prosecutor must prove all components of both the *actus reus* and the *mens rea*; therefore effectively preventing criminal liability from attaching to an act without due consideration of a defendant's mental state.⁴³

The Court explained that there would be no dispute that the *mens rea* requirement in section 875(c) would be satisfied if it were shown that the actor purposefully transmitted a communication for the express purpose of issuing a threat or with the knowledge that the communication would be viewed as a threat by the recipient.⁴⁴ The court expressed its distaste for liability turning on whether a "reasonable person" would regard the communication as a threat—regardless of what the defendant thinks—because it reduces culpability for the element of the crime to negligence.⁴⁵ This reluctance stems from the belief that a negligence standard is insufficient because an actor must possess a guilty mind to be criminally liable.⁴⁶

Notably, the court declined to address whether recklessness would be a sufficient mental state, relying on its jurisprudence to refrain from being the first appellate court to decide issues of first impression.⁴⁷ Additionally, the court avoided whether section 875(c) can be satisfied by demonstrating a defendant acted

⁴² *Elonis*, 135 S. Ct. at 2007.

⁴³ A dissenting opinion filed by Justice Alito explained that he would remand the case to the Court of Appeals for the Third Circuit for consideration of whether a showing of recklessness is sufficient to convict. *Id.* at 2016 (dissent, Alito, J.).

⁴⁴ *Elonis*, 135 S. Ct. at 2012.

⁴⁵ *Id.* (citation omitted).

⁴⁶ *Id.* (citations omitted).

⁴⁷ To date no Circuit Court of Appeals has ever held that recklessness is a sufficient standard for mental culpability for section 875(c) cases. *Id.* at 2013. However, the Ninth Circuit has looked to similar statutes when determining the *mens rea* for section 875(c). *United States v. Sirhan*, 504 F.2d 818, 819 (9th Cir. 1974); *Seeber v. United States*, 329 F.2d 572, 577 (9th Cir. 1964). Looking at 18 U.S.C. § 876 *et seq.*, which contains similar language, the Ninth Circuit has consistently read in a *mens rea* requirement of "knowingly" into cases involving section 875(c). *Sirhan*, 504 F.2d at 819; *Seeber*, 329 F.2d at 577. The *mens rea* requirement for section 875(c) has also been hotly discussed by various circuit courts with respect to whether the statute requires general intent or specific intent. Karen Rosenfield, *Redefining the Question: Applying a Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 CARDOZO L. REV. 1837, 1846 (2008). Several circuits require general intent while the Ninth Circuit requires specific intent. *Id.* at 1848 n. 75.

recklessly.⁴⁸

Despite the certified question, the Court did not discuss whether section 875(c) was intended to contain an additional element to threaten or whether *Virginia v. Black* required an actor to possess intent to threaten; however, there is some evidence that the court would have supported the argument had it considered the issue.⁴⁹ *Elonis* urged the court to interpret section 875(c) similarly to its neighboring sections, which all contained an express additional mental element.⁵⁰ The general presumption is that when Congress includes a mental state in one statute, but omits it from another, the omission is deliberate.⁵¹ The government, relying on this principle of construction, urged the court to hold that since Congress intentionally omitted an express intent to threaten, one did not exist.⁵² The court found that the government interpreted the principle too liberally and held that the omission of express intent to threaten in the statute is not wholly determinative that Congress intended to dispose with an additional mental requirement.⁵³ Instead, the rules of statutory construction must still follow the principle that wrongdoing must be conscious to be criminal and that the purpose of a mental requirement is to separate guilty conduct from innocent conduct.⁵⁴ Additionally, the court specifically held that there must be some objective evidence that a reasonable person would view the communication as a threat leaving ample room for the lower courts to consider the actor's intent to threaten within the context the communication was made.⁵⁵

Elonis stands for two things: (1) criminal liability under section 875(c) requires some showing that the communication was

⁴⁸ *Elonis*, 135 S. Ct. at 2012–13.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Elonis*, 135 S. Ct. at 2012–13. See *United States v. X-Citement Video*, 513 U.S. 64, 68–69, 73 (1994) (The court rejected a reading of a statute which would have required only that a defendant knowingly sent child pornography, regardless of whether he knew the age of the performers in favor of an interpretation, which required knowledge that the performers depicted were minors, because that was “the crucial element separating legal innocence from wrongful conduct.”); *Staples v. United States*, 511 U.S. 600, 619 (defendant must know that his weapon had automatic firing capability to be convicted of possession of such a weapon).

