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FIRST AMENDMENT IMPLICATIONS FOR E-MAIL THREATS: ARE THERE ANY FREE SPEECH PROTECTIONS?

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I. INTRODUCTION

E-mail use is as common today as sending letters and packages through the Postal Service. According to an October 2003 study, nearly 117 million Americans use e-mail on a daily basis.[1] Worldwide there are about 30 billion e-mails sent per day.[2] While e-mail can often be an effective way of communicating with friends, family, and business colleagues, it can also be used as a means to threaten someone's life or plan a violent crime against an unwitting third party. Often, threatening e-mails are directed toward someone, and the victim can report the threats to the police. These online threats are known as cyber-stalking.[3] A 1999 study by the U.S. Justice Department states that women are twice as likely as men to be victims of stalking by strangers and eight times as likely to be victims of stalking by intimates.[4]

According to the Justice Department's report, the definition of cyber-stalking includes two people using an implied threat when they exchange several private e-mails in which they discuss kidnapping an unnamed individual and harming them at some generic time in the future.[5] Is this type of communication legal? What if the exchanged e-mails discussed a violent and sexual fantasy about a neighbor, co-worker, or class-

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1. Pew Internet Project, *Spam: How it is hurting e-mail and degrading life on the Internet*, http://www.pewinternet.org/pdfs/PIP_Spam_Report.pdf (accessed Feb. 13, 2005).

2. *Id.*

3. U.S. Attorney General, *Report on Cyberstalking: A New Challenge for Law Enforcement and Industry*, http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm (accessed Feb. 13, 2005)

4. *Id.*

5. *Id.*

mate but the "victim" never knew about these messages? Is this form of speech protected by the First Amendment?

In late 1994 and January 1995, a University of Michigan student, Jake Baker, and an acquaintance in Canada traded several e-mails about sexual and violent fantasies they had about women.[6] One of the e-mails included a violent fantasy about one of Baker's female classmates. The e-mail was also posted on an Internet bulletin board.[7] Baker's female classmate, the subject of the violent fantasy, never knew about the e-mails until Baker was indicted.[8] The e-mails became the focus of two widely publicized trials in Michigan.[9] Baker was eventually found not guilty in both.[10] The cases discussed several different possible interpretations of federal threat laws.[11]

The U.S. Supreme Court recently decided a case where the victim's fear mandates that threatening speech lose its First Amendment protection.[12] The Court, in a 6-3 decision, ruled that cross burning is not protected speech when it is used to intimidate an individual or a group of people.[13] The salient part of the Court's ruling is that intimidation is a true threat, and a prohibition on intimidating threats protects people from a fear of violence.[14] The Court stated that the speaker does not actually have to carry out the threat for it to be illegal.[15] This follows the reasoning of several lower court decisions that use a reasonable person standard to determine the efficacy of a threat.[16]

Several court cases at the U.S. district and circuit levels have dealt with Internet and e-mail threats.[17] However, to date no cases involving Internet related hate speech or e-mails have made their way to the U.S. Supreme Court. Many of the cases in the lower courts[18] have relied on federal statute to prohibit threats in interstate communications.[19] This article will examine the application of this statute within the context of

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6. *U.S. v. Alkhabaz*, 104 F. 3d 1492, 1493 (6th. Cir. 1997).

7. *Id.*

8. *Id.* at 1507.

9. *U.S. v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995), *aff'd*, 104 F. 3d 1492 (6th Cir. 1997).

10. *Id.*

11. *Id.*

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

13. *Id.*

14. *Id.* at 552.

15. *Id.*

16. *Alkhabaz*, 104 F.3d 1492; *Rollins v. Cardinal Stritch U.*, 626 N.W. 2d 464 (2001); *U.S. v. Newell*, 309 F. 3d 396 (2002); *Planned Parenthood of Columbia / Willamette v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

17. *Id.*

18. *Id.*

19. 18 U.S.C. § 875 (LEXIS 2005).

several threat cases. It will determine whether the U.S. Court of Appeals for the Sixth Circuit, especially in light of *Virginia v. Black*,[20] properly decided the *Baker* case. In Part II, the article will then review three seminal hate speech cases in which the U.S. Supreme Court delineated under what circumstances speech may be restricted.[21] Part II will also include a review of the Internet-based *Planned Parenthood of Columbia/ Willamette* case.[22] Part III will discuss and review the federal anti-threat statute and its application to online communications.[23] In Part IV, this article will explore three e-mail threat cases.[24]

Part V will then apply the holding from the U.S. Supreme Court's decision in *Virginia v. Black* to the facts from the *Baker* case. Part VI, the Conclusion, will answer the question of whether e-mail hate speech/ threats, such as that in the *Baker* case, should be considered free speech protected under the First Amendment.

