NOTE

BURSTING BOTTLES: DOUBTING THE OBJECTIVE-ONLY APPROACH TO 18 U.S.C. § 875(C) IN LIGHT OF *UNITED STATES V. JEFFRIES* AND THE NORMS OF ONLINE SOCIAL NETWORKING*

TABLE OF CONTENTS

* This Note received the Jackson Walker Award for Best Student Piece on Media Law. The Author would like to thank his wife, Dava DeBauche; parents, Tom and Lisa DeBauche; Sandy and Jim Foor; and Jeff and Jan Provine for their unconditional love and unwavering support. The Author also thanks his young son, Weston Thomas DeBauche, for providing an abundance of joy in expectation and reality during the dog days of law school. The Author also thanks Dr. Melissa Hamilton, Michael Hoffman, and Katie Barnhill, whose brainstorming, guidance, and constructive criticism were integral to the composition of this Note. Lastly, the Author thanks the hardworking editors of the *Houston Law Review* for their time and dedication in preparing this Note for publication.

Neither do men put new wine into old bottles:
else the bottles break, and the wine runneth out,
and the bottles perish:
but they put new wine into new bottles,
and both are preserved.[1]

I. INTRODUCTION

Franklin Delano "Dale" Jeffries II made a very bad series of decisions when he wrote, performed, recorded, posted, and shared a music video threatening to kill the judge overseeing his daughter's upcoming custody hearing.[2] Because of these decisions, he was convicted under 18 U.S.C. § 875(c), which prohibits "transmit[ting] in interstate or foreign commerce *any communication* containing *any threat* . . . to injure the person of another."[3] A Sixth Circuit

1. *Matthew* 9:17 (King James). The metaphor driving this Note was inspired by an article written in 2011. George R.S. Weir, Fergus Toolan & Duncan Smeed, *The Threats of Social Networking: Old Wine in New Bottles?*, 16 INFO. SECURITY TECHNICAL REP. 38, 43 (2011) ("[U]ndesirable behaviour that has plagued society over the years will re-appear as it is re-enabled by new communication technologies, especially in contexts where the average user may be innocent and unsuspecting of the threats posed by social networking. Without exception, these threats are merely 'old wine in new bottles.'").

2. *See infra* Part II.A.1 (discussing the background facts giving rise to Jeffries's conviction).

3. 18 U.S.C. § 875(c) (2012) (emphasis added); United States v. Jeffries, 692 F.3d 473, 477 (6th Cir. 2012); United States v. Jeffries, No. 3:10-CR-100, 2010 WL 4923335, at *11 (E.D. Tenn. Oct. 22, 2010).

panel subsequently affirmed the conviction with the same judge writing two separate opinions.[4]

Judge Sutton's first opinion relied on precedent in reviewing the first reported case of a Section 875(c) prosecution involving a song or video.[5] He reasoned that the statute covers "any threat," including threats delivered in "old-fashioned ways or in the most up-to-date."[6] After all, this is not the first time that an "old [bottle] was filled with new wine."[7]

Judge Sutton's second opinion doubted whether the precedent was right.[8] Relying on the plain language of the statute,[9] legislative history,[10] background norms for construing criminal statutes,[11] and distancing the issue from First Amendment implications,[12] Judge Sutton's second opinion penultimately proposed an alternative interpretation[13] before asking another lawmaking body to allay, or accept, his doubts.[14]

This Note follows up on Judge Sutton's doubts and attempts to add to them. Following Judge Sutton's lead, this Note advances the doubt that the substance and design of Section 875(c) has been misinterpreted in the courts. Further, this Note attempts to highlight the insufficient capacity of Section 875(c) in light of current communicative practices, social norms, and privacy expectations. Overall, this Note argues that Section 875(c) is an old bottle that should not be filled with new wine, or else the wine will expand as it ferments and burst the bottle.[15]

---

4. *Jeffries*, 692 F.3d at 475, 483 (majority opinion); *id.* at 483 (Sutton, J., dubitante).

5. *Id.* at 478, 482 (majority opinion).

6. *Id.* at 482.

7. *Id.* (explaining that it is not the first time "an old statute was applied to a technology nowhere to be seen when the law was enacted").

8. *Id.* at 483 (Sutton, J., dubitante).

9. *Id.* at 483–84.

10. *Id.* at 484.

11. *Id.* at 484–85.

12. *Id.* at 485.

13. *Id.* at 485–86 (suggesting a standard that contains both objective and subjective components).

14. *See id.* at 486 ("The Department of Justice, defense lawyers and future courts may wish to confirm that the current, nearly uniform standard for applying § 875(c) is the correct one. I am inclined to think it is not.").

15. Fermentation is the process of converting sugar to alcohol and carbon dioxide effected by the metabolism of yeast. THE OXFORD COMPANION TO WINE 272 (Jancis Robinson ed., 2d ed. 1999). Fermentation can be done in the bottle, but a possible consequence is the generation of so much gas that the bottle explodes. *Id.* at 273. Similarly, the potency of the Internet as a form of mass communication increases as time passes and developments occur. Marc John Randazza, *The Other Election Controversy of*

For eighty years, Section 875(c) has maintained nearly the same shape, form, and material as a vessel for punishing pernicious speech.[16] Similarly, the objective-only approach to true threats has persisted over time.[17] The doubts proffered by Judge Sutton in his dubitante opinion primarily focus on this history—the "old bottle."[18] The doubts contributed by this Note focus on the present application of Section 875(c) in the age of online social networking—the "new wine" exemplified in *United States v. Jeffries*.[19]

Part II begins by reciting the factual and procedural history leading to the Sixth Circuit's decision and then details each of the court's (or Judge Sutton's) opinions. Part III.A begins the analysis by examining the precedential value and potential effect of Judge Sutton's second opinion. Then, Part III.B looks to the history and plain language of Section 875(c) and the importance of culpability in criminal law—cracks in the old bottle—exposed by Judge Sutton. Part III.C reviews the application of Section 875(c) and similar statutes in the age of the Internet and argues that a subjective component should be read or written into the negligence-based statute in light of changing privacy expectations and communicative norms brought about by online social networking. Finally, Part III.D looks at the form Section 875(c) could take to avoid bursting.

Y2K: Core First Amendment Values and High-Tech Political Coalitions, 82 WASH. U. L. Q. 143, 153 (2004); Nicholas P. Dickerson, Comment, *What Makes the Internet So Special? And Why, Where, How, and by Whom Should Its Content Be Regulated?* 46 HOUS. L. REV. 61, 65–66 (2009).

16. The law, which was eventually codified as 18 U.S.C. § 875(c), was first passed in 1932 and criminalized the use of the mail system to transmit threats communicated "with intent to extort . . . money or other thing[s] of value." Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649; *Jeffries*, 692 F.3d at 484. The law was modified in 1934, as criminals had taken to using means other than the mail, such as the telephone and telegraph, to transmit their threats. Act of May 18, 1934, Pub. L. No. 73-231, 48 Stat. 781; S. REP. NO. 73-533, at 1 (1934). It was expanded again in 1939 to apply to threats made without extortionate intent. Act of May 15, 1939, Pub. L. No. 76-76, 53 Stat. 742; *see infra* text accompanying notes 106-18 (detailing the history of Section 875(c)).

17. *See, e.g.*, Watts v. United States, 394 U.S. 705, 707–08 (1969) ("Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with 'an *apparent* determination to carry them into execution.' The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it." (internal citations omitted)); Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 SW. L. REV. 43, 60 & nn. 93–94 (2011) (asserting that the circuit courts' interpretation of what constitutes a "true threat" was mostly unchanged by the Supreme Court's decision in *Virginia v. Black*).

18. *See Jeffries*, 692 F.3d at 484–85 (Sutton, J., dubitante).

19. *See infra* Part III.C.2 (discussing the culture surrounding online social networking).

II. CASE RECITATION

A. Background

1. Facts of the Case. Dale Jeffries was upset about an upcoming hearing to reevaluate his rights to visit his teenage daughter.[20] And so, he wrote a song called Daughter's Love, which in part contained "sweet passages about relationships between fathers and daughters," but the rest of the song was an "assortment of the banal . . . the ranting . . . and the menacing."[21] Specifically, Daughter's Love threatened to kill the judge if he did not "[d]o the right thing" at the upcoming hearing.[22] Jeffries posted the video online five days before the hearing.[23]

Jeffries recorded himself performing the song on an American-flag painted guitar, posted the music video on YouTube, and shared it with selected family, friends, fathers' rights organizations, and public figures on Facebook.[24] Jeffries's ex-sister-in-law saw a link to *Daughter's Love* on Facebook and subsequently informed the judge.[25]

---

20. *See Jeffries*, 692 F.3d at 475 (majority opinion) ("Tangled in a prolonged legal dispute over visitation rights to see his daughter . . . . [h]e wrote a song. . . . [which was] part country, part rap, sometimes on key, and surely therapeutic.").

21. *Id.*

22. *Id.* at 476–77. The video begins with Jeffries saying, "This song's for you, judge." *Id.* at 475. Some of the lyrics include: "Take my child and I'll take your life. I'm not kidding, judge, you better listen to me," and "I guarantee you, if you don't stop, I'll kill you," and "[s]o I'm gonna f___ somebody up, and I'm going back to war in my head. 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." *Id.* at 475–76 (italics omitted) (censoring profanity throughout the opinion). The song also encouraged others to take action, stating "you're gonna get some crazy guy like me after your ass. And I hope I encourage other dads to go out there and put bombs in their goddamn cars. Blow 'em up. Because it's children we're, children we're talkin' about." *Id.* at 477 (italics omitted).

23. *Id.* at 475. The video ends with Jeffries telling the judge to "[d]o the right thing July 14th." *Id.* at 477. The video can be viewed on YouTube. Knoxville News Sentinel, *Army Sgt. Jeffries' Video That Threatened a Knox County Judge*, YOUTUBE (Mar. 31, 2011), http://www.youtube.com/watch?v=fS3qh9VuuaY (edited for profanity).

24. *Jeffries*, 692 F.3d at 475, 477. Jeffries sent messages, through Facebook, to various users and included a personal or descriptive note in some of the messages in addition to providing a link to the YouTube video. Brief of Defendant/Appellant Franklin Delano Jeffries, *Jeffries*, 692 F.3d 473 (No. 11-5722), 2011 WL 6146331, at *5–6 [hereinafter Jeffries Brief]. Several of the personal notes included "GIVE THIS TO THE JUDGE," which was sent to his sister, and "Comedy for the Judges of Tennessee," which was sent to an organization called DADS of Tennessee. *Id.* at *10. Jeffries also posted the video on his own Facebook wall with a message, stating in part: "Depending on how my court date goes on the 14th for my daughter's love will determine how evil I will get." *Id.* Commenting on the nature of the posts, the Sixth Circuit noted that Jeffries was not "shy about his distribution of the video. He posted the video publicly, sent it to a television station and state representative, and urged others to 'take it to the judge.'" *Jeffries*, 692 F.3d at 481.