⁵⁵ *Elonis*, 135 S. Ct. at 2012–13.

objectively threatening, and (2) the prosecution cannot satisfy the statute by showing a defendant acted negligently.⁵⁶ In his dissent Justice Thomas pointed out the court's failure on addressing the certified questions going as far as to claim that "[o]ur job is to decide questions, not create them" implying that *Elonis* stands for little since there is still confusion, uncertainty, and the need of a uniform standard.⁵⁷

III. PART THREE: THE MENS REA REQUIREMENT AND CLASSIFICATION OF SECTION 875(C)

18 U.S.C. § 875(c) raises two primary concerns based upon its statutory construction. The first concern is premised on section 875(c)'s classification as a crime of general intent or a crime of specific intent. This classification is an important first step to the court's analysis because a specific intent crime would require a deeper inquiry into the mental state of the actor, which would result in a higher standard.⁵⁸ The second concern is based on the lack of an explicit *mens rea*, which makes it difficult not only for the court to adopt a uniform standard, but to also declare which mental states are sufficient to support a conviction.⁵⁹ In the absence of an explicit *mens rea*, the court is free to read in any *mens rea* except negligence, provided the mental state used sufficiently separates innocent conduct from guilty conduct and provides sufficient protection to the innocent actor.⁶⁰

A. The Court's Classification of Section 875(c) as a Crime of General Intent Does Not Provide Adequate Protection to the Innocent Actor and the Ambiguous use of the Terms General Intent and Specific Intent Create Erroneous Standards

When confronted with a section 875(c) case the court first looks to classify the crime as a crime of general intent or specific intent.⁶¹ This classification is a threshold question that will determine the degree of mental culpability needed to satisfy the statute.⁶² There is a current preference for section 875(c) as a

⁵⁶ *Id.*

⁵⁷ *Id.* at 2028 (dissent, Thomas, J.). *See infra* Part V.

⁵⁸ *See infra* Part IV. A.

⁵⁹ 18 U.S.C. 875(c); *see infra* Part IV. A.

⁶⁰ *See infra* Part IV. B.

⁶¹ *See, e.g.*, *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988).

⁶² *Id.*

crime of general intent because several circuit courts have specifically voiced a preference for general intent crimes over specific intent crimes whenever the *mens rea* requirement is absent.⁶³

In many cases a general intent requirement that a defendant acted purposefully, knowingly, or recklessly is sufficient,⁶⁴ but where such a requirement “would fail to protect the innocent actor,” the statute “would need to be read to require . . . specific intent.”⁶⁵ The courts recognize that there are several ways to define general intent⁶⁶ and specific intent⁶⁷; however,⁶⁸ the lack of

⁶³ Rosenfield, *supra* note 47, at 1848. *See, e.g.*, United States v. DeAndino, 958 F.2d 146, 148–49 (6th Cir. 1992) (“[B]ecause the language of section 875(c) does not expressly require a heightened mental element in regard to the ‘communication containing a threat,’ it is presumed that the statute requires general intent.”); United States v. Myers, 104 F.3d 76, 81 (5th Cir. 1997) (“As a straightforward matter of textual interpretation, we will not presume that a statutory crime requires specific intent in the absence of language to that effect. Because § 875(c) contains nothing suggesting a specific intent requirement, it defines only a general intent offense.”) (citations omitted); United States v. Darby, 37 F.3d 1059, 1066 (1994) (“In the absence of an explicit statement that a crime requires specific intent, courts often hold that only general intent is needed.”) (quoting United States v. Lewis, 780 F.2d 1140, 1142–43 (4th Cir. 1986)).

⁶⁴ These crimes are typically labeled as crimes of “general intent.”

⁶⁵ Carter v. United States, 530 U.S. 255, 269 (2000).

⁶⁶ BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “general intent” as “the state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability”). General intent is commonly used when no particular mental state is set out in the definition of the crime. CASES AND MATERIALS ON CRIMINAL LAW 159 (Joshua Dressler et al. eds., 6th Ed., 2012). Another common use of this term is to “designate as ‘general intent’ any mental state, whether expressed or implied, in the definition of the offense that relates solely to the conduct and/or result that constitutes the social harm of the criminal offense.” *Id.*

⁶⁷ BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “specific intent” as “the intent to accomplish the precise criminal act that one is later charged with”). Typically specific intent crimes require one of three special mental elements to be found in the statute. CASES AND MATERIALS ON CRIMINAL LAW, *supra* note 66, at 158. First to be guilty of some offense the state must prove an intention by the actor to commit some future act separate from the *actus reus* of the offense e.g. possession of marijuana with *intent to sell*. *Id.* (emphasis in original). Second an offense may require proof of a special motive or purpose for committing the *actus reus* e.g. offensive contact on another person *with the intent to humiliate*. *Id.* (emphasis in original). Third, some offenses require proof of the actor’s awareness of an attendant circumstance e.g. intentional sale of obscene material to a person *known to be under the age of 18 years of age*. *Id.* (emphasis in original). Additionally, specific intent can also refer to statutes that have a specific *mens rea* element in its definition. *Id.*

⁶⁸ There is no universal definition or meaning to either general intent or subjective intent. CASES AND MATERIALS ON CRIMINAL LAW, *supra* note 66, at 158.

a uniform approach muddles the court's analysis.⁶⁹

Confusion occurs when the classification as a general intent crime or specific intent crime hinges upon whether the actor had the intent to send the threatening communication or whether the actor had the intent to send the threatening communication with the intent to threaten the recipient.⁷⁰ For example, a court may base its decision that section 875(c) is a general intent crime using the term as it refers to the knowledge requirement, meaning that any *mens rea*, bar negligence, can be used to show that the actor consciously made the statement, while another court may decide that the crime is one of general intent because there is no explicit heightened requirement of intent to threaten.⁷¹ This misclassification resulted in confusion as to the proper interpretations of the words and the proper classification of the crime.⁷²

The constitutional test should include whether the actor has general intent, referring to the knowledge requirement, to send the communication and whether that communication was sent with the intent to threaten the recipient.⁷³ This is the proper classification for crimes of specific intent.⁷⁴ Unfortunately the

Instead each jurisdiction and court has its own interpretation and application of these terms, which could explain why the terms often clash when brought before the federal circuit courts based on how many different jurisdictions actually encompass each circuit. *Id.* See also Rosenfield, *supra* note 47, at 1850–51 (“Despite the majority of courts’ conclusion that general intent means objective intent with respect to its conclusion regarding section 875(c), the majority employs inconsistent usages and the definitions of the term. For example, in one opinion, the majority referred to general intent as defendant’s intent to threaten and specific intent as the heightened intent to carry out his actions.”) (citation omitted).

