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WHEN IS A YOUTUBE VIDEO A “TRUE THREAT”?

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ABSTRACT

*In United States v. Jeffries, the Sixth Circuit upheld a defendant’s conviction under 18 U.S.C. § 875(c) for transmitting a threat through interstate commerce after the defendant posted a music video on YouTube. The video threatened a local judge presiding over the defendant’s child custody proceedings. Circuits have split on whether § 875(c) and other similar federal threat statutes require the defendant to possess a subjective intent to threaten. This Article argues that the “true threat” test courts use to apply § 875(c) essentially incorporates a subjective intent to threaten. The Article then applies the subjective intent requirement to YouTube videos, using the reasoning in United States v. Alkhabaz as a model.*

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## INTRODUCTION

When does a YouTube video constitute a criminal threat? The Sixth Circuit recently held that a defendant who posted an original music video on YouTube violated a federal threat statute.<sup>1</sup> The video contained threatening comments directed at a local judge, and referenced the defendant’s upcoming court date in a custody case. Lyrics in the video included “take my child and I’ll take your life” and “July the 14th is the last time I’m goin’ to court.”<sup>2</sup> The court upheld the defendant’s conviction under 18 U.S.C. § 875(c), which criminalizes conveying a threat to injure or kidnap a person through interstate commerce.<sup>3</sup>

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<sup>1</sup> *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012), *cert. denied*, 134 S. Ct. 59, 187 L. Ed. 2d 25 (2013).

<sup>2</sup> *Id.* at 475–76.

<sup>3</sup> *Id.* at 483.

Using § 875(c) to prosecute threats made in YouTube videos raises interesting First Amendment concerns. Unlike other interstate communications, such as telephone calls, YouTube videos and similar posts on other forms of social media are generally not directed at specific individuals. Thus, an application of criminal liability to YouTube videos may have a particularly chilling effect on public speech.

This Article argues that a YouTube video can only constitute a “true threat” if its creator had a subjective intent to threaten. Subjective intent to threaten is demonstrated by evidence that the video was disseminated to the threatened individual or that the threat was made to further a purpose through intimidation. Requiring subjective intent reduces the potential chilling effect of § 875(c) by ensuring that only threats directed at specific individuals or groups are subject to liability.

#### I. CIRCUIT SPLIT ON REQUISITE MENS REA FOR 18 U.S.C. § 875(C)

The text of § 875(c) contains no language about the requisite mens rea. The statute provides: “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.”<sup>4</sup> Despite this broad language, courts have not interpreted § 875(c) as a strict liability offense, noting the absurdity of the results and the general common law preference for mens rea requirements in criminal statutes.<sup>5</sup>

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<sup>4</sup> 18 U.S.C. § 875(c) (2012). Under a plain language interpretation, YouTube could face liability for “transmit[ting]” a threat uploaded by a user. The First Amendment, however, prohibits strict liability for statutes criminalizing speech. *See* *Smith v. California*, 361 U.S. 147, 154–55, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959) (holding a statute imposing strict liability on booksellers for possessing obscene material impermissibly chilled protected speech).

<sup>5</sup> *See, e.g.,* *United States v. Darby*, 37 F.3d 1059, 1063 (4th Cir. 1994) (“although section 875(c) contains no explicit mens rea element, the statute is not ... a strict liability offense.”); *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir.

Although courts agree that a violation of § 875(c) is not a strict liability offense, they disagree about the requisite mens rea. Courts have addressed two questions about § 875(c)'s mens rea requirements. The first is whether the defendant must intend to carry out the threat or simply intend to make the threat. Courts have held that only intent to threaten is required, or conversely that intent to carry out the threat is not required.<sup>6</sup>

The second mens rea issue is whether the intent to threaten must be objective or subjective. Phrased differently, the issue is whether the communication must be a threat when viewed from the perspective of the defendant (subjective intent) or from the perspective of a reasonable person (objective intent). Currently, only the Ninth Circuit requires subjective intent.<sup>7</sup> Other circuits require only objective intent.<sup>8</sup> However, some circuits, such as the Sixth Circuit, functionally require subjective intent through the application of the true threat test.