25. *Jeffries*, 692 F.3d at 477. Jeffries's ex-sister-in-law was using Facebook, accessing her niece's page, when she saw that Jeffries was Facebook friends with her

2. Procedural History. Federal prosecutors charged Jeffries under 18 U.S.C. § 875(c), which prohibits "transmit[ting] in interstate or foreign commerce *any communication* containing *any threat* . . . to injure the person of another."[26] A jury in the Eastern District of Tennessee convicted Jeffries.[27] The crux of Jeffries's appeal involved whether the jury instruction stated the proper elements of a Section 875(c) charge.[28] The trial court refused to give Jeffries's proposed instruction, which included a subjective intent element,[29] and instead instructed that the jury evaluate the communication from an objective-only perspective.[30] That is, if a reasonable person would have perceived his words and conduct as a true threat to the judge in light of the context, then Jeffries communicated a "true threat."[31] Reinforcing the objective-only approach, the instruction stated that Jeffries's subjective intent in making the communication is "irrelevant"—the government does not have to prove that Jeffries intended for the judge to understand the music video as a threat or that Jeffries intended to carry out the threat.[32]

Jeffries also appealed the trial court's admission of Facebook messages sent to individuals that were not part of the charged conduct in the indictment and the exclusion of other posts and links on his Facebook wall, including other videos he posted on YouTube.[33] A Sixth Circuit panel composed of Judges Sutton, Griffin, and Dowd affirmed the conviction.[34]

---

niece. Jeffries Brief, *supra* note 24, at *12–13. She went to Jeffries's page and saw a link to the video. *Id.*

26. 18 U.S.C. § 875(c) (2012) (emphasis added); *Jeffries*, 692 F.3d at 477.

27. *Jeffries*, 692 F.3d at 477.

28. *Id.*

29. *Id.* at 477–78. Jeffries asked the court to instruct the jury that they "must determine the defendant's subjective purpose in making the communication. If the defendant did not seriously intend to inflict bodily harm, or did not make the communication with the subjective intent to effect some change or achieve some goal through intimidation, then it is not a 'true threat.'" *Id.* at 478.

30. *Id.* at 477–78. The trial court instructed the jury to "consider whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury." *Id.* at 477.

31. *Id.*

32. *Id.* at 477–78.

33. *See generally* Jeffries Brief, *supra* note 24, at *21–28 (describing the admitted and excluded content, and in particular, the nature of the excluded videos titled "PT Belt Part One," "Speak English COORS BEER SUCKS," and "Auditions for Fathers").

34. *Jeffries*, 692 F.3d at 473, 475, 483.

B. The Sixth Circuit's Reasoning

1. Judge Sutton's Majority Opinion. Feeling bound by precedent, Judge Sutton wrote an affirmance that signaled more resignation than confidence. In fact, the analysis began by stating that "[b]ased on existing precedent," the trial court correctly rejected Jeffries's instruction including the element of subjective intent.[35] And, the relevant analysis ended by saying "[a]s we see it . . . [we are required] to stand by our decisions."[36]

Discussing the proper jury instruction, Judge Sutton wrote that a Section 875(c) prosecution merely requires that the threat be real—a "true threat."[37] If the government proves that a reasonable person would perceive the threat as real, the First Amendment does not protect such speech.[38] The government must only "establish that the defendant (1) made a knowing communication in interstate commerce that (2) a reasonable observer would construe as a true threat to another."[39] The majority relied on two prior cases, *United States v. DeAndino*[40] and *United States v. Alkhabaz*,[41] because in each case the "defendant's subjective intent had nothing to do with it."[42] Judge Sutton further noted that several circuits have expressly rejected an additional subjective requirement in construing threat prohibitions,[43] and nearly all of the others have "effectively reached the same conclusion by laying out a test that asks only whether a reasonable observer would perceive the threat as real."[44]

---

35. *Id.* at 477–78.

36. *Id.* at 481.

37. *Id.* at 478.

38. *Id.*

39. *Id.*

40. United States v. DeAndino, 958 F.2d 146, 149–50 (6th Cir. 1992) (holding that a Section 875(c) prosecution does not require proof of "a specific intent to threaten based on the defendant's subjective purpose").

41. United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) (holding that to convict under Section 875(c), a jury need conclude only that "a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation").

42. *Jeffries*, 692 F.3d at 478–79.

43. *Id.* at 479; *see, e.g.*, United States v. Francis, 164 F.3d 120, 123 (2d Cir. 1999) ("[T]here are no First Amendment concerns that require departure from the principle that a statute that does not specify a *mens rea* level requires only general intent."); United States v. Myers, 104 F.3d 76, 81 (5th Cir. 1997) ("[W]e decline to hold that § 875(c) requires specific intent.").

44. *Jeffries*, 692 F.3d at 479; *see, e.g.*, United States v. Mabie, 663 F.3d 322, 332–33 (8th Cir. 2011); United States v. Welch, 745 F.2d 614, 619–20 (10th Cir. 1984).

However, the majority opinion engaged with Jeffries's argument[45] that the Supreme Court's decision in *Virginia v. Black*[46] puts emphasis "on what the speaker actually meant."[47] In *Black*, the Virginia statute at issue treated "any cross burning as prima facie evidence of intent to intimidate."[48] The Court struck down the statute because it "ignore[d] all of the contextual factors that are necessary to decide" whether the conduct was meant to intimidate.[49] The Sixth Circuit dismissed Jeffries's argument as reading too far into *Black* because unlike the Virginia statute, which "lacked any standard at all," the reasonable person[50] standard "winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made."[51] Further, the majority opinion contended that most of the circuits that have considered the issue have agreed that *Black* does not provide a basis for replacing the objective-only approach.[52]

The Sixth Circuit also found that Jeffries's threats had the purpose of getting the judge to "do the right thing" at the custody hearing[53] and that his words and appearance left the distinct impression that the threats were real.[54]

Concluding, the majority opinion marked the significance of the case. Although "this is the first reported case of a successful § 875(c) prosecution arising from a song or video," the statute covers "any threat," be it delivered orally, in writing, "by video or by song, in old-fashioned ways or in the most up-to-date."[55] Judge Sutton reasoned that this is not "the first time that an old [bottle]

---

45. *See Jeffries*, 692 F.3d at 479 (reasoning that "the defendant's subjective intent ha[s] nothing to do with it," and "[t]hat would be the end of it but for one thing: *Virginia v. Black*").

46. Virginia v. Black, 538 U.S. 343 (2003).

47. Jeffries Brief, *supra* note 24, at *36; *see Jeffries*, 692 F.3d at 479 ("As Jeffries reads the decision, it invalidates all communicative-threat laws under the First Amendment unless they contain a subjective-threat element.").

48. *Black*, 538 U.S. at 347–48.

49. *Id.* at 367.

50. The majority of circuits have developed a version of a reasonable person standard. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 302–14 (2001) (identifying the various forms of the circuits' reasonable person tests).

51. *Jeffries*, 692 F.3d at 479–80.

52. *Id.* at 480–81.

53. *Id.* at 481. The government must prove that the threatening communication was "done to effect some change or achieve some goal through intimidation." *Id.* at 477; *see* United States v. Alkhabaz, 104 F.3d 1492, 1493, 1495 (6th Cir. 1997) (holding that a true threat must be "communicated to effect some change or achieve some goal").

54. *Jeffries*, 692 F.3d at 481.

55. *Id.* at 482.

was filled with new wine—that an old statute was applied to a technology nowhere to be seen when the law was enacted."[56]

The Sixth Circuit also rejected Jeffries's argument that as the "recipient" of the video, only the targeted judge's perspective matters.[57] Although the judge was the only target of the threat, he was not the only recipient—every person who received a message on Facebook was a recipient.[58] Lastly, the court noted that the admission of other YouTube videos posted by Jeffries may have "entertained the jury and illustrated [his] sometimes peculiar sense of humor" but was not relevant to the threatening communication from an objective-only point of view.[59]

2. Judge Sutton's Dubitante Opinion. In what may be the first dubitante opinion ever written by a Sixth Circuit judge,[60] Judge Sutton then "[wrote] separately because [he] wonder[ed] whether [the] initial decisions in this area (and those of other courts) have read the statute the right way from the outset."[61] In writing dubitante, judges can express doubt concerning a legal point even though they are ultimately unwilling to state that it was wrong.[62]

Judge Sutton began airing out his doubts by looking at the word "threat" and positing that every relevant definition of the noun "threat" or verb "threaten" includes an intent component but does not contain any objective definition of a communicated "threat."[63] That is, missing from any dictionary is a definition that "asks *only* how a reasonable observer would perceive the words."[64] He concluded his language analysis by stating, "[i]f

---

56. *Id.*

57. *Id.* at 482–83.

58. *Id.* at 483.

59. *Id.* (internal quotation marks omitted).

60. Pierre Bergeron, *A Potential First for the Sixth Circuit*, SIXTH CIR. APP. BLOG (Aug. 29, 2012), http://sixthcircuitappellateblog.com/recent-cases/a-potential-first-for-the-sixth-circuit/.

61. *Jeffries*, 692 F.3d at 483 (Sutton, J., dubitante).

62. BLACK'S LAW DICTIONARY 574 (9th ed. 2009); *see infra* note 77 (defining and detailing the rarity of dubitante opinions).

63. *Jeffries*, 692 F.3d at 483–84.

> "[T]o declare (usually conditionally) one's intention of inflicting injury upon" a person, says one dictionary. 11 Oxford English Dictionary 352 (1st ed. 1933). "[A]n expression of an intention to inflict loss or harm on another by illegal means, esp. [sic] when effecting coercion or duress of the person threatened," says another. Webster's New Int'l Dictionary 2633 (2d ed. 1955). "A communicated intent to inflict harm or loss on another," says still another. Black's Law Dictionary 1489 (7th ed. 1999). And so on . . . .

Id.

64. *Id.* at 484.

words matter, I am hard pressed to understand why these definitions do not resolve today's case" because every definition shows that "subjective intent is part and parcel of the meaning of a communicated 'threat' to injure another."[65]

Then, Judge Sutton looked to the history of Section 875 and how the statute was initially written to prohibit extortion.[66] Because it encompassed threats coupled with intent to extort something valuable from the target of the threat, he argued that "[f]rom the beginning, the communicated 'threat' thus had a subjective component."[67] Illustrating this point, Judge Sutton noted that when Congress prohibited nonextortive threats through the addition of Section 875(c) in 1939, Congress offered no hint that it meant to write subjective intent out of the statute.[68]

Additionally, Judge Sutton looked to the background norms of construing criminal statutes and how the mens rea in Section 875(c) is negligence, which "rarely takes the stage in criminal law" and normally is the result of "express congressional directive."[69] He declared that "[n]o such directive exists here."[70]

Before concluding, Judge Sutton contended that instead of looking to "these conventional indicators of meaning," courts have confused Section 875(c) cases by making them about general versus specific intent, or free speech principles, which may "do[] more to distract than inform."[71] He proposed a new approach that requires (1) a subjectively intended threat and (2) an objectively real threat.[72] Judge Sutton concluded his doubts with a call to action, charging the "Department of Justice, defense lawyers and future courts . . . to confirm that the current, nearly uniform standard for applying

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; *see supra* note 16 (detailing the background of 18 U.S.C. § 875(c)); *infra* notes 106–18 and accompanying text (analyzing the legislative history of Section 875(c) in further detail).