⁶⁹ Rosenfield, *supra* note 47, at 1852. The circuit courts are also confused on a uniform meaning of the terms general intent and specific intent, which further clouds their reasoning and creates more confusion. *Id.* at 1846.

⁷⁰ *Id.* at 1851; United States v. Bagdasarian, 652 F.3d 1113, 1115–16 (9th Cir. 2011); United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994) (distinguishing between a “general intent to make a threat to injure another, on the one hand, and a subjective intention to carry out the threats, on the other”).

⁷¹ Rosenfield, *supra* note 47, at 1851.

⁷² *Id.*

⁷³ Bagdasarian, 652 F.3d at 1118.

⁷⁴ See, e.g., N.Y. Penal Law § 220.16(1) (McKinney 2015). For example, statutes that criminalize the possession of marijuana with intent to sell require that the actor possessed the drug with the further consequence of selling the drug to another. See also Sanford H. Kadish & Stephen J. Schulhofer, CRIMINAL LAW AND ITS PROCESSES 216 (7th ed. 2001); Rosenfield, *supra* note 47, at 1837 n.6 (“For example, burglary requires that an actor break and enter with the further consequence of committing a felony inside. Therefore, conviction for burglary

courts tend to interlock the two analyses instead of making them distinct inquiries.⁷⁵ When using the court's incorrect application the question is framed as: "must the [actor] intend to threaten or must the [actor] intend to threaten and also intend to carry out the threat"?⁷⁶ This conduct based inquiry has no relation to the actor's state of mind; instead it looks to the extent of the conduct required to violate the statute by merging the two inquiries into a single question.⁷⁷

If the courts were to continue to interpret section 875(c) as a crime of general intent, they would continue to apply a negligence standard because the inquiry would never reach the subjective aspect of whether the speaker intended to threaten and would continue to hinge criminal liability based on the recipient's reaction.⁷⁸ Furthermore, classifying the statute as a crime of general intent is not supported by the statutory language, whereas there is support for a classification of specific intent.⁷⁹

The definition of "threat" is "a statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done."⁸⁰ A subjective component of an actual intent to "inflict pain, injury, or damage" is contained within the plain meaning of the word.⁸¹ Therefore, in order to comply with the statute's language, the court must treat

requires proof of intent of a further consequence.").

⁷⁵ Rosenfield, *supra* note 47, at 1851.

⁷⁶ *Id.* at n.100.

⁷⁷ *Id.* at 1850–51.

⁷⁸ *Id.* at 1850–52. Under the Model Penal Code "[a] person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." MODEL PENAL CODE § 2.02(d).

⁷⁹ See the statutory language and the specific use of the word "threat." See *generally* 18 U.S.C. § 875(c).

⁸⁰ OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/threat (last visited March 3, 2016).

⁸¹ *United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., dubitante). "Where the plain language [of a statute is] supported by consistent judicial interpretation . . . 'it is not necessary to look beyond words of statute.'" *Maine v. Thiboutot*, 448 U.S. 1, 6 n. 4 (1980). See also Matthew J. Hertko, *Statutory Interpretation in Illinois: Abandoning the Plain Meaning Rule for an Extratextual Approach*, 2005 U. ILL. L. REV. 377, 379 (2005) ("The plain meaning rule holds that statutory interpretation begins with the language of the statute, and, if the language is clear and unambiguous, ends with the same.").

the crime as one of specific intent and require both an objective and subjective component.⁸²

*United States v. Sutcliffe*⁸³ is one of the more recent Ninth Circuit cases affirming section 875(c)'s classification as a specific intent crime and affirming the two part test used by the circuit.⁸⁴ Consistent with its jurisprudence, the Ninth Circuit held that section 875(c) is a specific intent crime.⁸⁵ Plainly put, the Ninth Circuit requires the government to prove the mental state of the actor when sending the threatening communication, coupled with a heightened intent to threaten the recipient.⁸⁶ The test considers both the actor's specific intent to threaten and whether the communication itself is objectively threatening, effectively combining an objective component and subjective component to afford the most protection from unintended violations.⁸⁷ The holding comes from a stem of cases that interpreted similar threat statutes.⁸⁸ In those cases the court held that there must be a subjective element in addition to an objective component in order to properly protect against unintended violations.⁸⁹ This standard recognizes that the level of mental culpability needed to convict "exceed[s] a mere transgression of an objective standard of acceptable behavior" and that section 875(c) must require specific intent to threaten in order to distinguish and separate criminally punishable conduct from innocent conduct.⁹⁰

If the majority approach were adopted and section 875(c) remains classified as a crime of general intent, meaning that there is no heightened requirement to consider whether the actor intended to threaten, the statute's application would not successfully protect the innocent actor from facing criminal liability for unintended offenses.⁹¹ As it is currently applied,

⁸² See *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015). See also *Jeffries*, 692 F.3d at 484.