The use of differing terminology further complicates the disagreement among the circuits. Courts frame the mens rea issues described above using the terms “general intent,” “specific intent,” “subjective intent,” and “objective intent.”<sup>9</sup> These terms are used interchangeably, with “general intent” being synonymous with

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1992) (transmission of threat cannot be inadvertent).

<sup>6</sup> See, e.g., *Jeffries*, 692 F.3d at 478; *United States v. Lincoln*, 589 F.2d 379, 381 (8th Cir. 1979); *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978).

<sup>7</sup> See *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988); *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005); *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011) (holding that a conviction required both objective and subjective intent in a case involving statements that encouraged killing Barack Obama, then a presidential candidate, that were posted in an online forum).

<sup>8</sup> See, e.g., *United States v. White*, 670 F.3d 498 (4th Cir. 2012) (holding that § 875(c) only requires the defendant to intentionally send communication, not intentionally threaten); *United States v. Mabie*, 663 F.3d 332 (8th Cir. 2011) (holding that objective test measures whether a reasonable observer would find the communication conveyed intent to cause harm); *United States v. Alkhabaz*, 104 F.3d 1493, 1496 (6th Cir. 1997) (rejecting a subjective standard).

<sup>9</sup> Karen Rosenfield, Note, *Redefining the Question: Applying a Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 CARDOZO L. REV. 1837, 1846 (2008).

“objective intent,” and “specific intent” with “subjective intent.”<sup>10</sup> For the sake of clarity, this Article will only use the terms “subjective intent” and “objective intent.”

## II. THE FIRST AMENDMENT REQUIRES THAT § 875(C) APPLY ONLY TO “TRUE THREATS”

The Supreme Court has held that threat statutes criminalize pure speech.<sup>11</sup> Therefore, § 875(c) “must be interpreted with the commands of the First Amendment clearly in mind.”<sup>12</sup> Threats are one of the limited categories of pure speech that the First Amendment does not protect.<sup>13</sup> However, a statute prohibiting threats must distinguish true threats from “constitutionally protected speech.”<sup>14</sup> A statute that does not make this distinction chills protected speech through the threat of prosecution.<sup>15</sup>

First Amendment analysis of criminal threat statutes hinges on whether the prohibited speech is a true threat.<sup>16</sup> For a threat to be a true threat, it must “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>17</sup>

Various circuit courts have further developed the true threat test in the context of § 875(c) and related federal statutes. This test essentially incorporates the subjective intent test applied by the Ninth Circuit. This incorporation of subjective intent is evident from comparing two cases in the Sixth Circuit.

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<sup>10</sup> *Jeffries*, 692 F.3d at 485 (Sutton, J., *dubitante*) (citing *DeAndino*, 958 F.2d at 148).

<sup>11</sup> *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

<sup>12</sup> *Id.*

<sup>13</sup> *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

<sup>14</sup> *Watts*, 394 U.S. at 707.

<sup>15</sup> *Black*, 538 U.S. at 365.

<sup>16</sup> *Watts*, 394 U.S. at 708; *Black*, 538 U.S. at 359–60.

<sup>17</sup> *Black*, 538 U.S. at 359.

### III. THE SIXTH CIRCUIT AND TRUE THREAT ANALYSIS

The Sixth Circuit explicitly rejects any subjective intent requirement under § 875(c).<sup>18</sup> However, the circuit applies a true threat analysis in all § 875(c) cases.<sup>19</sup> This analysis incorporates subjective features. Therefore, the Sixth Circuit's analysis of § 875(c) is functionally identical to the Ninth Circuit's approach. Comparing the cases *United States v. Jeffries* and *United States v. Alkhabaz* demonstrates this.