II. U.S. SUPREME COURT AND HATE SPEECH

One of the seminal court cases involving hate speech is *Brandenburg v. Ohio*.[25] The U.S. Supreme Court overturned an Ohio law that punished advocating violence as a means of political change.[26] In *Brandenburg*, an Ohio Ku Klux Klan leader was convicted under a state statute that punished advocating violence as a means of political change.[27] In a per curiam opinion, the Court ruled that the First Amendment does not permit a state to forbid advocacy of the use of force, except where the advocacy is directed to 'imminent incitement.'[28] The mere teaching of resorting to violence as a means of political change does not equal actually preparing a group for violent action.[29]

According to *Brandenburg,* any hate speech statute must distinguish between the concept of advocacy and the actual preparation for violence.[30] The only time speech may be limited is if violence is imminent.[31]

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law

20. *Black*, 538 U.S. 343.
21. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Black*, 538 U.S. 343.
22. *Planned Parenthood*, 290 F.3d 1058.
23. 18 U.S.C. § 875.
24. *Baker*, 890 F. Supp 1375; *Newell*, 309 F. 3d 396; *Rollins*, 626 N.W. 2d 464.
25. 395 U.S. 444.
26. *Id* at 445.
27. *Id.*
28. *Id.* at 447.
29. *Id.*
30. *Id.* at 448.
31. *Id.*

> violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[32]

The four-part *Brandenburg* test is the basis for determining the constitutionality of speech that advocates violence.[33] In the first part of the test, advocacy, words inform an audience about the speaker's hopes and beliefs.[34] They can be linked with statements about the reason for the advocacy.[35] In *Brandenburg*, the Court defined advocacy as the "mere abstract teaching" of political reform.[36] The Court said this type of speech is legal.[37]

The second part of the *Brandenburg* test is direction to incitement.[38] This is speech that goes beyond mere advocacy.[39] If the defendant is only aware that his words will incite illegal action but does not have the incitement in mind as his purpose, his speech is protected.[40] If the speaker knows his words will likely trigger an illegal action, then the speech is not protected.[41]

The third part of the test is imminence.[42] This is at the heart of *Brandenburg*. It means a very short period of time just before the violence occurs or, more specifically, "violence occurring nearly immediately after the actual spoken words or the speech's conclusion."[43]

The final part of the *Brandenburg* test is the likelihood of illegal action.[44] When illegal action takes place, there are few if any free speech controversies.[45] If speech leads to violence, then it is the direct result of the third part of the test, imminence.[46]

The Court's 1992 decision, *R.A.V. v. St. Paul*,[47] was one of its most complicated cases involving hate speech and incitement. A St. Paul, Minnesota statute did not include a restriction against "fighting words" or "breach of peace," but it prohibited the display of symbols and words that aroused anger on the basis of race, color, creed, religion, or gender.[48]

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32. *Brandenburg*, 395 U.S. at 447.
33. *Id.*
34. *Id.* at 447.
35. *Id.*
36. *Id.*
37. *Id.* at 448.
38. *Id.* at 447.
39. *Id.*
40. *Id.*
41. *Id.* at 449.
42. *Id.* at 449.
43. *Id.* at 434.
44. *Id.* at 447.
45. *Brandenburg*, 395 U.S. at 434.
46. *Id.* at 449.
47. 505 U.S. 377.
48. *Id.* at 380.

The Court struck down the St. Paul ordinance because it prohibited speech solely on the basis of the subject the speech addressed.[49] According to the Court, other subjects such as sexual orientation, occupation, and political affiliation could have been legal targets of hate speech.[50] Writing for the majority, Justice Scalia stated that the First Amendment did not permit the government to impose special prohibitions, or content-based restrictions, on speakers who express views on disfavored subjects.[51] In the Court's ruling, Scalia mentioned threats, stating that they are outside of the scope of First Amendment protection because we need to be able to protect individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.[52]

The U.S. Supreme Court recently decided a third case involving hate speech.[53] In an 8 to 1 decision, the Court outlawed the burning of a cross when it is done with an intention to intimidate.[54] In *Virginia v. Black*, the Court said it is legal to ban conduct, such as burning a cross, but not to ban the expression or ideas associated with the act.[55] It overturned the part of the Virginia state statute declaring that all burning of crosses is automatically a form of intimidation.[56] Writing for the majority, Justice O'Connor stated that a prohibition on true threats protects individuals from the fear of violence and the ensuing disruption to their lives.[57] Justice O'Connor's opinion defined a true threat as "those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."[58] In *Virginia*, the Court pointed out that the speaker does not need to actually carry out the threat for the speech to be illegal.[59] It said that intimidation is a threat when a speaker intends to place a person or group of people in fear of bodily harm or death.[60]