69. *Jeffries*, 692 F.3d at 484–85.

70. *Id.* at 485.

71. *See id.* (noting that "some of the cases, including our own, have framed the inquiry as one of general versus specific intent," and "[h]owever useful this concept may be in deciphering laws in other areas . . . the distinction does not entitle courts to alter the meaning of *threat*," and further, that "[o]ther cases, many of the recent ones, have looked at this issue through the prism of free-speech principles and the *Black* decision. But the bright lights of the First Amendment may have done more to distract than inform" (emphasis added) (internal quotation marks omitted)).

72. *See id.* ("What should happen instead is this: The statute should require first what the words say (a subjectively intended threat) and second what constitutional avoidance principles demand (an objectively real threat).").

Section 875(c) is the correct one."[73] He added, "I am inclined to think it is not."[74]

In sum, after applying the objective-only approach to Section 875(c) in the majority opinion, Judge Sutton then doubted whether the approach was correct. The remainder of this Note looks to the effect Judge Sutton's dubitante opinion may (and should) have on the interpretation or form of Section 875(c) going forward.

III. ANALYSIS

A. The Potential Effect of Judge Sutton's Dubitante Opinion

"When some law-making bodies 'get into grooves,' Judge Learned Hand used to say, 'God save' the poor soul tasked with 'get[ting] them out.'"[75] Judge Sutton, although falling into the "groove" by affirming Jeffries's conviction, may have taken this daunting task upon himself by broadcasting and substantiating his well-founded doubts in his dubitante opinion.[76]

1. What is the Precedential Value of a Dubitante Opinion? In writing dubitante, a judge indicates that he doubted a legal point but was unwilling to state that it was wrong.[77] Most frequently used to express doubt in general, the dubitante opinion normally does not define a judge's disposition in a given case.[78] A dubitante opinion provides a detailed description of a judge's level of concern with the case's disposition, and in this way, signals that a better legal argument may exist.[79] Thus, for a

---

73. *Id.* at 486.

74. *Id.*

75. *Id.* (citing LEARNED HAND, THE SPIRIT OF LIBERTY 241–42 (2d ed. 1953)).

76. *See infra* Part III.B.1 (analyzing the plain meaning of "threat"); Part III.B.2 (commenting on the importance of mens rea in American criminal jurisprudence).

77. BLACK'S LAW DICTIONARY, *supra* note 62, at 574; *see also* DAVID M. WALKER, THE OXFORD COMPANION TO LAW 379 (1980) (defining "dubitante" as "[t]he term used in a law report of a judge who doubts a proposition of law but does not go so far as to repudiate it as bad or wrong"). *Dubitante* opinions are quite rare in the United States; in fact, as of January 16, 2014, Westlaw shows 966 cases using the term *dubitante*, while LEXIS shows 796 cases. *See* Jason J. Czarnezki, *The* Dubitante *Opinion*, 39 AKRON L. REV. 1, 1, 2 & n.7, 3 (2006); Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151, 1176 (1994) ("The rarest category of separate opinions are those issued 'dubitante' . . . .").

78. Czarnezki, *supra* note 77, at 2; *see also* Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 393 (2d Cir. 1975) (Friendly, J., dubitante) ("Although intuition tells me that the [court of last resort] would not sustain the award made here, I cannot prove it. I therefore go along with the majority, although with the gravest doubts.").

79. Czarnezki, *supra* note 77, at 5. Dubitante opinions may also take the form of "concurring dubitante" or "dubitante dissents." Kogan & Waters, *supra* note 77, at 1176–

court of last resort, the decision may be a candidate for review "because the *dubitante* opinion calls out for a better legal argument to be made."[80]

2. What Was Judge Sutton's Purpose in Writing a Dubitante Opinion? Judge Sutton explicitly asked the Department of Justice and future courts to "confirm that the current, nearly uniform standard for applying § 875(c) is the correct one."[81] In doing so, he may have been asking the Sixth Circuit to review the decision en banc[82] or for the Supreme Court to take up the matter.[83]

Because Judge Sutton wrote both of the Sixth Circuit's opinions, his dubitante opinion is neither a dissent nor a concurrence.[84] Instead, it should be viewed as a plea to a court who can challenge stare decisis, or to Congress, or to the Department of Justice, to revisit Section 875(c), heeding the better legal argument (or approach) proffered therein.[85] The remainder of this Note attempts to contribute to this "better legal argument" by (1) expounding on the arguments raised by Judge Sutton,[86] and then (2) identifying and supporting additional considerations that warrant either a more appropriate interpretation, or a new edition, of Section 875(c).[87]

---

77. Under any designation, "dubitante" opinions express grave doubts with legal reasoning and may illuminate or lead to a better legal argument. Czarnezki, *supra* note 77, at 6.

80. Czarnezki, *supra* note 77, at 6.

81. United States v. Jeffries, 692 F.3d 473, 486 (6th Cir. 2012) (Sutton, J., dubitante).

82. "A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." FED. R. APP. P. 35(a).

83. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." SUP. CT. R. 10.

84. *See* Czarnezki, *supra* note 77, at 5–7.

> While the issuance of a *dubitante* opinion by a judge expresses reservations with the majority's holding, the *dubitante* opinion nevertheless, by design, also indicates a judge's (possibly reluctant) agreement with the majority's rationale. . . . This construction of the *dubitante* opinion gives [it] a unique definition separate from a concurrence . . . and promotes judicial efficiency by providing lower courts with binding precedent to follow.

Id at 6–7.

85. *See supra* Part II.B.2 (summarizing the arguments raised in Judge Sutton's dubitante opinion).

86. *See infra* Part III.B (explaining that the legislative history of Section 875(c) and the importance of culpability in criminal law do not support an objective-only approach for true threats).

87. *See infra* Part III.C (expounding on how the Internet should change the interpretation of Section 874(c)).

B. Cracks in the Bottle: Advancing Judge Sutton's Doubts

"True threats" are not protected by the First Amendment, along with several other kinds of speech.[88] "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[89] Instead of conveying a fact, idea, or opinion, a "true threat" causes fear, disruption, and a risk of violence.[90] Because these social harms flow from the communicated threat itself and do not depend on the specific intent of the speaker, courts have construed the statute as entailing the "reasonable person" test.[91] This objective test defines a "true threat" as a communication that a reasonable person would find threatening.[92] Such a test does not incorporate consideration of the speaker's actual intent.[93] The test usually comes in one of three forms.[94] The variations are based on whether the perspective considered is that of the reasonable speaker, a reasonable listener, or a "neutral" reasonable person.[95] Most circuits have a straightforward reasonable person test for true threats.[96]

In contrast, the subjective test comes in two forms: (1) the *specific intent to carry out the threat* test; and (2) the *specific*

---

88. *See* Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 679 & nn.75–81 (identifying the categories of speech that are not protected by the First Amendment, including true threats, obscenities, child pornography, libel, fighting words, and incitement to violence).

89. Virginia v. Black, 538 U.S. 343, 359 (2003).

90. United States v. Aman, 31 F.3d 550, 555 (7th Cir. 1994) ("The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense." (quoting United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991))); *see* Scott Hammack, Comment, *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, 81 (2002) (stating that threats made over the Internet are more menacing because of "their ability to reach a much larger and more widespread audience").

91. *See* Mason, *supra* note 17, at 46–48 (identifying the social harms of communications proscribed by 18 U.S.C. § 871, which prohibits "true threats" made against the President).

92. G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 938, 939 n.328 (discussing three interpretations of the objective test used to determine whether particular speech constitutes a "true threat").

93. Rogers v. United States, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring); Rothman, *supra* note 50, at 316.

94. Blakey & Murray, *supra* note 92, at 938.

95. *Id.*

96. Mason, *supra* note 17, at 60 & nn.93–94.

intent to threaten test.[97] Like the objective tests, both subjective tests require that the defendant knowingly made the statement.[98] Relevant to this Note, the second subjective standard, the *specific intent to threaten* test, further requires that the government show that the defendant also intended for the communication to be threatening or intended for the target to feel threatened.[99] This subjective test increases the burden of proof that the prosecution must meet.[100] Such a standard narrows the category of speech classified as a "threat" and decreases overreaching by prosecutors who may overprosecute speech communicated over the Internet in light of the perception that the Internet is dangerous.[101]

The subjective element, requiring proof that the speaker intended his communication to be a threat, is entirely missing from the standard currently applied by an overwhelming majority of courts.[102] Although courts have repeatedly held that

---

97. *Compare* United States v. Himelwright, 42 F.3d 777, 783 (3d Cir. 1994) (rejecting that the government must prove specific intent to carry out a threat and requiring only proof of a specific intent to threaten), *with* United States v. Kelner, 534 F.2d 1020, 1026 (2d Cir. 1976) (holding that "specific intent to carry out the threat" is necessary to satisfy First Amendment concerns); *see also* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1235–36 (2006).

98. *See* United States v. Twine, 853 F.2d 676, 679–80 (9th Cir. 1988) (noting that the inclusion of the word "knowingly" into Section 875(c) explicitly required proof of culpability that, at the very least, "exceed[s] a mere transgression of an objective standard of acceptable behavior . . . [such as] negligence [or] recklessness"); Crane, *supra* note 97, at 1236; Mason, *supra* note 17, at 90.

> Since there can be no doubt that the speaker intended *to communicate*, then prosecuting the speaker based on the unintended but reasonably foreseeable illocutionary force of the utterance . . . is no different conceptually from prosecuting the drunk driver who intentionally got behind the wheel for the unintended but reasonably foreseeable fact that he was over his limit.

Id.

99. United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005); Crane, *supra* note 97, at 1236.

100. United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008) (discussing the importance of the objective standard specifically in antithreat statutes "to allow police to arrest" before violence ensues, thereby implying that such a standard facilitates law enforcement to more easily meet the burden of proof); Anna S. Andrews, *When Is a Threat "Truly" a Threat Lacking First Amendment Protection? A Proposed True Threats Test to Safeguard Free Speech Rights in the Age of the Internet*, UCLA ONLINE INST. FOR CYBERSPACE L. & POL'Y (May 1999), http://legacy.gseis.ucla.edu/iclp/aandrews2.htm.

101. *See* Sally Greenberg, *Threats, Harassment, and Hate On-Line: Recent Developments*, 6 B.U. PUB. INT. L.J. 673, 673 (1997); Eric J. Segall, *The Internet as a Game Changer: Reevaluating the Truth Threats Doctrine*, 44 TEX. TECH L. REV. 183, 191 (2011) (indicating that the longevity and unrestricted distribution of speech through the internet makes it more dangerous than other forms of communication); Andrews, *supra* note 100.