#### A. *United States v. Jeffries*

In *Jeffries*, the defendant filmed himself performing an original song entitled "Daughter's Love," and uploaded the video to YouTube. The song described Jeffries' relationship with his daughter and his ongoing legal dispute over visitation rights. Jeffries created the video shortly before a hearing to determine whether his unsupervised visits should continue. The song contained several passages apparently aimed at the judge who was presiding over the custody case and referenced the defendant's upcoming hearing. Among these passages was the following:

Take my child and I'll take your life. I'm not kidding, judge, you better listen to me. I killed a man downrange in war. I have nothing against you, but I'm tellin' you this better be the last court date . . . so July the 14th is the last time I'm goin' to court. Believe that. Believe that, or I'll come after you after court. Believe that.

Jeffries ended the video by looking into the camera and stating

I can shoot you. I can kill you. I can f\_\_\_\_ you. Be my friend. Do something right. Serve my daughter. Yeah, look at that, that's the evil. You better keep me on God's side. Do the right thing July 14th.

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<sup>18</sup> *United States v. Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997).

<sup>19</sup> *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012); *Alkhabaz*, 104 F.3d at 1496.

After uploading the video, the defendant sent links to the video to several people involved with the case, encouraging them to share the video with “the Judge.” After the jury convicted Jeffries of violating § 875(c), he appealed on the grounds that the trial judge had refused to instruct the jury on a subjective intent requirement. The Sixth Circuit upheld the trial court’s instruction, holding that the only requirement was that a reasonable observer would consider the threat a true threat.

### B. *United States v. Alkhabaz*

In an earlier case, the Sixth Circuit affirmed the dismissal of an indictment where the defendant had exchanged several emails with another unknown defendant.<sup>20</sup> The emails discussed a shared sexual interest in torture and rape.<sup>21</sup> The case involved a fictional story that the defendant Alkhabaz wrote about the rape and murder of one of his classmates.<sup>22</sup> Alkhabaz emailed the story to the other defendant and also posted the story to a Usenet group called alt.sex.stories.<sup>23</sup> Alkhabaz did not attempt to send the story to the classmate about whom he wrote the story. However, another classmate saw the story and reported it to the school authorities who began the investigation.

The case was appealed after the district court dismissed the indictment on First Amendment grounds for failing to allege a true threat.<sup>24</sup> The Sixth Circuit upheld the dismissal, agreeing that the communication was not a true threat, although ostensibly doing so on statutory grounds, rather than basing its holding on the First Amendment.<sup>25</sup>

The court held that § 875(c) required that the threat be made “to effect some change or achieve some goal through intimidation.”<sup>26</sup> Even if a reasonable observer could find that the

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20 *United States v. Alkhabaz*, 104 F.3d 1492, 1493 (6th Cir. 1997).

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 1496.

26 *Id.* at 1495.

story was a “serious expressio[n] of an intention to inflict bodily harm,” the story was not meant to use intimidation to further that purpose.<sup>27</sup> Instead, the story was sent “to foster a friendship based on shared sexual fantasies.”<sup>28</sup>

### C. *Distinguishing Alkhabaz from Jeffries*

*Alkhabaz* and *Jeffries* shared several important features, yet produced different results. Posting a fictional story to a Usenet group is in many respects similar to posting a video on YouTube. Both were posted on publicly accessible parts of the Internet.<sup>29</sup> Moreover, both forms of communication differed from emails and phone calls in that they do not inherently target specific recipients. In the abstract, the cases involved similar communications.