What *Brandenburg*, *R.A.V.*, and *Virginia* have in common is a focus on when speech is no longer permissible based on imminence and a real fear of violence. In each case the Court was concerned with protecting people from a danger. Similar logic was applied in a U.S. appeals court

49. *Id.* at 381.
50. *Id.* at 391.
51. *Id.* at 381.
52. *Id.* at 388.
53. *Black*, 538 U.S. 343.
54. *Id.* at 363.
55. *Id.* at 366.
56. *Id. at* 365.
57. *Id.* at 360.
58. *Id.* at 359.
59. *Black*, 538 U.S. at 359.
60. *Id.* at 360.

case involving Internet hate speech.[61]

In 2002, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, ruled that the anti-abortion Web site, the Nuremburg Files, constituted a threat towards four Oregon abortion providers.[62] The Nuremburg Files Web site was supported by a pro-life group, the American Coalition of Life Activists (ACLA).[63] It had listed the names, addresses, and telephone numbers of over 200 people including pro-choice judges, politicians, and abortion providers.[64] Each abortion provider's name was listed in black meaning they were alive or in gray meaning they had been wounded.[65] Murdered doctors had a slash running through their names.[66]

The four Oregon doctors who brought the suit in 1997 feared for their lives after their names appeared on the Web site and on a GUILT poster.[67] One of the doctors, Warren Hern, interpreted the posters and Web site to mean, "Do what we tell you to do, or we will kill you. And they do."[68] Another plaintiff, Dr. James Newhall, said he was "severely frightened" because every time there was a WANTED poster aimed at an individual that person was subsequently murdered.[69] Newhall was afraid he was the next to die.[70]

In ruling that the Web site was threatening speech and therefore unconstitutional, the appeals court focused on the *Brandenburg* test.[71] The court ruled that had ACLA generically endorsed violence committed by others against abortion providers that endorsement alone may have been protected speech, but naming specific doctors crossed the *Brandenburg* line.[72] The Court stated, "It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate[d] the threat."[73] The court stated that the test for incitement

61. *Planned Parenthood*, 290 F.3d 1058.

62. *Id.*

63. *See id.* at 1080 (explaining that the goal of the Web site was "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity"). The Web site stated its name was based on the war crimes trial from World War II. *Id.*

64. *Id.* at 1065.

65. *Id.*

66. *Id.* at 1065.

67. The GUILT posters were paper-based listings of abortion providers. ACLA sponsored both the posters and Nuremburg Files Web site. *Id.*

68. *Planned Parenthood*, 290 F.3d at 1066.

69. *Id.*

70. *Id.*

71. *Brandenburg*, 395 U.S. 444 (1969).

72. *Planned Parenthood*, 290 F.3d at 1072.

73. *Id.* at 1075.

is whether the listener takes seriously the communication as an "intent to inflict bodily harm."[74] This distinguishes a true threat from speech that is merely "frightening."[75]

III. FEDERAL THREAT STATUTE

U.S. law prohibits any attempt to threaten or extort someone through interstate communications.[76] Specifically, it punishes someone who threatens to kidnap or injure another person using any interstate communications system.[77] In order to prosecute the offense of transmitting threatening communications in interstate commerce in violation of 875(c), the government does *not* need to prove that the defendant intended his communication be received as a threat.[78]

It is not necessary for defendants to have the intent to carry out the threat in order for them to be found guilty.[79] The threat itself is a crime.[80] The government *only* needs to prove that the defendant intentionally transmitted a communication where a reasonable person familiar with the context of the communication would interpret it as a true threat.[81] Finally, 875(c) has also been interpreted to mean that a specific individual target does not need to be identified in the threat in order to support a conviction.[82]

There are two often-cited court cases where 875(c) has been applied

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74. *Id.* at 1076.

75. *Id.*

76. 18 U.S.C. § 875.

77. *Id.* § 875 (c) states, "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."

78. *See U.S. v. Whiffen*, 121 F. 3d 18 (1st Cir. 1997) (upholding the lower court's decision that the defendant's statements were true threats and a reasonable jury would have found the defendant's statements to be taken as threats by the intended victim). The court also ruled that 875 (c) is a general intent crime. *Id.*; *see also* 31 Am. Jur. 2d, *Extortion, Blackmail, and Threats* §21 (1994).