⁸³ 505 F.3d 944 (9th Cir. 2007).

⁸⁴ *Id.* at 953.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *United States v. Bagdasarian*, 652 F.3d 1113, 1123 (9th Cir. 2011); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007); *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988); *Seeber v. United States*, 329 F.2d 572, 576 (9th Cir. 1964).

⁸⁸ See generally *Twine*, 853 F.2d at 680–81 (court discusses the stem of cases interpreting threat statutes).

⁸⁹ *Id.*

⁹⁰ *Id.* at 680 (citation omitted).

⁹¹ See, e.g., *United States v. Turner*, 720 F.3d 411, 414–15, 417, 420–25, 429 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 49, (2014), *reh'g denied*, 135 S. Ct. 698

section 875(c) leaves open the possibility that, without sufficiently considering the intent of the actor sending the message, a speaker may face criminal liability if a jury were to find that he or she had made the threatening statement either purposefully or knowingly and the recipient felt threatened.⁹²

*B. Recklessness as a Subjective Mens Rea Adequately
Distinguishes Criminal Conduct from Innocent Conduct Without
Resorting to a Higher Standard of Culpability*

When federal criminal statutes are silent on the required mental state, the prosecution is allowed to “read into [the] statute only that *mens rea* which is necessary to separate wrongful from ‘otherwise innocent conduct.’”⁹³ When statutes omit a *mens rea*, the standard approach is not to read the statute as a strict liability crime.⁹⁴ In order for criminal liability to attach, the actor must possess a guilty mind when engaging in the conduct that constitutes the crime unless Congress expressly designs the offense as a strict liability crime.⁹⁵ One of the important questions remaining after *Elonis* is which *mens rea* is sufficient for section 875(c) cases.⁹⁶

(2014) (convicting a blogger under section 875(c) for creating a blog post expressing his desire for a panel of circuit judges to be executed following a controversial court decision). Another issue is that, without taking into consideration a speaker’s intent, the statute could potentially sweep up several hundreds or thousands of teenagers “shooting off their mouth[es].” Grande, *supra* note 27.

⁹² *Turner*, 720 F.3d at 414–15, 417, 420–25, 429. See *infra* Part IV.B. for a discussion on whether reckless can be a sufficient *mens rea*.

⁹³ *Carter v. United States*, 530 U.S. 255, 269 (2000). See also MODEL PENAL CODE § 2.02. (“(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”)

⁹⁴ There is a strong preference for the presence of a *mens rea* requirement rather than reading the statutes as strict liability crimes based primarily on the absence of a *mens rea* without express intent by Congress. *Morissette v. United States*, 342 U.S. 246, 250 (1952). “Mere omission from a criminal enactment of any mention of criminal intent” should not be read “as dispensing with [the requirement of a *mens rea* element]”. *Id.*

⁹⁵ *Carter*, 530 U.S. at 252. However, a defendant does not need to know that his conduct is illegal in order to be convicted of a committed crime. *Staples v. United States*, 511 U. S. 600, 608, n. 3 (1994). The Supreme Court has explained that a defendant must only generally “know the facts that make his conduct fit the definition of the offense,” even if the defendant does not know that those facts give rise to a crime. *Id.*

⁹⁶ *Elonis v. United States*, 135 S. Ct. 2001, 2012–13 (2015) (The Supreme

As a matter of law, the *mens rea* requirement in criminal statutes is a question reserved specifically for the court to determine.⁹⁷ When a statute lacks a *mens rea*, that absence is not dispositive of Congress' intent to dispense with a mental state requirement.⁹⁸ Instead, the prosecution is allowed to prove that the actor completed the *actus reus* with any culpable mental state above negligence.⁹⁹ In terms of the *mens rea* hierarchy, purposefully is the highest degree of mental culpability with knowingly, recklessly, and negligently following with decreasing culpability.¹⁰⁰ Purposefully, knowingly, and recklessly all differ from negligence and can be classified as subjective mental states because, unlike negligence, these standards consider the actor's actual knowledge and intent.¹⁰¹

Considering these principles, the key requirement behind a sufficient *mens rea* is it must be only as restrictive as necessary to establish that the actor possessed a guilty mind and it is able to firmly distinguish and separate criminal conduct from innocent conduct.¹⁰² The Supreme Court has held that a showing of purposefully or knowingly is sufficient for a section 875(c)

Court held that purposefully and knowingly are sufficient, but declined to address whether recklessness would suffice).

⁹⁷ *Staples*, 511 U. S. at 611.

⁹⁸ See DeBauche, *supra* note 8, at 999.

⁹⁹ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978); *Carter*, 530 U.S. at 269 (2000) (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994)); MODEL PENAL CODE § 2.02(3) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.").

¹⁰⁰ Kenneth W. Simmons, *Rethinking Mental States*, 72 B.U.L. REV. 463, 470 (1992).