It is the subjective purpose behind each communication that differentiates *Alkhabaz* from *Jeffries*. Two key facts in *Jeffries* led the court to consider the YouTube video a true threat, unlike the story in *Alkhabaz*. First, while *Alkhabaz* merely posted his story without attempting to specifically communicate it to the threatened individual, *Jeffries* posted his video and then sent links to several people involved with the case. This fact by itself might not have been determinative, as the Sixth Circuit explicitly rejected a test based on whether the threat was communicated to the threatened party.<sup>30</sup> However, the fact that *Jeffries* made an effort to communicate with the judge was evidence that he was trying to effect a change through intimidation.<sup>31</sup>

The second distinguishing fact was the actual content of the two communications. *Jeffries* clearly indicated a demand in his video. The video not only contained threats to the judge but also had frequent and specific references to the upcoming court date and urged the judge to “do the right thing.”<sup>32</sup> These statements

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<sup>27</sup> *Id.* at 1496.

<sup>28</sup> *Id.*

<sup>29</sup> *United States v. Baker*, 890 F. Supp. 1375, 1379 (E.D. Mich. 1995) *aff'd sub nom.*, *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

<sup>30</sup> *Alkhabaz*, 104 F.3d at 1494–95.

<sup>31</sup> *United States v. Jeffries*, 692 F.3d 473, 481 (6th Cir. 2012).

<sup>32</sup> *Id.* at 476–77.

were evidence that Jeffries was asking the judge to rule in his favor at the hearing.<sup>33</sup> In contrast, Alkhabaz's story contained no indication that he was trying to obtain something by communicating a threat.<sup>34</sup>

Therefore, because Jeffries' video included a request and was disseminated in an attempt to reach the judicial officer, it was considered a true threat. In contrast, Alkhabaz's story did not contain a demand or request and was only posted online and emailed to an unrelated third party; it therefore lacked the requisite intent to be a true threat.

*D. The Sixth Circuit's True Threat Test Combines Subjective and Objective Standards*

The true threat test, as applied in *Jeffries*, is substantially similar to a subjective intent requirement. The test applied by the court is whether a reasonable person would perceive the communication as a true threat.<sup>35</sup>

The test can be broken into two elements, although the Sixth Circuit does not frame it in this manner. The first step is to determine whether the threat is a true threat, as required by the First Amendment in *Watts v. United States*.<sup>36</sup> The second step is to consider whether a reasonable person would perceive the communication as a serious threat to inflict bodily harm. A threat must satisfy both steps to sustain a conviction.

The true threat analysis employed by the Sixth Circuit incorporates several subjective factors. *Alkhabaz's* use of the test asks whether the threat was made to further a purpose or goal.<sup>37</sup> And the jury instruction in *Jeffries*, although explicitly stating that there was no subjective intent requirement, told the jury to consider whether a reasonable person would find that "the communication was done to effect some change or achieve some

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<sup>33</sup> *Id.* at 481.

<sup>34</sup> *Alkhabaz*, 104 F.3d at 1496.

<sup>35</sup> *Jeffries*, 692 F.3d at 478.

<sup>36</sup> 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

<sup>37</sup> *Alkhabaz*, 104 F.3d at 1495.

goal through intimidation.”<sup>38</sup> Whether the threat was made to achieve a goal considers the defendant’s subjective intent. Therefore, the Sixth Circuit requires objective proof of subjective intent. This approach is not substantively different from simply requiring subjective intent.

Intent is by its very nature subjective. But this fact does not mean that evidence of intent must be subjective. For example, in many areas of criminal law, the jury can find intent without any subjective evidence because it can infer intent from objective evidence.<sup>39</sup> If a defendant uses a deadly weapon on a victim, the jury may infer an intent to kill, even absent any subjective evidence about the defendant’s state of mind.<sup>40</sup> Accordingly, subjective intent is often proven with objective evidence. Therefore, despite the Sixth Circuit’s stated rejections of the Ninth Circuit’s subjective intent requirement,<sup>41</sup> in practice the two tests lead to the same results in most situations.