79. *See U.S. v. Landham*, 251 F.3d 1072 (6th Cir. 2001) (affirming that it is sufficient that the threat be made regardless of the subjective intention of the defendant). A reasonable person would interpret a threat as an intent to commit bodily harm and the communication is meant to achieve that goal. *Id.*; *see also* 31 Am. Jur. 2d, *Extortion, Blackmail, and Threats* § 51 (1994).

80. *Id.*

81. *See U.S. v. Francis*, 164 F. 3d 120 (2d Cir. 1999) (upholding the notion that the government's burden of proof is that "the defendant intentionally transmitted a communication in interstate commerce and that the circumstances were such that an ordinary, reasonable recipient familiar with the context of the communication would interpret it as a true threat of injury").

82. *See U.S. v. Cox*, 957 F.2d 264 (6th Cir. 1992) (extending a provision in 18 U.S.C. § 876, the federal law against using the Postal Service to mail messages threatening to kidnap, extort, or injure someone, and stating that the target does not need to be specifically identified).

and interpreted broadly.[83] In *U.S. v. Kelner*,[84] Russell Kelner was convicted in 1974 for threatening Palestine Liberation Organization leader Yassir Arafat on television.[85] Kelner was convicted under 875(c) notwithstanding his claim that he and his organization, the Jewish Defense League, did not have any specific plans to carry out an assassination.[86]

In upholding the district court's decision, Judge Oakes stated that broadcasting a threat to an indefinite and unknown audience is a communication of a threat.[87] Judge Oakes wrote that broadcast television is a legitimate means of communication sufficient to violate the statute because he did not believe Congress would have "left such a gaping hole in its statutory prohibition against the communication of threats in commerce."[88] That "hole" would otherwise allow any would-be assailant to avoid prosecution.[89]

The judge stated that under 875(c) it was not necessary for the government to prove that an appellant had a specific intent or an ability to carry out his threat.[90] The government proved that Kelner "intended to communicate a threat of injury through means reasonably adapted to that purpose."[91] The court said that threatening utterances are criminal under the statute, not the specifics of the intent to carry out the threat.[92] Judge Oakes wrote that the government has a duty to protect people from threats:

> As part of the Government's constitutional responsibility to insure domestic tranquility, it is properly concerned – in an era of ever increasing acts of violence and terrorism, coupled with technological opportunities to carry out threats of injury – with prohibiting as criminal conduct specific threats of physical injury to others. . . .[93]

In *U.S. v. DeAndino*,[94] the U.S. Court of Appeals for the Sixth Circuit overturned the 1990 exoneration of Jean Pierre DeAndino who was found not guilty in district court for threatening to kill Nelson Baker.[95]

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83. *U.S. v. Kelner*, 534 F. 2d 1020 (2d Cir. 1976); *U.S. v. DeAndino*, 958 F.2d 146 (1992).

84. 534 F.2d 1020 (2d Cir. 1976).

85. *Id.*

86. *Id.* at 1021. In an interview on WPIX, when asked by reporter, John Miller, "Are you saying that you plan to kill them [Arafat and his lieutenants]?" Miller answered, "We are planning to assassinate Mr Arafat. Just as if any other mur—just the way any other murderer is treated."

87. *Id.* at 1023.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Kelner*, 534 F. 2d at 1025.

93. *Id.* at 1026.

94. *DeAndino*, 958 F.2d 146 (1992).

95. *Id.* at 147.

DeAndino was convicted under 875(c) for telling Baker he was "going to blow his brains out" and "going to die."[96] In overturning the lower court's verdict, the appeals court stated that a *specific* intent is *not* needed for words to be considered a threat.[97] *General* intent satisfied the court because 875(c) "does not expressly require a heightened mental element in regard to communication containing a threat."[98]

The court in *DeAndino* ruled that the government must establish that a true threat is made under circumstances where a reasonable person would perceive the statement as a threat.[99] It also noted that the mental state of the defendant is not a factor in the statute's wording:

> [T]here is nothing in the language of the statute or legislative history to indicate that Congress intended that there be a heightened mens rea requirement in regard to the threat element or to indicate that the prosecution has to prove a specific intent to threaten based on the defendant's subjective purpose.[100]

The important part of the appeals court ruling is that it disagreed with the district court's conclusion that 875(c) requires specific intent for conviction.[101] In most cases involving 875(c) the courts try to identify both the actus reus and mens rea to determine if an individual has broken the law.[102] The actus reus is defined as performing an illegal act voluntarily, and the mens rea is when the crime is committed with the appropriate state of mind.[103] With threats, the actus reus is a communication with intent to kill or injure.[104] David Potter contends the actus reus comes directly from the statute because it states "any communication containing any threat to kidnap any person or any threat to injure the person of another."[105] While 875(c) does not contain an explicit mens rea, Potter states most courts have held that the defendant must knowingly or intentionally *transmit* the communication containing the threat.[106]

As it relates to the Internet and e-mail, the statute's language is broad enough to apply to these online communications.[107] Potter be-

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96. *Id.* at 147.