¹⁰¹ *Id.* Consider the four culpable mental states defined by the Model Penal Code. § 2.02. MODEL PENAL CODE § 2.02. The Model Penal Code (MPC) is a statutory text which was developed by the American Law Institute in 1962. One of the major innovations of the MPC is its use of standardized *mens rea* terms (mental culpability) to define the differing levels of mental states previously identified at common law. These standardized terms originated under common law doctrines and were compiled in an effort to create a uniform penal code. The MPC is not governing law in any jurisdiction, except where the jurisdiction explicitly adopts the code in full or in specific provisions. The use of the MPC mental culpability definitions in this Note is an effort to clearly explain the four major mental states used in criminal law, which exist in most jurisdictions in one form or another. See generally THE AMERICAN LAW INSTITUTE, https://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=92 (last visited Apr. 30, 2016).

¹⁰² Simmons, *supra* note 100, at 470; *Staples*, 511 U. S. at 611; *Morissette* 342 U.S. at 250.

conviction, but it did not address whether recklessness would suffice.¹⁰³ Knowingly is essentially an elevated form of recklessness; therefore, if the court condones knowingly as a standard, it should also find a lesser standard to be suitable.¹⁰⁴ Since section 875(c) does not require a specific *mens rea*, the court is allowed to read in recklessness as opposed to the higher mental states if doing so would establish that the actor possessed a guilty mind and if recklessness can adequately separate criminal conduct from lawful conduct.¹⁰⁵ Therefore, the inquiry should begin with recklessness and work its way up to the higher standards only if needed to avoid an unnecessary heightened standard.¹⁰⁶

The primary concern with recklessness is that there is little precedent for the Supreme Court to use it as a *mens rea* because the courts have historically used “knowingly” with no consideration of recklessness.¹⁰⁷ When Congress does not specify

¹⁰³ See *Elonis v. United States*, 135 S. Ct. 2000, 2012–13 (2015).

¹⁰⁴ Katherine R. Tromble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521, 523 (1999).

¹⁰⁵ *Id.* “Recklessness is probably the most important culpability term under the Model Penal Code, for it is the culpability that the Code presumes when a criminal statute is silent.” Simmons, *supra* note 100 at 470 (citing Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, SOC. PHIL. & POL’Y, Spring 1990, at 59, 71 (1990)); *Carter v. United States*, 530 U. S. 255, 269 (2000). See also *supra* note 65.

¹⁰⁶ *Elonis*, 135 S. Ct. at 2015 (dissent, Thomas, J). In jurisdictions that have adopted the Model Penal Code, the recommended approach is to use recklessness as the default standard for criminal statutes that do not name a specific mental state because recklessness is the minimum standard that is most widely found in the common law. Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 44 (2010) *cf.* MODEL PENAL CODE § 2.02(4).

¹⁰⁷ *Rosenfield*, *supra* note 47, at 1864. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978) (the Supreme Court determined that although the *mens rea* for the violation of the Sherman Act was silent because the defendant acted consciously to violate the law, knowledge was sufficient); *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 514, 517 (1994) (the Supreme Court determined that although there was no specified *mens rea* contained within the Mail Order Drug Paraphernalia Control Act, the court required that the defendant act with knowledge and that the defendant must have been aware that customers in general are likely to use the merchandise sold with drugs); *United States v. Bailey*, 444 U.S. 394, 408 (1980) (the Supreme Court determined that although 18 U.S.C. § 751(a) lacked a specific *mens rea* there was nothing in the language or legislative history which indicates that Congress intended to require a heightened standard of culpability beyond knowingly, thus abiding by the generally accepted principle “that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a

a *mens rea* in a criminal statute, the Court has no justification for inferring that anything more than recklessness is needed, unless recklessness would not adequately separate wrongful conduct from innocent conduct or provide sufficient protection to the innocent actor.¹⁰⁸ Once the court has reached recklessness it has satisfied its constitutional duty.¹⁰⁹ If it were to continue, the court could risk shifting its power of interpretation into judicial reconstruction or amendment.¹¹⁰

A *mens rea* of recklessness does not “pose the same conflict with the principles of criminal law as negligence.”¹¹¹ Namely, recklessness punishes an actor for consciously disregarding a known risk rather than basing liability on what the actor should have known and on the reaction of the recipient.¹¹² Despite being the lowest standard of mental culpability, recklessness still has its own practical difficulties i.e. proving that the speaker was consciously aware of the risk, thus effectively barring the prosecution from pursuing non-meritorious cases while affording protection to innocent speakers against unintended violations.¹¹³

Recklessness, similar to the higher standards of culpability, would also require the court to place essential questions of fact into the hands of the jury to resolve.¹¹⁴ These questions would include what is a substantial and unjustifiable risk and whether the defendant’s conduct deviated from the conduct that an ordinary law abiding citizen would observe in a similar position.¹¹⁵ A jury may also consider whether the defendant was aware of the risk depending on the method of transmission and the context of the communication.¹¹⁶ Sending these questions to the jury would also neutralize the concern that a defendant may perjure himself or herself by denying the knowledge of the risk to avoid

conviction.”).