#### IV. APPLYING SUBJECTIVE AND OBJECTIVE INTENT REQUIREMENTS TO YOUTUBE VIDEOS

Subjective and objective intent requirements often lead to the same outcome. If a communication is objectively threatening, it is more likely that the communication was intended to be a threat. And if there is evidence that the creator of the communication intended to threaten the recipient, it is more likely that the message will be viewed as objectively threatening.

However, a subjective intent requirement prevents § 875(c) from chilling protected speech. With this requirement, § 875(c) only reaches threats directed at specific individuals or groups. And YouTube users may submit content that contains threatening language without fear of liability, as it is not directed at specific individuals. So what do these requirements mean for threats posted on widely broadcast Internet channels such as YouTube?

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<sup>38</sup> *Jeffries*, 692 F.3d at 477.

<sup>39</sup> See 1 BARBARA E. BERGMAN, NANCY HOLLANDER & THERESA M. DUNCAN, *WHARTON’S CRIMINAL EVIDENCE* § 3:17 (15th ed. 2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Alkhabaz*, 104 F.3d at 1496.

### A. *Objective Intent Requirement*

Holding the threat to an objective standard means that the language of the threat must be sufficiently threatening, given the context, that a reasonable observer would find it to be a serious expression of an intent to cause harm. For example, if a YouTube video contains only an innocuous message, the video would not meet the objective standard, regardless of the creator's intent. But if the content of the communication is threatening, under a purely objective standard, the defendant's testimony about his intentions would not be relevant.

### B. *Subjective Intent Requirement*

Requiring subjective intent means that there must be evidence that the creator of the message intended to threaten. This was the situation in *Alkhabaz*, where the content of the defendant's story met the objective standard but the circumstances demonstrated that he did not send the communication in order to further a purpose through intimidation.<sup>42</sup> In terms of a YouTube video, this means that a video may contain threatening language as long as there is no evidence that the video's creator intended to threaten someone. *Jeffries* indicates that a video directed toward the threatened individual, or circumstances, such as demands for specific action, that show intent to threaten, are evidence of subjective intent.

### C. *Practical Differences Between the Sixth and Ninth Circuit Approaches.*

The practical differences between the approaches of the two circuits are evidentiary, not in the substance of what a conviction requires. But the Sixth Circuit's true threat analysis limits even these evidentiary differences. In the Ninth Circuit, a defendant's statements about his intent will always be relevant in determining whether the communication was a threat. In the Sixth Circuit, the defendant's testimony regarding his intent will have less relevance,

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<sup>42</sup> *Id.*

though it could still be relevant when determining whether the threat was intended to achieve a goal or further a purpose.

#### CONCLUSION

While the Sixth Circuit and the Ninth Circuit use ostensibly different tests when analyzing cases under 18 U.S.C. § 875(c), the elements of each test are essentially the same. The Ninth Circuit requires both subjective and objective intent to threaten in order to uphold a conviction. The Sixth Circuit not only requires objective intent, but also requires the threat to be a true threat, and this true threat test incorporates analysis of subjective intent to threaten.

Therefore, there is no substantive difference between the requirements for a § 875(c) conviction under the ostensibly different tests of the Ninth and Sixth Circuits. In either circuit, the government must prove both objective expression of serious intent to cause bodily harm and subjective intent to threaten.

In the context of a YouTube video or other widely broadcast communication, § 875(c) is violated only when there is evidence that its creator had a subjective intent to threaten. In the YouTube context, evidence of subjective intent can be efforts to direct the video at a specific individual or group, or to accomplish a goal through intimidation. This subjective requirement mitigates potential chilling effects on speech while allowing the government to prosecute legitimate threats.

#### PRACTICE POINTERS

- When advising clients about potential criminal liability for YouTube videos or similar communications, keep in mind both the objective and subjective requirements. A client's video may be objectively threatening but not directed at any individual, and thus not subject to liability.
- When practicing in the Sixth Circuit, frame any defense based on lack of subjective intent to threaten in terms of a true threat analysis. The court is more likely to reject an argument framed around the subjective intent requirement.