97. *Id.* at 147-49.

98. *Id.* at 148-49.

99. *Id.* at 149 (*citing U.S. v. Hoffman*).

100. *Id.*

101. *DeAndino*, 958 F.2d at 148.

102. David C. Potter, *Note: The Jake Baker Case: True Threats and New Technology*, 79 B.U. L. Rev. 783 (1999).

103. *Black's Law Dictionary* 37 (Bryan A. Garner ed., 7th ed., West 1999).

104. Potter, *supra* n. 102, at 785.

105. Potter, *supra* n. 102, at 784.

106. *Id.* (emphasis added).

107. *Id.* at 802.

lieves that e-mails fall into the category of interstate commerce.[108] Messages are usually routed through an Internet Service Provider ("ISP") that is often located in a different state, even if the message is directed to a recipient in the same state.[109]

IV. E-MAIL THREAT COURT CASES

For about three months between November 1994 and January 1995, University of Michigan student Jake Baker and his acquaintance, Arthur Gonda (living somewhere in Ontario, Canada), exchanged e-mail messages in which the content expressed a sexual interest in violence against women and girls.[110] On June 9, 1995 Baker posted a story on an Internet news group, "alt.sex.stories,"[111] describing the torture, rape, and murder of a young woman who had the same name as one of Baker's classmates.[112] The government charged Baker with one count of unspecified threatening communications transmitted in interstate and foreign commerce from December 2, 1994 through January 9, 1995.[113] The charge was based on the posted story.[114] On March 15, 1995, the government then charged Baker and Gonda in a superseding indictment with five counts of violating 18 U.S.C. § 875(c).[115] These five counts focused on the e-mails.[116]

Citing the *Kelner* decision, Judge Cohn dismissed the charges against Baker:

> Statements expressing musings, considerations of what it would be like to kidnap or injure someone, or desires to kidnap or injure someone, however unsavory, are not constitutionally actionable under § 875(c) absent some expression of an intent to commit the injury or kidnapping. In addition, while the statement need not identify a specific individual as its target, it must be sufficiently specific as to its potential target or targets to render the statement more than hypothetical.[117]

Judge Cohn distinguished Baker's statements from those of Russell Kelner's, noting that Kelner publicly said he was planning on murdering Arafat.[118] The Judge emphasized that the e-mails were private commu-

108. *Id.*

109. Jennifer Star, *Note: E-mail Harassment – Available Remedies and Proposed Solution* 39 Brandeis L.J. 317, 330 (2000).

110. *Baker*, 890 F. Supp 1375.

111. *Id.* at 1379.

112. *Id.* (the court records refer to the female student as "Jane Doe" in order to protect her identity).

113. *Id.* at 1380.

114. *Id.* at 1379.

115. *Id.*

116. *Id.* at 1378.

117. *Id.* at 1386.

118. *Id.*

nications between Baker and Gonda and there was little, if any chance that they would have been made public.[119] The messages became public only because of the trial.[120]

The government appealed the decision and brought the case to the U.S. Court of Appeals for the Sixth Circuit.[121] The appeals court upheld the lower court's ruling, but did so using a three-part test from the statute. First, 875(c) requires transmission in interstate or foreign commerce; secondly, the communication must contain a threat; and finally, the threat must be to injure or kidnap an individual.[122]The court stated the government satisfied the first and third parts of the test, but not the second - an actual threatening communication.[123] The court pointed to the *DeAndino* requirement that the law only requires a general threat and ruled that an e-mail communication did not satisfy.[124]

The court ruled that in order for a communication to be deemed a threat, a reasonable person would have to take the statement as a serious expression of an intention to inflict bodily harm and perceive the expression as being communicated to effect some change or achieve some goal through intimidation.[125] Judge Cohn stated that any communication must have the purpose of a violent goal:

> Although it may offend our sensibilities, a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation.[126]

The court did not believe that the e-mails exchanged between Baker and Gonda were meant to effect violent action(s) or to achieve a goal of intimidation.[127] Rather the e-mails were an attempt to foster an online friendship based on sexual fantasies.[128]

In the court's 2-1 ruling, Judge Robert Krupansky dissented.[129] In his dissent, Judge Krupansky pointed out that Baker and Gonda discussed implementing a plan to abduct, rape, and murder a young woman.[130] He referred to the *DeAndino* case citing that 875(c) does not