102. *See*, *e.g.*, United States v. Elonis, 730 F.3d 321, 332 (3d Cir. 2013) (noting that the majority of circuit courts still use the objective test); United States v. White, 670 F.3d 498, 507–08 (4th Cir. 2012) (applying the objective test to discern a true threat); *see also* Andrews, *supra* note 100.

the objective-only standard achieves this goal,[103] such a standard falls short when applied to indirect communications sent via online social networks, as exemplified by *United States v. Jeffries*.[104] The history and backdrop of Section 875(c) lend support to this point.[105]

The history of 18 U.S.C. § 875(c) dates back to Public Law 72-274, enacted in 1932, which was intended to prevent the use of the mail to transmit threats.[106] That is, Public Law 72-274 was enacted to combat extortionate threats—communications sent with the actual intent to extort money or other things of value—sent through the mail.[107] "A motivating factor for passage of the 1932 act was the kidnapping of [famous aviator] Charles Lindbergh's son, and the concomitant use of the mail to convey the kidnappers' threats and demands."[108] In 1934, Public Law 73-231 modified the law so that it applied to any threat made "in interstate commerce" regardless of the means of communication.[109] The modified law recognized that criminals

---

103. *See, e.g.*, United States v. Jeffries, 692 F.3d 473, 480 (6th Cir. 2012) ("The reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made . . . ."); United States v. Alkhabaz, 104 F.3d 1492, 1505 (6th Cir. 1997) ("[A] communication which an objective, rational observer would tend to interpret, in its factual context, as a credible threat, is a 'true threat' which may be punished by the government.").

104. *See generally* United States v. Jeffries (6th Cir. 2012); *see also* United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995) (discussing how the Internet, unlike traditional print media, has nearly unlimited distribution capabilities and thus "may complicate analysis and may . . . require new or modified laws"); Amy E. McCann, Comment, *Are Courts Taking Internet Threats Seriously Enough? An Analysis of True Threats Transmitted Over the Internet, as Interpreted in* United States v. Carmichael, 26 PACE L. REV. 523, 545–46 (2006) (arguing that a standard incorporating a subjective component, applied in the context of Internet communications, would allow for the fear caused in the proposed victim to be taken into account).

105. *See Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante) (discussing the history of Section 875(c)).

106. *See* Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649, 649. Public Law 72-274 specifically states:

> [W]hoever, with intent to extort from any person any money or other thing of value, shall knowingly deposit or cause to be deposited in any post office or station . . . any written or printed letter or other communication . . . addressed to any other person, and containing any threat (1) to injure the person, property, or reputation of the addressee or of another . . . or (2) to kidnap any person, or (3) to accuse the addressee or any other person of a crime, or containing any demand or request for ransom or reward for the release of any kidnaped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Id.

107. *Id.*

108. *Baker*, 890 F. Supp. at 1383; H.R. REP. NO. 692, at 1 (1932).

109. *See* Act of May 18, 1934, Pub. L. No. 73-231, 48 Stat. 781, 781. Public Law 73-231 states that:

were using other means of communication, such as the telephone and telegraph, in addition to the mail.[110] The modified law still required extortionate intent.[111] However, in 1939, Public Law 76-76 further expanded the law to include nonextortionate threats.[112] The new law distinguished between threats made with and without extortionate intent and applied separate penalties.[113] There were only minor changes to the law before it was codified as 18 U.S.C. § 875 in 1948.[114]

Although the distinction between extortionate and nonextortionate threats remains in Section 875 today,[115] Congress did not intend to eliminate the actual (subjective) intent element of the statute when it enacted Section 875(c).[116] The later modifications merely addressed whether the statute should prohibit nonextortive threats, not whether the statute should cover words that might be objectively perceived as threatening when the speaker did not actually intend to have a threatening effect on a particular target.[117] Making this point, Judge Sutton noted that the concept of intention-free threats never arose during debates about the bill, but rather the concept of purposive threats dominated the discussion.[118]

> [W]hoever, with intent to extort from any person, firm, association, or corporation any money or other thing of value, shall transmit in interstate commerce, by any means whatsoever, any threat (1) to injure the person, property, or reputation of any person . . . or (2) to kidnap any person, or (3) to accuse any person of a crime, or (4) containing any demand or request for a ransom or reward for the release of any kidnaped person, shall upon conviction be fined not more than $5,000 or imprisoned not more than twenty years, or both . . . .

Id.

110. *See* S. REP. NO. 73-533, at 1 (1934) ("Realizing the effectiveness of the Federal Government's investigation agencies, criminals are purposely refraining from sending extortion letters through the mails, using instead the telephone, telegraph, radio, and other means of conveyance.").

111. *See id.* ("This bill supplements the Patterson Act, which makes it a Federal criminal offense to transmit threats through the mails, with intent to extort any money or other thing of value." (citations omitted)).

112. *See* Act of May 15, 1939, Pub. L. No. 76-76, § 2(b), 53 Stat. 742, 744 ("Whoever shall transmit in interstate commerce by any means whatsoever any communication containing any threat to kidnap any person or any threat to injure the person of another shall be fined not more than $1,000 or imprisoned not more than five years, or both.").

113. *Id.* § 2(a)–(b), at 743.

114. *See* 18 U.S.C. § 875(b)–(d) (2012) (proscribing threats with extortionate intent in subsections (b) and (d)).

115. *Id.*

116. United States v. Jeffries, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., dubitante).

117. *Id.* (citing Act of May 15, 1939, Pub. L. No. 76-76, 53 Stat. 742).

118. *Id.* (citing *Threatening Communications: Hearing Before the H. Comm. on the Post Office & Post Rds.*, 76th Cong. 7, 9 (1939) (statement of William W. Barron, Department of Justice)).

Not only does the current interpretation of Section 875(c) run afoul of this legislative history, but it contradicts the plain language of the statute as well.[119] Furthermore, the importance of culpability in criminal law as a justification for punishment furthers the doubt that Section 875(c) has been interpreted wrongly "from the outset."[120]

1. The Objective-Only Approach Does Not Comport with the Plain Language of the Statute. "If words matter, I am hard pressed to understand why [definitions of the word 'threat'] do not resolve today's case."[121] Judge Sutton wondered why "conventional indicators of meaning" such as plain language do not frame the inquiry.[122] After all, "[e]very relevant definition of the noun 'threat' or the verb 'threaten' . . . includes an intent component"[123] and all definitions fail to recognize any objective component, one that asks how a reasonable observer would understand the communication.[124] In contrast, the objective-only approach to true threats does not incorporate any consideration of the speaker's actual intent.[125]

For example, the FBI defines a "threat" as "an expression of intent to do harm or act out violently against someone or something."[126] This definition differs from those used by courts in determining what constitutes a "true threat" and other threatening behaviors proscribed by statute.[127]

Accordingly, definitions of the word "threat" are irreconcilable with the objective-only approach to interpreting

---

119. *See infra* Part III.B.1 (arguing that the definitions of the words "threat" and "threaten" do not warrant an objective-only standard).

120. *See Jeffries,* 692 F.3d at 483; *infra* Part III.B.2 (arguing that the reasonable person standard incorporated in the objective-only approach is inconsistent with the justifications for punishment).

121. *Jeffries*, 692 F.3d at 484.

122. *Id.* at 485.

123. *Id.* at 483–84.

124. *Id.* at 484; *see supra* note 63 (reproducing the definitions relied on by Judge Sutton).

125. Rothman, *supra* note 50, at 316; *see also* United States v. White, 670 F.3d 498, 509 (4th Cir. 2012) (concluding that "means to communicate" refers to the act of communicating, not the intent to threaten).

126. MARY ELLEN O'TOOLE, FBI, DEP'T OF JUSTICE, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 6 (1999), *available at* http://www.fbi.gov/stats-services/publications/school-shooter; *see also* Redfield, *supra* note 88, at 663 n.1.

127. O'TOOLE, *supra* note 126, at 6; *see, e.g.*, 18 U.S.C. § 115(a) (2012) (making it a crime to threaten to assault, kidnap, or murder a federal official, judge, or law enforcement officer); 18 U.S.C. § 844(e) (2012) (prohibiting threats and the conveyance of false information regarding false bomb or arson reports); 18 U.S.C. § 871(a) (2012) (making it a crime to threaten to kidnap or kill the President or any person in the line of succession for the Presidency of the United States).

Section 875(c) because included in each definition is the speaker's subjective intent that the communication is actually threatening.[128] The objective-only approach does not blame the speaker's intent in making the communication, but rather it blames the speaker's inability to meet a standard of nonthreatening communication based on social norms.[129] Thus, the current definition punishes socially unacceptable communications, instead of situation-specific, legally impermissible threats transmitted by an individual.[130] This is, in part, a result of Section 875(c) not requiring that the threat "be communicated to its target."[131] In the place of the target stands the recipient, actual or hypothetical, who receives the communication.[132] If, objectively speaking, this recipient perceives the video as a threat, the standard is met.[133] In this way, the reading of "threat" in the statute is functionally disparate from the plain meaning of "threat," which shows that "subjective intent is part and parcel of the meaning of a communicated 'threat' to injure [a targeted person]."[134]

Furthermore, the objective-only approach, which implicates negligence, conflicts with the importance of culpability as a justification for punishment in criminal law.[135] As Justice Marshall stated in *Rogers v. United States*:

> Under the objective construction . . . the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We 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 . . . speech.[136]

---

128. *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante); *see supra* text accompanying notes 97–105 (explaining the meaning of "subjective intent" as applied to the statute).

129. *See generally* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 6.8, at 504–05 (1978) (addressing the inherent implications of "objective" and "subjective" standards).

130. "Any time a standard . . . is identified as 'objective' the implication is that the standard could not serve as a proper ground for blaming the particular individual to whom the standard is applied." *Id.* Objective standards are "social" rather than individual standards. *Id.* § 6.8, at 505.

131. *See Jeffries*, 692 F.3d at 483 (majority opinion).

132. *Id.*

133. *Id.*

134. *Id.* at 484 (Sutton, J., dubitante).

135. *See Rogers v. United States*, 422 U.S. 35, 46–47 (1975) (Marshall, J., concurring) (indicating that intent should be a prerequisite for culpability when addressing crimes of pure speech).

136. *Id.* at 47 (citations omitted).

2. The Objective-Only Approach Does Not Comport with the Importance of Culpability in American Criminal Jurisprudence. There is no explicit mens rea element in the plain language of Section 875(c).[137] However, "[a]llowing prosecutors to convict without proof of intent reduces culpability on the all-important element of the crime to negligence."[138] Thus, the objective-only interpretation of Section 875(c) permits a conviction "not because the defendant intended his words to constitute a threat . . . but because he should have known others would see it that way."[139] Judge Sutton's doubt, whether the reasonable man should take the stage in Section 875(c) convictions, amounts to questioning whether the mens rea of the crime is appropriate.[140] After all, the potential prison sentence for a Section 875(c) conviction is substantial: five years.[141]

Although negligence is a blameworthy mental state, it is not as blameworthy as "knowledge" or "purpose."[142] In effect, the current standard punishes conduct that the actor may not intend to cause a social harm.[143] This conflicts with a longstanding maxim of criminal law, the contention that "an injury can amount to a crime only when inflicted by intention."[144]

This Note is not arguing that Jeffries's conduct is blameless. It clearly is not.[145] But pouring new wine into Section 875(c) every time a new, unforeseen means of communication emerges furthers the relaxation of culpability and questions the moral justifications of criminal law.[146] After all, one of the "most fundamental postulates of our criminal justice system" is that a

---

137. 18 U.S.C. § 875(c) (2012); *see* United States v. Alkhabaz, 104 F.3d 1492, 1494 (6th Cir. 1997) (noting the absence of an explicit mens rea in Section 875(c)).