¹⁰⁸ *Elonis*, 135 S. Ct. at 2015 (dissent, Thomas, J.). See also *supra* Part IV.B.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Rosenfield*, *supra* note 47, at 1864; see also *Farmer v. Brennan*, 511 U.S. 825, 837 (1970) (criminal law punishes behavior where there is “knowledge of a significant risk”).

¹¹² Justin Myer Lichterman, *True Threats: Evolving Mens Rea Requirements for Violations of 18 U.S.C. S 875(c)*, 22 *CARDOZO L. REV.* 1961, 1995 n. 187 (2001). See also *Farmer*, 511 U.S. at 837–38 (recklessness requires the prosecution to show that the actor possessed a guilty mind when he or she consciously disregarded an unjustifiable risk).

¹¹³ Lichterman, *supra* note 112, at 1985.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

prosecution because it would leave those conclusions to the finders of fact.¹¹⁷ Additionally, recklessness still allows the courts to enforce the statute in the way Congress intended so that it only affects speech that has no purpose other than as a threat.¹¹⁸ Furthermore, a *mens rea* of recklessness would afford the greatest First Amendment protection because it is the least restrictive standard for the regulation of speech.¹¹⁹

Recklessness draws a clear line and successfully distinguishes lawful conduct from criminal conduct because it criminalizes affirmative acts consciously committed by the actor and applies criminal liability accordingly.¹²⁰ Unlike a negligent standard, recklessness fulfills Congressional intent to deter actors from sending threats through channels of interstate commerce.¹²¹ It would also defeat the dangers of self-censorship due to ambiguity because the actor's actual knowledge would no longer be irrelevant and liability would not solely depend on the recipient's reaction.¹²² Actors would be insulated from negligent acts and only be punished for affirmative and concuous choices.¹²³ Furthermore, there is no need to automatically foreclose a lower standard of mental culpability if such a standard effectuates the purpose of the statute and provides adequate protection while effectively criminalizing only the conduct the statute was designed to reach.¹²⁴

IV. PART FOUR: THE COURTS MUST ABANDON A STRICTLY OBJECTIVE APPROACH AND ADOPT A SUBJECTIVE COMPONENT TO SECTION 875(C)'S CONSTITUTIONAL TEST

In *Elonis* the Supreme Court created tension by holding that in

¹¹⁷ *Id.* at 1995 (noting potential defenses such as misinterpretation of contextual subtexts, heat of the moment responses, unintended reproduction, or diminished capacity).

¹¹⁸ *Id.* n.188.

¹¹⁹ Lichterman, *supra* note 112, at n.135 ("Because freedom of speech is considered to be in a constitutionally 'preferred position,' any legislation that might infringe upon it must use the means that are the least restrictive of free speech, even when the legislative purpose is legitimate and when there is a substantial government interest.") (citation omitted).

¹²⁰ Model Penal Code § 2.02.

¹²¹ See *Elonis v. United States*, 135 S. Ct. 2001, 2018–19 (2015) (dissent Thomas, J.).

¹²² See *id.*

¹²³ *Id.*

¹²⁴ See *United States v. Bailey*, 444 U.S. 394, 408, (1980); *Carter v. United States*, 530 U. S. 255, 269.

order to convict there must be “at a minimum” some objective evidence that the communication is of a character that “a reasonable observer would construe as a true threat to another” because it directly conflicts with its holding that negligence is an insufficient standard.¹²⁵ In order to reconcile this clash and avoid negligence, the court must adopt a subjective component to circumvent a strict objective reading of the statute.¹²⁶ The requirement for objective evidence follows the general trend that the circuits favor an objective test for section 875(c) cases, which would not require proof of an actor’s intent to threaten.¹²⁷ The Ninth Circuit is alone in its hybrid application, which uses a two part subjective and objective component analysis.¹²⁸ First, the statement must be understood by people hearing or reading it as a serious expression of intent to injure.¹²⁹ Second, there must be sufficient evidence that the actor intended the statement to be understood as a threat.¹³⁰ A purely objective approach would result in an unconstitutional negligence standard¹³¹ because it would reduce the second prong to whether the actor should have known the statement would be understood as a threat by a reasonable third person and would not consider the actor’s actual intent to threaten.¹³² However, the Ninth Circuit’s hybrid analysis complies with the *Elonis* holding and also requires the court to look at the actor’s intent to threaten.¹³³

The Ninth Circuit correctly determined that a proper reading of section 875(c) necessitates a reading of subjective intent to threaten. The principle concern behind the Ninth Circuit’s decision to incorporate a subjective component was to draw a distinct line between criminal conduct and innocent conduct in an effort to exclude defendants whose conduct was innocent or the result of a mistake.¹³⁴

The Ninth Circuit’s concern that a purely objective standard

¹²⁵ *Elonis*, 135 S. Ct. at 2019 (dissent Thomas, J.).

¹²⁶ See *United States v. Bagdasarian*, 652 F.3d 1113, 1115-16 (9th Cir. 2011).

¹²⁷ *Id.*; Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 SW. L. REV. 43, 61 (2011).

¹²⁸ *Bagdasarian*, 652 F.3d at 1115–16, 18.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Elonis v. United States*, 135 S. Ct. 2001, 2019 (2015) (dissent Thomas, J.).