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119. *Baker*, 890 F. Supp at 1386.
120. *Id.* at 1390.
121. *Alkhabaz*, 104 F.3d at 1493 (Alkhabaz and Baker are the same person).
122. 18 U.S.C. § 875.
123. *Alkhabaz*, 104 F.3d at 1494.
124. *Id.* at 1495.
125. *Id.*
126. *Id.*
127. *Id.* at 1496.
128. *Id.*
129. *Id.*
130. *See id.* at 1498. The following e-mail exchange between Baker and Gonda shows an illegal plan of action:

confine the scope of criminalized communications to those only directed towards identifiable individuals and intended to effect some violent goal: "a simple, credible declaration of an intention to cause injury to some person, made for any reason, or for no reason whatsoever, may also constitute a threat."[131]

Judge Krupansky embraced the *DeAndino* principle that a reasonable person's interpretation of intent towards harm could be the test to determine if a message equaled a threat.[132] According to *DeAndino,* whether the originator of the message intended to intimidate or coerce anyone becomes irrelevant.[133] Judge Krupansky interpreted Baker's e-mail as plotting a violent harm towards a female he knew (either a classmate or neighbor), and therefore, a specific target of violence is not needed to convict.[134] The judge reminded the rest of the court that, at a minimum, Baker and Gonda had agreed to meet and try to implement their conspiracy on an unwitting female victim.[135]

The district and appeals court decisions have been widely criticized.[136] Attorney Melanie Persellin agreed with Judge Krupansky's assessment that a threat can be made against an identifiable category of people without singling out individuals.[137] Persellin analyzed this case from the context that 875(c) requires proof that the Internet stories and e-mails were interstate transmissions and contained a threat to injure or kidnap someone.[138] She disagrees with the appeals court's interpretation that the e-mails about torturing and raping women did not have any true threat elements.[139] Persellin argues that if the *Alkhabaz* court had

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I can't wait to see you in person. I've been trying to think of a secluded spot. but my area knowledge of Ann Arbor is mostly limited to the campus. I don't want any blood in my room, though I have come up with an excellent method to abduct a bitch. As I said before, my room is right across from the girl's bathroom. Wait until late at night. grab her when she goes to unlock the door. Knock her unconscious. and put her into one of those portable lockers (forget the word for it). or even a duffle bag. Then hurry her out to the car and take her away. . .What do you think?

Gonda replies:

I think that it is best to disconnect yourself as much as possible from the crime. The police, would surely come around asking questions. . .leaving with a huge bag may look very suspicious to anyone who might see you. . .A dorm may be too populated for an abduction. . .also, it would be better to go for complete strangers. [sic] *Id.*

131. *See Alkhabaz*, 104 F.3d at 1502 (Krupansky, J., dissenting).

132. *Id.* at 1502.

133. *DeAndino*, 958 F.2d, 148.

134. *Id.* at 1504.

135. *Id.* at 1507.

136. Melanie Pearl Persellin, *Notes and Comments: Sticks and Stones May Break My Bones, But Your Words Are Sure to Kill Me: A Case Note on U. S. v. Alkhabaz*, 50 DePaul L. Rev. 993 (2001).

137. *Id.* at 1019.

138. *Id.* at 1020.

139. *Id.*

correctly applied the facts from the *DeAndino* case, it would have used a reasonable person test to determine that Baker's statements were intended to harm someone.[140]

David Potter disagreed with the appeals court ruling based on the *Kelner* decision.[141] While the district court found that Baker's communications fell short of being an "equivocal, unconditional, immediate, and specific threat," he points out that in *Kelner* that appeals court upheld the threat conviction even though Kelner's threats to Arafat were not immediate in nature.[142] It would have been impossible for Kelner to carry out an assassination attempt without delay once the threat was broadcast.[143] Potter argues that 875(c) literally refers to *any* communication containing any threat to injure or kidnap not just a threatening communication aimed at affecting a specific goal.[144] He believes that the e-mails, which discussed a generic plan to find a woman, injure her, and kidnap her, should have been sufficient enough to secure a conviction under 875(c).[145]

While the Baker e-mails have been the subject of numerous debates on interpreting 875(c), there are two other cases involving the use of e-mail as threats.[146] In 2002 in *U.S. v. Newell*, the U.S. Court of Appeals for the Sixth Circuit upheld a lower court's conviction based on 875(c).[147] Tommy Newell was convicted of threatening Cynthia Hamden, a married woman with whom he had an affair from December 1999 until August 2000.[148] When the relationship ended, Newell sent her harassing and threatening e-mails.[149] Between August 13, 2000 and September 11, 2000 he sent over 70 e-mails and left 26 threatening messages on her home telephone answering machine.[150] Hamden, who lived in Monroe County, Michigan, contacted the sheriff's department.[151] They in turn contacted Newell who lived in Utah and warned him to discontinue the

140. *Id.* at 1024.