138. *Jeffries*, 692 F.3d at 484.

139. *Id.* at 484–85.

140. *See id.*

141. 18 U.S.C. § 875(c).

142. Mason, *supra* note 17, at 103.

143. *See id. But see* United States v. Jeffries, No. 3:10-CR-100, 2010 WL 4923335, at *7 (E.D. Tenn. Oct. 22, 2010) (noting that Jeffries, in *Daughter's Love*, acknowledged that the video may reach law enforcement and stated that he does "not care if [he] go[es] to jail for 2,000 years" (alteration in original)).

144. Morissette v. United States, 342 U.S. 246, 250 (1952); *see also* United States v. Alkhabaz, 104 F.3d 1492, 1494 (6th Cir. 1997) (stating that "[o]ur law does not punish bad purpose standing alone, however; instead we require that mens rea accompany the actus reus specifically proscribed by statute" (alteration in original) (quoting United States v. Monasterski, 567 F.2d 677, 683 (6th Cir. 1977)).

145. *Jeffries*, 692 F.3d at 475 (majority opinion).

146. *See* Mason, *supra* note 17, at 114 (noting that while the felony criminalization of negligent threats is constitutional, it "continues a trend of mens rea relaxation which is troubling because it blurs intuitions about the boundaries between criminal and tortious conduct, and about the moral justifications for the criminal law").

conviction can result "only from a violation of clearly defined standards of conduct."[147]

Convictions based on threatening communications sent through online social networks, as exemplified in *Jeffries*, may amount to punishment based on inaction and ignorance rather than actual intent indicated by express action.[148] The current application of Section 875(c) passes off the objective "context" of the threat as sufficient in determining liability but does not sufficiently take into consideration the actions taken or foregone in the actual transmission of the threat.[149] Such a standard should no longer be defended as a viable, well-articulated means for punishing certain communications.[150] Reading a subjective element into the statute or rewriting the statute to contain a more culpable mens rea would provide a better articulated, more appropriate standard going forward.[151] This is especially important in light of large-scale normative changes resulting from online social networking because the concept of "negligence" itself is based on social norms.[152]

C. Why 18 U.S.C. § 875(c) Should Not Be "Filled with New Wine"

Under the objective-only approach to Section 875(c), "people aren't really in control of their words . . . . [I]f it is possible that

147. *Alkhabaz*, 104 F.3d at 1494 (quoting *Monasterski*, 567 F.2d at 683).

148. *See infra* note 161 and accompanying text (addressing the concept of "stage-setting"); *cf.* United States v. Cordoba-Hincapie, 825 F. Supp. 485, 500 (E.D.N.Y. 1993) ("[T]he idea of criminal responsibility based upon the actor's failure to act as carefully as he should affords an important and largely unutilized means for avoiding the tyranny of strict liability in the criminal law." (quoting Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 110).

149. *See supra* note 51 and accompanying text (addressing the application of the objective standard as considering the "context" in which the communication was made).

150. *See* FLETCHER, *supra* note 129, § 6.8, at 504 ("In other contexts 'objective' and 'subjective' are cast about as though they were dice with only one face of meaning. In fact they have several faces, and any discussion that fails to acknowledge this diversity of meaning proves to be loaded in favor of unarticulated and undefended theories of liability.").

151. *See* United States v. Bagdasarian, 652 F.3d 1113, 1116–17 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test . . . must be read into all threat statutes that criminalize pure speech."); Rothman, *supra* note 50, at 333–42 (proposing an "intent prong," under which "[t]he speaker must have purposely, knowingly, or recklessly made a statement," taking into consideration "[w]hether it was likely that the threat would reach the target," and applying the test in various scenarios (footnote omitted)).

152. *See* Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 654 (2003) ("[J]uror norms give content to the reasonable person standard. . . . [J]urors must draw on their own understanding of reasonable behavior . . . .").

someone could misread your intentions or misunderstand what you are trying to do, you could find yourself like Mr. Jeffries, charged and even convicted of a crime."[153]

As it stands, courts view threatening speech made via online social networks as if the speakers are shouting in front of a large crowd.[154] However, the social media audience member is not part of a large crowd.[155] A physical connection with audience members in real space may exert a restraining influence on the speaker, but the same is not true of speakers and audience members connected by online social media.[156]

A more appropriate analogy is the message in a bottle.[157] As long as the speaker brings an objectively threatening communication into existence, it matters not where it ends up, but rather what it contains.[158] Under any "context" a reasonable person may find that the speaker intended for the message to be found and thus to effectuate the purpose of causing fear and inducing some change or result.[159]

While there may be no such thing as "take-backs," when yelling in front of a crowd or throwing a bottle into the sea, the

153. Jeffries's defense attorney, Jonathan Harwell, made this statement after the trial and conviction. Kristin M. Hall, *Conviction Upheld for Threat to Judge via YouTube*, KNOXNEWS.COM (Aug. 27, 2012), http://www.knoxnews.com/news/2012/aug/27/conviction-upheld-for-threat-to-judge-via/?print=1.

154. *See* United States v. Jeffries, No. 3:10-CR-100, 2010 WL 4923335, at *10 (E.D. Tenn. Oct. 22, 2010) (analogizing the posting of a video to YouTube to shouting in front of a large crowd of people engaged in their own pursuits, and stating that "[m]any people would not hear the Defendant's message, just as millions of Internet users would never view the Defendant's video posted on YouTube," but "some persons [may] be concerned by the content of the Defendant's song and statements and the serious and angry way in which he delivered them and would report the matter to some authority"). Similarly, the Supreme Court compared speech broadcast over the Internet to speech broadcast by historical speakers, such as the town crier and the pamphleteer. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).

155. *See* Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 149–50 (2011) (asserting that the "social media audience member is truly part of a lonely crowd").

156. *Id.*

157. While arguing the case in the district court, Jeffries likened the posting of the video on YouTube to writing a threat on paper and then placing it in a bottle. *Jeffries*, 2010 WL 4923335, at *10.

158. *See* Mason, *supra* note 17, at 58.

> In sharp contrast to the ambiguity about communicative intent that inheres in a non-linguistic act, the language a person uses—the words he intentionally utters—is always evidence of the person's intent in using the language. It's not the only evidence probative of intent, to be sure, but it's always good evidence, and it's always there.

Id. (emphasis omitted).

159. *Cf.* United States v. Jeffries, 692 F.3d 473, 480 (6th Cir. 2012) (majority opinion) (asserting that the reasonable person standard "winnows out" protected speech because it "forces jurors to examine the circumstances in which a statement is made").

circumstances under which threatening communications are made demand more consideration.[160] Keeping messages sent via online social media private demands substantially more effort and knowledge—"stage-setting"—than messages sent through any other medium.[161] Like messages in a bottle, no amount of stage-setting, or efforts taken to restrict the reach of the communication, can effectively limit the destination of a message sent online.[162]

The problem lies in the fact that Section 875(c) itself is a vessel drifting far from its intended proscription[163]—an old bottle lacking the capacity to either expand or encompass communications made in the age of online social networking.[164] Several cases involving Section 875(c) and related statutes shed light on how the proscription on true threats has been applied to online communications.[165]

1. Applying the Proscription Against True Threats in the Age of the Internet. The issue of Internet communications posing unique problems was foreseen by courts and scholars years ago.[166] However, courts generally have had little trouble applying established law to new technology and Internet communication

160. *See* Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 316–17 (2005) ("[A]n Internet message can circulate via e-mail or remain posted somewhere even long after the message's creator has tried to retract it."); Mason, *supra* note 17, at 86 ("[T]here just are no 'take-backs' when certain types of speech acts are completed. You don't get to back out of the contract, even if you *privately* meant something by the words other than the public meaning assumed by your counterparty.").

161. *See* Mason, *supra* note 17, at 91 ("If you want to preserve a 'private language' defense, you'd better do some *stage-setting*, and restrict your audience to those for whom the stage has been set." (emphasis added)).

162. *See* Moreno v. Hartford Sentinel, Inc., 91 Cal. Rptr. 3d 858, 863 (Ct. App. 2009) (holding that an individual who published information on the Internet could not have a reasonable expectation that it would remain private).

163. *See supra* notes 112–18 and accompanying text (discussing the background of Section 875(c)).

164. *See Jeffries*, 692 F.3d at 482 (referring to Section 875(c) as an old bottle being filled with new wine).

165. *See, e.g.*, United States v. Morales, 272 F.3d 284, 285–86 (5th Cir. 2001) (applying Section 875(c) to a communication in an Internet chatroom); United States v. Alkhabaz, 104 F.3d 1492, 1493 (6th Cir. 1997) (an additional example of Section 875(c) applied to an online communication).

166. *See e.g.*, Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850 (1997) (noting that the Internet is "a unique and wholly new medium of worldwide human communication" (quoting Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 para. 81 (E.D. Pa. 1996)); Andrews, *supra* note 100 (predicting, in 1999, that "[t]he recent rise of the Internet . . . may give the true threats doctrine new life").

mediums.[167] Several cases are indicative of Section 875(c) and related "true threat" statutes being filled with "new wine" by encompassing certain threats made via the Internet. When compared to the circumstances in *Jeffries*, the inflexible design of the objective-only approach to Section 875(c) convictions becomes more apparent.

a. United States v. Alkhabaz *(the "*Jake Baker *case").* In the *Jake Baker* case, the Sixth Circuit affirmed a trial court's quashing of an indictment that charged the defendant with transmitting threats to injure another through e-mail messages.[168] The defendant, Baker, posted a fictional story to a Usenet newsgroup that described the kidnapping, torture, and murder of a woman with the same name as one of the defendant-author's classmates.[169] A subsequent investigation uncovered e-mails sent between Baker and a friend, Gonda, which discussed their shared interest in the sexual abuse and torture of women.[170] The district court dismissed the indictment brought under Section 875(c) because the e-mails were private, and the court found nothing in them to suggest that they would be distributed any further.[171] Looking to how a reasonable person would expect Gonda (the recipient) to interpret the e-mail, the court determined that he was not likely intimidated by the e-mail.[172] In affirming, the Sixth Circuit emphasized that the test does not create a subjective standard but instead must be "determined objectively, from the perspective of the receiver."[173]

The most notable difference between the e-mails sent by Baker, and the Facebook posts made by Jeffries, is accessibility to the public.[174] In particular, the number of foreseeable recipients in Jeffries's situation was significantly higher than Baker's situation.[175] Baker sent private e-mails to one person, apparently in an attempt to "foster a friendship

---

167. Robert D. Richards & Clay Calvert, *The "True Threat" to Cyberspace: Shredding the First Amendment for Faceless Fears*, 7 COMMLAW CONSPECTUS 291, 294 (1999).

168. *Alkhabaz*, 104 F.3d at 1496.

169. *Id.* at 1493.

170. *Id.*

171. *Id.* at 1493, 1496; United States v. Baker, 890 F. Supp. 1375, 1386 (E.D. Mich. 1995).

172. *Alkhabaz*, 104 F.3d at 1496.