¹³² See *United States v. Elonis*, 2011 WL 5024284, at *2 (E.D.Pa. 2011), *aff’d*, 730 F.3d 321 (3d Cir. 2013) (showing the application of a purely objective test).

¹³³ *Bagdasarian*, 652 F.3d at 1115–16, 18; *Elonis*, 135 S. Ct. at 2017–18.

¹³⁴ *United States v. Twine*, 853 F.2d 676, 679–80 (9th Cir. 1988).

would lead to criminalizing innocent behavior is echoed in Justice Thomas' dissent in *Elonis*.¹³⁵ An uncertain or ambiguous standard can easily foster a chilling effect on lawful speech or lead to self-censorship for fear of breaking the law.¹³⁶ The uncertainty created by the court could easily lead to a freeze on speech because the court has only voiced its opinion on what is not acceptable instead of creating a uniform standard for the legal community to follow.¹³⁷

Another concern that would be rectified with a hybrid analysis is that internet speech can be viewed more menacingly due to the lack of human interaction.¹³⁸ Specifically, when a court applies an objective listener-based test to an online threat, the court runs the risk of finding the presence of reasonable fear even if such fear would not be found if the interaction was face to face.¹³⁹ For example, an internet blogger may be found criminally liable for expressing his distaste of a judge's decision on an internet forum if the communication appears threatening, even if there is no actual intent to harm the judge.¹⁴⁰ In order to prevent a chilling effect on lawful speech, the courts must follow the Supreme Court's directive that some objective evidence is necessary i.e. whether the communication itself is of a threatening nature, but in order to remove the risk of self-censorship or a chilling effect, the court must also consider the intent behind the speaker when sending the communication. This standard offers the best protection to the "innocent actor" while providing a clear standard for the legal community and removing any potential for

¹³⁵ *Id.* at 680; *Elonis*, 135 S. Ct. at 2018 (dissent Thomas, J.) ("Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place. Lower courts are thus left to guess at the appropriate mental state for § 875(c). . . . This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.")

¹³⁶ *Elonis*, 135 S. Ct. at 2018 (dissent Thomas, J.); *Alexander v. United States*, 509 U.S. 544, 555 (1993).

¹³⁷ *Elonis*, 135 S. Ct. at 2018 (dissent Thomas, J.).

¹³⁸ Scott Hammack, *The Internet Loophole: Why Threatening Speech on-Line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 96 (2002).

¹³⁹ *Id.*

¹⁴⁰ *United States v. Turner*, 720 F.3d 411, 414–15, 417, 420–25, 429 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 49, (2014), *reh'g denied*, 135 S. Ct. 698 (2014). "Under a general intent standard, whether a communication is a true threat is determined objectively from all the surrounding facts and circumstances, rather than from the defendant's subjective purpose." *United States v. Whiffen*, 121 F.3d 18, 20 (1st Cir. 1997) (internal quotations omitted).

self-censorship.¹⁴¹

V. PART FIVE: THE CURRENT APPLICATION AND INTERPRETATION OF 18 U.S.C. § 875(C) FRUSTRATES CONGRESS' ORIGINAL INTENT

The primary concern with respect to section 875(c)'s application to online communications is that the current interpretation and application frustrates Congress' original purpose based on an examination of the statute's legislative history.¹⁴² The current enforcement and interpretation contradicts the plain language Congress originally used as well as Congress' original desire to consider the actor's subjective intent.¹⁴³ Congress originally created different criminal penalties based on the actor's extortionate or non-extortionate intent.¹⁴⁴ The presence of these heightened mental states demonstrates that Congress originally intended the statute to be treated as a crime of specific intent.¹⁴⁵

The fact that most courts are reluctant to adopt a subjective component to their application of section 875(c) further frustrates the purpose of the statute and has led to a misapplication and deviation from the way Congress first wanted the statute to be interpreted.¹⁴⁶ Therefore, the concern should not be that the statute's language is different than it was when it went into effect over seventy years ago, but rather it should be on creating a uniform method of handling cases arising under section 875(c) in a way that reflects Congress' original intent.¹⁴⁷ Instead of

¹⁴¹ Hammack, *supra* note 138, at 96.

¹⁴² Lichterman, *supra* note 112, at 1986 n. 134; *United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012).

¹⁴³ DeBauche, *supra* note 8, at 997. *See United States v. Clemens*, 738 F.3d 1, 10 (1st Cir. 2013) (holding "the appropriate standard under which a defendant may be convicted for making a threat is whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it [wa]s made."), *cf. United States v. Twine*, 853 F.2d 676, 680–81 (9th Cir. 1988) (holding § 875(c) is a specific intent crime because the presence of the terms "knowingly" and "willingly" in similar threat statutes indicates Congress intended similar crimes to be interpreted as specific intent crimes to ensure "no one would be convicted for an act because of mistake, inadvertence, or other innocent reason").

¹⁴⁴ *See supra* Part II.

¹⁴⁵ *Jeffries*, 692 F.3d at 484 (drawing a line between acts committed with extortionate intent and non-extortionate intent and applying separate penalties based on the actor's mental state); DeBauche, *supra* note 8, at 984 n. 16 (the statute was first amended to include the intent to extort and amended again to include a penalty for bad acts committed with non-extortionate intent).

¹⁴⁶ *See supra* Part II.