141. Potter, *supra* n. 102, at 797.

142. *Id.*

143. *Id.*

144. *Id.* at 798.

145. *Id.* at 804.

146. *See generally*, *Newell*, 309 F.3d 396; *Rollins*, 626 N.W. 2d 464.

147. *Newell*, 309 F.3d 396.

148. *Id.* at 397.

149. *Id.*

150. *Id.* at 397-98. An example of one of the 70 e-mails is from August 13, 2000:

> I WILL NOT BE DISTRESPECTED LIKE THIS. . .I TRIED TO DO THIS YOUR WAY, BUT YOUR WAY HURTS TOO MUCH, I TAKE ALL THE PAIN WHILE YOU AND RICH HAVE FUN, WELL STARTING TOMORROW THE RULES ARE GOING TO CHANGE, BECAUSE I WILL NOT GO OUT LIKE THIS. NO FUCKING WAY.

151. *Id.* at 398.

messages.[152] Newell continued to make threatening calls to Hamden, and was again contacted by the Monroe County Sheriff's Department.[153] He subsequently stopped sending harassing messages.[154] On September 29, 2000, FBI agents arrested him in Ogden, Utah, and they charged him with a one-count indictment for transmitting threatening interstate communications in violation of 875(c).[155] On October 12, 2000, in the Eastern District Court of Michigan, Newell pled guilty, but appealed the sentencing.[156] Before his sentencing, Newell was told he would get twelve to eighteen months in prison, but, instead, he received twenty seven to thirty three months.[157]

The appeals court affirmed the punishment stating that the prison sentence was appropriate in light of the 'circumstances. The court noted, "both the purchase of the handgun in close temporal proximity to the making of the threats, and the tone communicated by the threats themselves, constitute conduct evidencing intent to carry out the threats."[158] Judge Marbley stated that Newell's threats contained explicit language including an intention to kill Hamden's husband.[159] Judge Marbley stated the 'sentence was appropriate 'for a violation of the 875(c) statute.[160]

A second case involving threatening e-mails is *Rollins v. Cardinal Stritch University*.[161] While this case does not involve an 875(c) violation, it parallels the *Baker* case in that it involves unwanted e-mails toward a female classmate at a university.[162] On October 27, 1999, Bruce Rollins, a student at Cardinal Stritch University in Edina, Minnesota, sent an unsolicited message to a female classmate with an image of kissing lips and the subject title, "FOR THE MEN (OR WOMEN) IN YOUR LIFE."[163] The female classmate forwarded the message to her class instructor stating that she did not know why Rollins sent her the message, but that Rollins gave her "the creeps" from his use of off color remarks to her during class.[164]

In January 2000, Rollins continued sending more unsolicited e-mails to his classmates including the woman who made the initial com-

152. *Id.* at 398.
153. *Newell*, 309 F.3d at 398.
154. *Id.*
155. *Id.* at 399.
156. *Id.*
157. *Id.*
158. *Newell*, 309 F.3d at 401.
159. *Id.* at 403.
160. *Id.* at 404.
161. 626 N.W. 2d 464 (Minn. 2001).
162. *Id.* at 466.
163. *Id.* at 466.
164. *Id.*

plaint.[165] Included in one of his e-mails was a forwarded message about the verdict in the *Baker* case without a direct message from Rollins himself.[166] The e-mail was forwarded to the University's Interim Dean of Students who, in turn, suspended Rollins.[167] At a disciplinary hearing, the Dean told Rollins he could stay if he had no in-person or e-mail contact with the female classmate.[168] Rollins sued the school challenging the student disciplinary proceeding as a violation of the university's handbook.[169] He alleged that the hearing, and his suspension, were arbitrary and without due process.[170] Siding with the university, The Court of Appeals of Minnesota upheld the verdict of the Hennepin County District Court.[171]

Both courts agreed that the university was within its rights to suspend Rollins based on the repeated complaints of the unwanted e-mails.[172] While *Rollins* did not focus on 875(c) for the cause of action, it did uphold the interpretation many courts have given that statute. More specifically, the court gave validity to the notion that the University's action was proper because the victim interpreted Rollins' e-mails as threatening. The messages engendered fear in the recipient, fear which a reasonable person, in this case, the university's Interim Dean of Students, would also interpret as threatening.