173. *Id.*

174. *Compare* United States v. Jeffries, 692 F.3d 473, 481 (6th Cir. 2012) ("He posted the video publicly, sent it to a television station and state representative, and urged others to 'take it to the judge.'"), *with Alkhabaz*, 104 F.3d at 1493 (noting that the e-mail messages supporting the Section 875(c) indictment were not available in any publicly accessible part of the Internet).

175. In *Alkhabaz*, the court stressed that Section 875(c) analysis must consider the foreseeable recipients. *Alkhabaz*, 104 F.3d at 1496.

based on shared sexual fantasies."[176] Perhaps Jeffries sent messages including links to the video to his friends, family, and like-minded organizations for a similar purpose.[177] However, unlike using e-mail, "most of the information" users provide on social networking sites involves asking the sites to make it public.[178] Not only does it become public, but posts that seem harmless at the time to the user may in fact be forever "offensive, stupid or reckless" because "[w]hat goes on the Internet often stays on the Internet."[179] This contrasts with e-mails, which are assumed to remain private between the speaker and recipient.[180] This is probably because e-mails are a speaker-initiated and speaker-controlled medium where recipients have the communication "pushed" at them by the speaker.[181] Facebook messages are a similar type of communication.[182] However, posting on a Facebook wall is not, requiring that the information be "pulled" off the Internet.[183] That is, only receivers in a position to access the communication (such as Dale Jeffries's ex-sister-in-law, but not the targeted judge) can extract and distribute the message further.[184]

b. United States v. Morales. In *Morales*, the Fifth Circuit considered whether a threat to kill unnamed students and teachers at a high school, made by the defendant to a third party in an Internet chat room, constituted a "true threat" under Section 875(c).[185] Morales argued that his statements were not

176. *Id*.

177. *See supra* notes 24–25 (detailing the nature of the messages sent by Jeffries on Facebook).

178. *See, e.g.*, *Facebook's Privacy Policy – Full Version,* FACEBOOK (Oct. 29, 2009, 1:59 PM), https://www.facebook.com/note.php?note_id=%20322194465300; *Twitter Privacy Policy*, TWITTER, http://twitter.com/privacy (last visited Feb. 7, 2014).

179. Robert J. Samuelson, Editorial, *A Web of Exhibitionists*, WASH. POST, Sept. 20, 2006, at A25.

180. United States v. Baker, 890 F. Supp. 1375, 1386 (E.D. Mich. 1995).

181. *See* Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1668 (1998).

182. Jason Passwaters, an expert testifying before the jury, testified that he could not determine whether any of the recipients of Jeffries' privately sent messages logged into Facebook, and thus were able to read the messages, before Jeffries attempted to retract them. Jeffries Brief, *supra* note 24, at *12.

183. Passwaters also testified, "[A] Facebook wall is an area of your Facebook account that you can post information to, and again depending on the settings, your privacy settings, that other people you are connected to can also post information to." Jeffries Brief, *supra* note 24, at *9 (alteration in original).

184. Because Jeffries's Facebook wall was viewable to the public, his page was accessible by his ex-sister-in-law who saw a link to the video and clicked on it. Jeffries Brief, *supra* note 24, at *12–13.

185. United States v. Morales, 272 F.3d 284, 285–87 (5th Cir. 2001).

true threats because "they were made to a random third party who had no connection" with the high school.[186] The court rejected this argument because the third-party receiver had experienced apprehension, the defendant repeated the threats several times during the short online chat, and the defendant gave "no indication that he was joking."[187] Based upon the "context" of the statements, the court determined the statements posed a "true threat" despite them being made to a random third party in an Internet chat room because "[i]t is this character and context of the threat that is the relevant test."[188]

Morales stands for the principle that "true threats" do not require directness.[189] It also stands for the principle that context matters.[190] Both defendants, Morales and Jeffries, claim that they had ulterior motives in making their communications.[191] Whereas Morales persisted to make threats even after seeing how his recipient reacted,[192] Jeffries had no such opportunity because the process of making, posting, and sharing the video online was void of feedback.[193] In fact, Jeffries attempted to remove the video as soon as he perceived others' reaction to it.[194]

However, even though joking or venting may be seen as a "purpose" warranting a Section 875(c) conviction,[195] online actors often express desires they do not intend to act on merely to draw attention to themselves.[196] Known as "flaming," some Internet advocates say threatening messages communicated online should be taken less seriously than similar behavior occurring in a different medium given that most "flamers" engage in such

186. *Id.* at 288.

187. *Id.*

188. *Id.*

189. *See id.* (noting that the government does not have to prove subjective intent to communicate the threat to the intended victim under Section 875(c), and further, that the threat does not have to be made directly to the victim).

190. *See id.* ("It is [the] character and context of the threat that is the relevant test.").

191. *Id.* at 286 (discussing how Morales insisted that he was only joking); Jeffries Brief, *supra* note 24, at *6 (contending that Jeffries's video should be viewed as venting or misguided humor).

192. *Morales*, 272 F.3d at 287.

193. *See* United States v. Jeffries, 692 F.3d 473, 477 (6th Cir. 2012) (explaining that Jeffries removed the video only twenty-five hours after posting it in response to negative reactions).

194. *Id.*

195. *See* United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) (reasoning that a threat communicated for a seemingly innocuous purpose constitutes a "true threat" if the defendant "attempt[ed] to create levity . . . through the use of intimidation").

196. Greenberg, *supra* note 101, at 684.

behavior because they can usually do so with impunity.[197] Had the recipients of Morales's message and Jeffries's video been less aware or accountable, their "flaming" may have gone unpunished as well.[198]

c. United States v. Bagdasarian. Finally, the Ninth Circuit's decision in *Bagdasarian* stands out as one of the only instances of a court *subjectifying* a "true threat" statute.[199] In *Bagdasarian*, two weeks before the 2008 presidential election, the defendant posted a series of anonymous, racist statements on an Internet message board that threatened to kill Barack Obama.[200] The statements included "he will have a 50 cal[iber bullet] in the head soon" and "just shoot the n——'s car and POOF!" with a link to a webpage advertisement for a large caliber rifle.[201] A subsequent investigation discovered that the defendant possessed several weapons, including a .50 caliber rifle and ammunition.[202] After a bench trial, the defendant was found guilty of violating 18 U.S.C. § 879(a)(3), which prohibits "true threats" against the President.[203] On appeal, the Ninth Circuit reversed the conviction, holding that the First Amendment requires a subjective intent element for a "true threat" determination.[204] That is, "the State can punish threatening expression, but *only if* the 'speaker means to communicate a serious expression of an intent to commit an act of unlawful

197. *Id.* at 684–85; Jennifer J. Rose, *The Listserv Review*, 2 INTERNET L. RESEARCHER, no. 6, Aug. 1997, at 9.

198. Another proposed variant of the subjective component, the *specific intent to threaten* test, may be better suited to handle this phenomena. *See supra* notes 97–101 and accompanying text (commenting on the application of the *specific intent to threaten* test).

199. *See* United States v. Jeffries, 692 F.3d 473, 480–81 (6th Cir. 2012) (claiming that although most of the federal circuit courts have concluded that an objective-only standard is appropriate, *Bagdasarian* held that a subjective gloss "must be read into all threat statutes that criminalize pure speech" (quoting United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011)).

200. *Bagdasarian*, 652 F.3d at 1115.

201. *Id.* at 1115–16 (edited for profanity).

202. *Id.* at 1116.

203. 18 U.S.C. § 879(a)(3) (2012); *Bagdasarian*, 652 F.3d at 1116, 1118. Similar to convictions under Section 875(c), there is no requirement that the speaker intended to carry out the threat, and there is no requirement that the speaker specifically intended that the recipients interpret the statement as a threat. *See* United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983) (per curiam) (explaining that "[a] threat is knowingly made if the maker comprehends the meaning of the words uttered," but clarifying that, for conviction, the speaker need not actually carry out the threat or intend the threat to be perceived as such); *see also supra* note 127 and accompanying text (enumerating and detailing various "true threat" statutes).

204. *Bagdasarian*, 652 F.3d at 1113, 1123–24.

violence to a particular individual.'"[205] Applying the *subjectified* standard, the Ninth Circuit held that no reasonable trier of fact could have found that the defendant had the subjective intent that the audience would interpret the statements as threats.[206] The Ninth Circuit's reasoning primarily relied on the grammatical structure of the statements, which precluded a finding of a subjective intent to threaten.[207]

One key distinction between Bagdasarian and Jeffries is that the former communicated anonymously.[208] It is well documented that anonymous Internet posters often "employ a degree of vitriol in excess of what they would feel comfortable (in most situations) using in person-to-person dialogue."[209] However, the same psychological reasons for such behavior underlie nonanonymous postings as well—the absence of immediate feedback and the apparent lack of consequences.[210]

Another key difference is the construct of the language used. Whereas Bagdasarian stated that "[President Obama] will have a 50 cal in the head soon," Jeffries threatened, "I'll kill you."[211]

Ultimately, "[t]he most significant aspect of the *Bagdasarian* decision is the court's explicit holding that [*Virginia v.*] *Black* requires" a *subjectified* standard for true threat convictions.[212] The Supreme Court has not yet reviewed the true threat dissonance created by the Ninth Circuit in *Bagdasarian*.[213] However, either the Sixth Circuit following the Ninth Circuit's lead after an en banc review of *Jeffries*, or even Judge Sutton's dubitante opinion itself, may cause such a "sea change" and prompt the consideration of a *subjectified* element in Section 875(c) convictions.[214] The tide is high, and the need for such a review is pressing, given the accelerated

---

205. *Id.* at 1116 (emphasis added) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).

206. *Id.* at 1122.

207. *Id.* at 1119, 1121–22.

208. *Id.* at 1120; United States v. Jeffries, 692 F.3d 473, 477 (6th Cir. 2012) (describing how Jeffries nonanonymously shared his video via Facebook, YouTube, and e-mail).

209. Mason, *supra* note 17, at 72–73.

210. *Id.* at 73. *But see Jeffries*, 692 F.3d at 475 (noting that in *Daughter's Love* Jeffries stated "I don't care if I go to jail for 2,000 years").

211. *Jeffries*, 692 F.3d at 476; *Bagdasarian*, 652 F.3d at 1120.

212. Mason, *supra* note 17, at 68 (citing *Bagdasarian*, 652 F.3d at 1117).

213. *Cf.* Mason, *supra* note 17, at 68 ("[T]he circuit split on this question is now extensive enough to warrant Supreme Court clarification.").