¹⁴⁷ Rosenfield, *supra* note 47, at 1844–45.

applying the law based on congressional intent, the courts today frustrate the statute's purpose by applying a general intent standard to crimes that were designed to require a specific intent analysis.¹⁴⁸

Another concern raised in *Elonis*, is that it would be improper for the court to read in intent to threaten element when it does not appear in the statutory language.¹⁴⁹ In his dissent, Justice Alito argued that the court's purpose is not to rewrite laws of Congress, but rather to interpret the law.¹⁵⁰ Typically the court does resist reading words or elements into statutes when they do not facially appear.¹⁵¹ Further, "where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion."¹⁵² However, a requisite mental element of recklessness or requesting the court to read in a subjective element that requires intent to threaten does not require the court to rewrite or reconstruct the statute. The Court is only asked to interpret a point Congress has already directly addressed.¹⁵³ By including the term "threat" Congress intentionally required a subjective inquiry into the mental state of the speaker.¹⁵⁴ The act of threatening is a subjective, affirmative, and conscious decision on the part of the speaker.¹⁵⁵ Declining to read in the element to threaten could reduce the statute to requiring the equivalent of a negligence standard.¹⁵⁶

¹⁴⁸ See Lichterman, *supra* note 112, at 1986 n. 134 ("Since Congress's intent in promulgating § 875(c) was to prevent threats, any interpretation that might immunize defendants who actually subjectively intended to threaten necessarily frustrates Congress's purpose."). See also *United States v. Whiffen*, 121 F.3d 18, 20–21 (1st Cir. 1997) (holding that section 875(c) is a general intent crime and follows an analysis based on the statutory language).

¹⁴⁹ *Elonis v. United States*, 135 S. Ct. 2001, 2023–24 (2015) (dissent Alito, J.).

¹⁵⁰ *Id.*

¹⁵¹ *Dean v. United States*, 556 U.S. 568, 572 (2009).

¹⁵² *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). See also *United States v. Sirhan*, 504 F.2d 818, 819 (9th Cir. 1974).

¹⁵³ See *e.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (discussing the judiciary's role of statutory interpretation in administrative proceedings). See also *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

¹⁵⁴ See *supra* note 86; *United States v. Jeffries*, 692 F.3d 473, 485 (6th Cir. 2012).

¹⁵⁵ See *supra* note 87.

¹⁵⁶ *Elonis v. United States*, 135 S. Ct. 2001, 2023–24 (2015) (dissent Alito, J.).

Therefore, while the court would be reading in words and elements not expressly named and enumerated within the plain language of section 875(c), it would do so in an effort to carry out Congressional intent¹⁵⁷ and to save the statute from constitutional attack.¹⁵⁸

In order to best reconcile the confusion among the circuits between general intent and specific intent, and to resolve any further disputes with the application of section 875(c), Congress should amend 18 U.S.C. section 875(c) to include a specific *mens rea* and to clarify whether the courts must consider an actor's intent to threaten.

CONCLUSION

The Supreme Court has condemned the use of negligence with respect to section 875(c); however, they have yet to declare a uniform standard. The confusion is a result of the poor construction of the statute, which does not specify a *mens rea* or a requirement to consider the actor's intent to threaten.

The majority approach treats section 875(c) as a crime of general intent. A general intent analysis does not afford sufficient protection to actors who violate the statute as the result of a mistake; therefore, the Court is required to use a specific intent analysis to afford protection to innocent actors.

Along the same vein, recklessness should suffice as a *mens rea*. The Court should not automatically jump to a higher standard without a threshold consideration of recklessness. Jumping to a higher standard puts an unnecessary restriction on speech when a lower standard of mental culpability would successfully distinguish criminal conduct from lawful conduct.

The Supreme Court's decision in *Elonis* created tension by holding there must be some objective evidence that the communication is threatening while simultaneously holding that negligence is insufficient. The Court also failed to specify how much weight must be given to the objective part of the analysis

¹⁵⁷ See e.g., *Dean v. United States*, 556 U.S. 568, 578–79 (2009) (dissent, Stevens, J.) (the court reviewed legislative history to determine Congress' intent when the statute was created in order to apply the statute as Congress intended).

¹⁵⁸ See *Boos v. Barry*, 485 U.S. 312, 330–31 (1988) (holding that facially overbroad statutes can survive a constitutional attack if the court provides a narrowing construction). See also *United States v. Cooper*, 173 F.3d 1192, 1202 (9th Cir. 1999) (presumption that a challenged statute is valid).

and what, if any, must be granted to a subjective evaluation. In order to alleviate this tension, the court must adopt the approach used by the Ninth Circuit. This approach would allow objective evidence supplemented by the actor's subjective intent to threaten in order to determine criminal culpability. This hybrid approach adequately affords protection to innocent actors and successfully distinguishes innocent conduct from criminal conduct.

Lastly, Congress clearly designed the statute to require a specific intent analysis and the current application frustrates this purpose because the courts disregard the statute's legislative history and do not consider a heightened intent requirement despite its presence in an earlier version. The Court would not need to judicially reconstruct the statute to read it as a crime of specific intent. The Court would only need to evaluate the legislative history of the statute to provide a construction to effectuate congressional intent.