V. ARE E-MAIL THREATS PROTECTED SPEECH?

What the preceding cases demonstrate is that it is illegal to not only threaten someone, but vague threats may not be constitutionally protected under the First Amendment. Interpretations of 875(c) range from defining the threat from the victim's point of view[173] to the reasonable person's standard.[174] U.S. Supreme Court cases such as *Brandenburg*, *R.A.V.*, and *Virginia* all illustrate the limits to free speech when the prospect of violence is imminent or has a demonstrable effect on the intended victim.[175] Other cases such as *DeAndino*, *Kelner*, and *Newell* also examined threats from the victim's point of view and applied a reasonable person standard, even when the threats weren't specific in nature.[176]

165. *Id.*
166. *Id.* at 467.
167. *Rollins*, 626 N.W.2d at 467.
168. *Id.* at 468.
169. *Id.*
170. *Id.*
171. *Id.* at 471.
172. *Id.*
173. *See Kelner*, 534 F. 2d 1020.
174. *See Alkhabaz*, 104 F.3d 1492.
175. *See Black*, 538 U.S. 343; *Brandenburg*, 395 U.S. 444; *R.A.V*, 505 U.S. 377.
176. *Kelner*,534 F. 2d 1020; *Newell*, 309 F.3d 396; *DeAndino*, 958 F.2d 146.

In light of the aforementioned cases, the facts of *Baker* would lead an observer to predict that the *Baker* court would have applied a similar standard. However, that court declined similar reasoning, and characterized the e-mails as private exchanges between two people.[177] The content of Jake Baker's and Arthur Gonda's e-mails indicate a generic goal of finding a young woman and violently and sexually abusing her.[178] It is arguable that those e-mails were in the realm of protected speech as the court held, but once the messages began discussing one of Baker's classmates, there was an identifiable person at risk. Perhaps the e-mails were simply fictional fantasy stories, but when a real person who lives in close proximity to one of the authors is the subject, can the law take that chance?

The U.S. Supreme Court's decision in *Virginia v. Black* would answer that question in the negative. The Court specifically pointed out that the speaker does not have to actually carry out the threat for it to be illegal.[179] A prohibition on true threats "protects individuals from the fear of violence" and from the disruption that fear engenders."[180] Restricting Jake Baker's e-mail would have protected "Jane Doe" from fearing for her life had she ever found out about the messages. She was the target of a violent fantasy story that was posted in an Internet chat site, a forum where literally anyone in the world, including someone in Ann Arbor, Michigan, could have located her.[181]

Even if Jake Baker may not have had any plans to kidnap and abuse Jane Doe, Arthur Gonda or an anonymous visitor to "alt.sex.stories" could have taken an initiative against the female student. Baker put her safety and well being at risk. If he had wanted his stories to be fictional, he should have used a pseudonym for Jane Doe's identity. His putting her life at risk is no different than what ACLA did with the Nuremburg Files Web site, posting the names, addresses, and telephone numbers of over 200 doctors, judges, and politicians.[182] Once their names were made public, their lives had changed. The four Oregon doctors received threats.[183] They needed police protection and wore bulletproof vests.[184]

In light of these examples, the courts seem inclined to rule that when a third party's life may be in jeopardy from a threatening statement, that speech has crossed beyond the bounds of First Amendment

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

178. *Id.* at 1495.

179. *Black*, 538 U.S. at 359.

180. *Id.*

181. *Baker*, 890 F. Supp. 1375.

182. *Planned Parenthood*, 290 F.3d at 1065.

183. *Id.* at 1086.

184. *Id.*

protection.[185] The *Kelner*, *DeAndino*, *Planned Parenthood*, and *Virginia* courts reach the same conclusion but arrive there in different ways. The *Baker* case seems to be an anomaly in that it was decided differently.

VI. CONCLUSION

This article's findings indicate that the e-mails in the *Baker* case would not be protected speech today in light of the Court's ruling in *Virginia v. Black*. It does not matter what technological means are used to convey the threats. The *Kelner*, *DeAndino*, *Newell*, and *Planned Parenthood* cases all show that the threats themselves were the salient factors in the courts' decisions. The courts focused on the dangers the threats imposed on the victims.

The different courts agreed that when victims fear for their lives and their lives are disrupted because of a threat, then First Amendment protection is lost.[186] In the *Baker* case, Jane Doe's life was placed at risk when her name was posted in connection with being the subject of a violent sexual story.[187] Even before the *Virginia* case, several appeals courts used the reasonable person standard to determine the constitutionality of ambiguous threats. *Virginia* simply narrowed the test to include the victim's safety.

185. *See Kelner*, 534 F. 2d 1020; *DeAndino*, 958 F.2d 146; *Planned Parenthood* 290 F.3d 1058; *Black* 538 U.S. 343.

186. *See e.g. Planned Parenthood*, 290 F.3d 1058.

187. *Alkhabaz*, 104 F.3d 1492.