214. *See Jeffries*, 692 F.3d at 479–80 ("*Black* does not work the *sea change* that Jeffries proposes." (emphasis added)).

use of online social networks in recent years and the societal changes that have occurred as a result.[215]

2. Online Social Networking Is Eroding Privacy Expectations and the Norms of Communication on a Societal Level. The law does not need rewriting every time a new, unforeseen technology emerges.[216] However, the Internet and new communication mediums, like online social networks, have fundamentally changed the manner in which people interact with one another.[217] Online social media has redefined how we talk to and correspond with one another, how we resolve conflicts, how we form friendships and communities, and how we perform our roles as citizens.[218] The use of online social media thus provides unique challenges to the application of laws that govern the brick and mortar world, and it requires a more appropriate statutory framework in light of modern communicative norms and privacy expectations.[219]

The use of online social networks has altered communicative norms in many respects. Prior to the emergence of the new-Internet era, "individuals lacked the technological megaphone to broadcast their story to the world."[220] Today, online social

---

215. A review of recent news articles confirms that alarming behavior on online social networks has reached a boiling point. For example, a man posted pictures on Facebook of his wife's dead body, after he allegedly shot her several times. *Facebook Posts Admit to Killing*, L.A. TIMES, Aug. 9, 2013, at AA2. Also, after the Newtown Shootings in December 2012, a young man used Facebook to threaten a similar school shooting, and did so "as a joke." Andrew Blankstein, *No Charges in Facebook Threats*, L.A. TIMES, Dec. 18, 2012, at AA3. Shockingly, he "got some laughs from his friends from it." *Id.* (internal quotation marks omitted).

216. *See* Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, HUMANIST, Sept./Oct. 1991, at 15, 21 ("Judges interpreting a late-eighteenth-century Bill of Rights tend to forget that, unless its *terms* are read in an evolving and dynamic way, its *values* will lose even the static protection they once enjoyed. Ironically, *fidelity* to original values requires *flexibility* of textual interpretation."). *But see* United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995) (foreseeing that "new technology such as the Internet may complicate analysis and may sometimes require new or modified laws").

217. Connie Davis Powell, *"You Already Have Zero Privacy. Get Over It!" Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146, 146, 162–65 (2011). Social networks are online communication platforms that enable individuals to join and create networks of users. *Id.* Usually, these services require the creation of profiles by users, in order for others to view and to provide invitations to join various networks and groups. *Id.* at 163. Well-known examples include Facebook, Twitter, and MySpace. *Id.* at 162–63.

218. Owen Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613, 1615 (1995).

219. *See* Powell, *supra* note 217, at 169–70 (discussing the application of privacy laws).

220. Lauren Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. 1315, 1333 (2009).

networks like Facebook provide that megaphone and facilitate the rapid distribution of communications to massive audiences because of their unique characteristics.[221] This ability makes the Internet the "ideal tool for harassment, threats, and the dissemination of hateful messages."[222] At the same time, using online social networks poses certain risks to users.[223]

In addition, "[t]he fantastic power and convenience of digital life has led us to change what we consider private in ways that we can only begin to understand."[224] As a result, many "[p]eople seem to crave popularity or celebrity more than they fear the loss of privacy."[225] Some of this extroversion is merely "crass self-promotion."[226] In fact, psychologists have noticed a correlation between the use of social networking and narcissism.[227] With millions of attention-seeking users simultaneously producing material, some information stays private simply because the information was "lost in the endless ocean of digital ephemera produced by others," not because the attention seeker was not trying.[228] The result is that many use the Internet to garner fame (or infamy).[229] Even for those who do not want to be famous, the

---

221. *See, e.g.*, Greenberg, *supra* note 101, at 673 (recognizing the Internet's ability to "distribute massive amounts of information quickly and anonymously"); Sullivan, *supra* note 181, at 1667–70 (identifying "unboundedness," "instantaneity," "interactivity," and "abundance" as the four key aspects of the technology of Internet communication).

222. Greenberg, *supra* note 101, at 686.

223. For example, when someone receives a post on their Facebook account it can be seen by that individual's Facebook friends or, potentially, anyone on Facebook if the individual has not activated certain privacy settings. *See generally* Lane v. Facebook, Inc., No. C 08-3845 RS, 2009 WL 3458198, at *1 & n.1 (N.D. Cal. Oct. 23, 2009) ("The actual scope of disclosure would depend on various account privacy settings employed by the Facebook member and that member's friends.").

224. L. Gordon Crovitz, Op-Ed., *Privacy? We Got Over It.*, WALL ST. J., Aug. 25, 2008, at A11.

225. Samuelson, *supra* note 179.

226. *Id.*

227. *See* EVGENY MOROZOV, THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM 187 (2011) (revealing that a poll found 57% of college students believe their generation uses social networking for self-promotion, narcissism, and attention seeking).

228. *Id.* at 163; *see also* United States v. Jeffries, No. 3:10-CR-100, 2010 WL 4923335, at *4 (E.D. Tenn. Oct. 22, 2010) (detailing Jeffries's argument that because it was unlikely the judge (Chancellor Moyers) could successfully find the video, as the video did not mention him by name, along with the fact that there were some 100 million videos already on YouTube, made it extremely unlikely the video would attract the attention of Chancellor Moyers). Even this Author has posted a video recording of an embarrassing moment in the hopes that it would go viral, but it has not, likely due to the surfeit of similar material. *See* Tal DeBauche, *Tal Eats It*, YOUTUBE (Sept. 2, 2009), http://www.youtube.com/watch?v=OviDIL3bxLc (showing the Author in front of the Great Pyramids in Egypt attempting a front flip and failing, injuring his tailbone in the process).

229. On the Internet, because barriers to entry are low and are no greater for speakers than listeners, individuals can become mass transmitters of information and

scale of communications is amplified when information is shared via online social networks.[230] Studies show that even when an Internet user is not anonymous and knows the recipient of his communicated message, the speaker is more likely to be disinhibited when engaged in computer-mediated communication than in other types of communications.[231]

Beyond the phenomena of disinhibited online postings, an additional problem posed by the current "true threats" standard is the potential for information leaks on online social networks.[232] Using online social networks leads to an undefined circulation and distribution of the shared content, which makes it difficult for speakers to define their audiences.[233] Although online social network users assume that only people they target will view their information, they often unintentionally make information available to the whole world.[234] However, for many, the benefit of making information available to any interested individual outweighs the cost of allowing access to an undefined group of people.[235]

Using media to develop and maintain social networks is common.[236] "On YouTube, for example, a person may make and share certain kinds of videos with one set of friends, while making and sharing other types of videos with a different set of friends."[237] "Not all videos target general consumption. Some

---

opinion. Sullivan, *supra* note 181, at 1666–67. Thus, the Internet is a platform for "robust, uninhibited . . . discourse among individuals." *Id.* at 1667.

230. *See* Fiss, *supra* note 218, at 1617 (noting that with the advent of new technology, there will be "more speech, spoken by more people, and more accessible to more people than ever before").

231. Adam N. Joinson, *Disinhibition and the Internet*, *in* PSYCHOLOGY AND THE INTERNET 75, 79–81 (Jayne Gachenback ed., 2d ed. 2007).

232. *See* Weir, Toolan & Smeed, *supra* note 1, at 40 ("Aside from the risks that may arise from user error, a service as complex as Facebook is prone to errors of commission or omission. An example of this is the recent revelation that Facebook applications accidentally . . . [permitted] access to users' accounts including profiles, photographs and messages.").

233. Gelman, *supra* note 220, at 1329; Meredith Regan, Note, *All the World Wide Web Is a Stage: Free Speech, Expressive Association, and the Right to Choose Your Audience*, 53 B.C. L. REV. 1119, 1136 (2012).

234. For example, Jeffries's Facebook wall was viewable to the public, which enabled anyone who stumbled upon it to access *Daughter's Love*. United States v. Jeffries, 692 F.3d 473, 477 (6th Cir. 2012); Jeffries Brief, *supra* note 24, at *13; *see also* United States v. Jeffries, No. 3:10-CR-100, 2010 WL 4923335, at *7 (E.D. Tenn. Oct. 22, 2010) (noting that Jeffries, in *Daughter's Love*, stated that he is "making this video public," and does not care "if everybody sees this internet site").

235. Gelman, *supra* note 220, at 1317–18; Regan, *supra* note 233, at 1136.

236. Patricia G. Lange, *Publicly Private and Privately Public: Social Networking on YouTube*, 13 J. COMPUTER-MEDIATED COMM. 361, 362 (2007).

237. *Id.* at 363.

reaffirm pre-existing social networks by including material intended to appeal to shared affinities between the senders and certain receivers."[238] Exemplifying this is the fact that Jeffries sent *Daughter's Love* to several fathers' rights organizations, messaging one member of such a group: "I hope you support my video?"[239]

All in all, new communication technologies, like online social networks, are "eroding the boundaries between publicity and privacy in fundamental ways."[240] That is, the culture of online social networking promotes desperate attention-seeking, disinhibition, and the intentional (or unintentional) proliferation of communications to undefined groups of recipients.[241] Furthermore, the culture of online social networking is fundamentally changing privacy expectations within interpersonal relationships. For example, "when one friend tells another a secret [in person], expectations within the context of 'friendship' mean that a confidant will not widely distribute sensitive information."[242] This expectation determined the issue in the *Jake Baker* case because e-mails were assumed "private" and not subject to further distribution.[243] However, using online social networks, people have different expectations about what information can be shared and what constitutes sensitive, private information.[244] That is, the maxim that "a friend of my friend is not necessarily my friend" is largely ignored.[245]

The current "true threats" standard overlooks these realities by requiring only *negligence* in not foreseeing the effects of the threatening communication on an objective recipient.[246] Under the current standard, it is irrelevant whether the target received, or whether the defendant intended for the target to receive, the threatening material.[247] The statute covers any objectively real threat, "making no distinction between threats delivered orally

238. *Id.* at 368.

239. Jeffries Brief, *supra* note 24, at *10.

240. Lange, *supra* note 236, at 364 (internal quotation marks omitted).

241. *See supra* text accompanying notes 224–239 (identifying desperate attention-seeking, disinhibition, and the intentional proliferation of communications to undefined groups of recipients as elements of the culture of online social networking).

242. Lange, *supra* note 236, at 364.

243. United States v. Alkhabaz, 104 F.3d 1492, 1496 (6th Cir. 1997).

244. Lange, *supra* note 236, at 364.

245. *See id.*

246. *See* Anna Glezer & John R. Chamberlain, *What Is the Necessary* Mens Rea *for Threats to Kill*?, 40 J. AM. ACAD. PSYCHIATRY & L. 294, 294 (2012) (contending that the mens rea for a "true threat" includes at least negligence in not foreseeing the effects of the threatening speech on listeners).

247. United States v. Jeffries, 692 F.3d 473, 477 (6th Cir. 2012) (majority opinion).

(in person, by phone) or in writing (letters, emails, faxes), by video or by song, in old-fashioned ways or in the most up-to-date."[248]

Of course, people can still issue threats in the form of letters or postcards, which are direct means of communication.[249] Some commentators have argued that on a general level the harm caused by online acts is equivalent to that of their offline counterparts, such that receiving an unexpected message on Facebook is no different than receiving an unexpected letter in the mail.[250] However, there are significant differences between tangible, direct communications and communications sent through online social networks.[251] In particular, the interactivity of the Internet allows receivers to use their own volition to "pull" speech, rather than having it "pushed" at them from speaker-initiated sources like the mail or telephone.[252] When communicating through the mail, the speaker has substantially more control over where the communication ends up and can intentionally direct the message towards a discrete target.[253] In contrast, online social network users either cannot control or do not appraise their degree of control over their situation.[254]

When a user of an online social network appraises a feature of the site as a benefit—perceiving the benefits as outweighing potential privacy threats—the user tends to use the feature without considering his control over the situation.[255] In particular, younger generations are "notorious risk-takers" who systematically do not recognize the consequences of disclosing information online.[256] As

---

248. *Id.* at 482.

249. Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 572 (2004).

250. *See, e.g.*, *id.* at 575; Neal Geach & Nicola Haralambous, *Regulating Harassment: Is the Law Fit for the Social Networking Age?*, 73 J. CRIM. L. 241, 245 (2009).

251. One such difference is the "unboundedness" of digital information. Sullivan, *supra* note 181, at 1667–68. Digital information transcends geographic boundaries and cannot be confined to "any . . . spatially bounded audience definition to which other media might be limited." *Id.*

252. *Id.* at 1668.

253. *See id.* ("[E]ven a speaker who tries to confine access to information on the basis of the geographical origin of the audience may be foiled because cyberspace addresses do not now exist in territorial domains.").

254. Gelman, *supra* note 220, at 1328–29; Burcu Bulgurcu, Understanding the Information Privacy-Related Perceptions and Behaviors of an Online Social Network User 27 (October 2012) (unpublished Ph.D. dissertation, University of British Columbia), *available at* https://circle.ubc.ca/handle/2429/43380.

255. Bulgurcu, *supra* note 254, at 26.

256. *See* James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1179 (2009).

> People are time-inconsistent; they care more about privacy as they age. Teens in particular are notorious risk-takers; they do dangerous things, like smoke and

these younger generations age, their privacy expectations become the norm and reflect the views of an increasing share of the population.[257] When "these attitudes persist into adulthood, the expectations of society as a whole [will] shift and diminish over time."[258] As younger generations continue to influence society, courts and Congress must be aware of these changes and make decisions regarding communicative norms and privacy expectations accordingly.[259]

Thus, the objective-only approach may result in increasing, excessive censorship of constitutionally permissible speech if left unaltered.[260] That is, when courts apply the objective-only standard to threats transmitted online, they will more often find the presence of reasonable fear and thus the existence of a "true threat."[261] If, however, courts consider the unique nature of the medium used to disseminate the message, music video, or link, they will be less likely to find a "true threat."[262] Instead of viewing communications from the objective-only viewpoint, the standard should consider the speaker's actual and intended audience, as evidenced by the means the speaker utilized in

---

> drive recklessly, that they later regret, even when given accurate information about the risks. Even if people generally develop more accurate expectations about how social network sites work and the privacy risks involved, hundreds of thousands of children come online each year: people who by definition don't have much experience in what to expect in terms of online privacy. It's quite plausible that these hundreds of thousands of new users form accurate expectations about the privacy risks only by being burned. That wouldn't be good.

Id. (footnotes omitted).

257. *See id.* at 1180–81 ("[The] overhang of personal information isn't going away; either society will significantly adjust its privacy norms or a lot of people are going to have some lifelong regrets about their youthful Internet indiscretions.").

258. Teri Dobbins Baxter, *Low Expectations: How Changing Expectations of Privacy Can Erode Fourth Amendment Protection and a Proposed Solution*, 84 TEMP. L. REV. 599, 622 (2012).

259. *Id.*

260. Scott Hammack, Note, *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).

261. Segall, *supra* note 101, at 194–96 (arguing that whether certain Internet speech is a true threat or constitutionally protected speech is particularly difficult to determine and thus implying that the current reasonability test to determine a "true threat" does not adequately take into account the unique qualities of the Internet); Hammack, *supra* note 260, at 96. ("Because certain types of speech are more menacing when communicated on-line, when a court applies an objective listener-based test to an on-line threat, it will more often find the presence of reasonable fear and thus the existence of a true threat.").

262. *See* Segall, *supra* note 101, at 194–96 (conceding that it is difficult to draw the line between what constitutes "protectable speech and true threats" when analyzing Internet communications because of the "pervasiveness of the Internet and how easy it is to reach so many people," implying that the reasonability test courts currently use does not adequately take into account these unique qualities of the Internet); Hammack, *supra* note 260, at 99.

delivering the communication, and in particular, the recipients the communication directly (intentionally or purposefully) reaches.[263] When the means of transmission evinces a purpose or actual intent to threaten a particular individual, a more culpable state of mind is likely to exist.[264]

Ultimately, Jeffries's situation sheds light on the potential misguidance of assimilating this new wine, wine unquestionably and exponentially changing the fabric of society, into the objective-only old bottle. Jeffries posted *Daughter's Love* on YouTube and shared it with friends, family, and others.[265] He also posted a link of the video on his Facebook account and sent several messages through Facebook to other users along with personal and descriptive notes.[266] *Daughter's Love* was not Jeffries's first YouTube endeavor.[267] Jeffries had posted numerous videos on YouTube in the years prior to the incident, including a few other "music videos."[268] He also maintained a website, which, in addition to linking to his YouTube videos, included several references to another site: tryingtogetfamous.com.[269]

As the "first reported case of successful § 875(c) prosecution arising from a song or video," the Sixth Circuit appropriately noted that this case is "a sign of the times."[270] Although one surely "cannot insulate his menacing speech from proscription by conveying it in a music video,"[271] perhaps the fact that Jeffries had an ulterior motive (seeking fame or infamy) in posting the

263. *See* Segall, *supra* note 101, at 194–96 (arguing that an Internet threat's intended audience should partly drive whether certain speech is considered an unprotectable true threat, due to the Internet's unique "pervasiveness . . . and how easy it is to reach so many people); Hammack, *supra* note 260, at 99.

264. *See* Segall, *supra* note 101, at 195–96 (arguing that, in the context of determining whether internet threats should be constitutionally protected speech, courts should distinguish between those threats directed toward "a large and ill-defined group . . . which should be given full First Amendment protection" and those that arguably should not, such as "personally directed invectives toward an individual displayed for everyone to see on the Internet for an unlimited period of time"); Hammack, *supra* note 260, at 99.

265. United States v. Jeffries, 692 F.3d 473, 475, 477 (6th Cir. 2012).

266. *See supra* notes 24–25 (describing the nature of the messages sent by Jeffries to other users on Facebook).

267. *See Dale Jeffries*, YOUTUBE, http://www.youtube.com/user/dalejeffriesjr (last visited Jan. 9, 2014) (showing a listing of Jeffries's shared videos, including several videos posted two or more years ago).

268. *Id.*

269. *See id.* (describing Jeffries as a "Film Director and Movie Maker"); *see also Dale Jeffries (Franklin Delano Jeffries II)*, FRANKLINJEFFRIES.COM, http://filmknoxville.com/ (last visited Jan. 9, 2014) (linking to the site tryingtogetfamous.com).

270. *Jeffries*, 692 F.3d at 482.

271. *Id.*

video, a motive shared by many who utilize online social networks or the fact that Jeffries never intended for his target (or his ex-sister-in-law) to receive it should bear on his negligent behavior.[272] Negligent behavior involves crass self-promotion, disinhibition, an undefined audience, and misjudged privacy expectations—behavior that merely conforms to the culture of online social networking.[273] Because the objective-only approach to 18 U.S.C. § 875(c) punishes unreasonable behavior, the statute should better reflect what constitutes "reasonable" in the era of online social networking.[274]

D. Proposing an Alternative Interpretation or Construction of 18 U.S.C. § 875(c)

Judge Sutton's doubts provide an opportunity for the Supreme Court to grant certiorari on the question of "[w]hether the U.S. Constitution requires that an individual who is accused of making a threat must have wanted that statement to be understood as a threat in order for [his] statement to lose its First Amendment protections."[275] Likewise, *Jeffries* may provide Congress an opportunity either to provide the express directive Judge Sutton found missing in Section 875(c)[276] or to amend the statute to explicitly include a more culpable mens rea.[277]

Although it is outside the scope of this Note to comment on the potential benefits and downfalls of proposed alternatives, the impetus of the argument is that *Jeffries* highlights the need for a standard that looks at the threatening communication's intended audience within the context of the medium used to transmit the threat.[278] Such a standard would undoubtedly assist a jury in

---

272. *See supra* notes 24–25 (detailing how the threatening communication proliferated).

273. *See generally supra* text accompanying notes 220–59 (explaining how norms of communication and privacy expectations have changed in the era of online social networking).

274. *See supra* notes 129–30 and accompanying text (examining the implications of an "objective" standard).

275. *See* Mason, *supra* note 17, at 68 (quoting Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 376 (2011)) (arguing that *Bagdasarian* provided such an opportunity).

276. *See Jeffries*, 692 F.3d at 485 (Sutton, J., dubitante) (asserting that the reasonable man's appearance in criminal law normally springs from an express congressional directive, but "[n]o such directive exists here").

277. *See, e.g.*, Mason, *supra* note 91, at 81 (noting that "the speaker specifically intended the utterance to be interpreted as a threat" is a possible mens rea in threat cases); Rothman, *supra* note 50, at 333–34 (proposing an "intent prong," that takes into consideration "[w]hether it was likely that the threat would reach the target").

278. *See* Segall, *supra* note 101, at 195–96 (noting the importance of the intended audience when determining whether threatening speech on the Internet should be

determining whether the charged defendant actually intended to threaten the target of the threat[279] and legitimately consider the "context" in which the threat was made.[280] The proposed amendment still would not require the threat to reach its target[281] but would heighten the government's burden in proving the threat was "communicated to effect some change or achieve some goal."[282]

IV. CONCLUSION

In writing two opinions in *Jeffries*, Judge Sutton filled an old bottle with new wine and then questioned its integrity.[283] History, plain language, and norms associated with construing criminal statutes expose fractures in the bottle.[284] The expansion of negligence in communicating through online social networks, due to eroding communication norms and misjudged privacy expectations, are shattering it.[285]

Franklin Delano "Dale" Jeffries made a very bad series of decisions when he wrote, performed, recorded, posted, and shared a music video threatening to kill the judge overseeing his daughter's upcoming custody hearing.[286] Although this case may have reached the same conclusion under a *subjectified* standard, the realities of social norms in the age of online social networking and other factors demand a standard that punishes threats made with actual, subjective intent. After all, the objective-only approach to 18 U.S.C. § 875(c) punishes speakers who just could not keep their words bottled up.

Thomas "Tal" DeBauche

---

considered constitutionally protectable speech or an unprotectable threat); Hammack, *supra* note 260, at 99 (arguing for this factor as part of a test for distinguishing unprotected true threats and incitement made online).

279. *See supra* notes 97–99 and accompanying text (detailing the nature of the *specific intent to threaten* test).

280. *See Jeffries*, 692 F.3d at 480 (majority opinion) (claiming that the reasonable person test forces jurors to examine the circumstances in which the statement is made).

281. *See id.* at 483 (stating that Section 875(c) prohibits a communication containing any threat regardless of whether the threat reaches the target).

282. *Id.* at 481 (quoting United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997)).

283. *See supra* Part II.B (summarizing the content of Judge Sutton's two opinions).

284. *See generally Jeffries*, 692 F.3d at 483–86 (Sutton, J., dubitante) (arguing that definitions of the word "threat," the history of Section 875, and background norms for construing criminal statutes may indicate that the current standard for applying Section 875 (c) is not the correct one).

285. *See supra* Part III.C.1.

286. *See supra* Part II.A.1 (discussing the background facts giving rise to Jeffries's conviction).