Counterman v. Colorado: Defining True Threats of Violence under the First Amendment

*Clay Calvert**

Introduction

Despite the First Amendment's absolutist command that "no law" shall be made abridging free speech, the U.S. Supreme Court has identified several varieties of expression that generally can be regulated without raising constitutional concerns.[1] In brief, "no law" doesn't really mean what it says; laws banning some types of speech are okay. These categorical carveouts from First Amendment protection typically evolve over decades. Such is the case for the "true threats" exception, which the Court addressed in the 2023 online-stalking case of *Counterman v. Colorado*.[2] Grasping this reality, encapsulated below, helps in better understanding the evolution of the true threats doctrine.

A. How Unprotected Categories of Speech Develop over Time

Consider the obscenity carveout. In 1942, the Court suggested in *Chaplinsky v. New Hampshire* that regulating obscenity "[has] never been thought to raise any Constitutional problem."[3] Fifteen years later, the Court definitively declared that "obscenity is not within the area of constitutionally protected speech or press."[4]

* Professor Emeritus, University of Florida.

[1] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

[2] 143 S. Ct. 2106 (2023).

[3] 315 U.S. 568, 572 (1942).

[4] Roth v. United States, 354 U.S. 476, 485 (1957).

Less clear then, however, was the Court's eventual definition of obscenity. That definition developed across multiple cases, including the Court's 1964 *Jacobellis v. Ohio* decision best remembered for Justice Potter Stewart's definitional lament about obscenity: "I know it when I see it."[5] It wasn't until 1973 in *Miller v. California* that the Court adopted its current obscenity test.[6]

Or think about another type of unprotected expression: incitement to unlawful conduct. Incitement doctrine evolved from the clear-and-present danger standard fashioned more than a century ago in *Schenck v. United States*,[7] the case that spawned the oft-misquoted maxim about "falsely shouting fire in a theatre."[8] It developed into the more demanding, free-speech friendly test articulated in 1969 in *Brandenburg v. Ohio*.[9] It holds that the First Amendment protects "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[10]

The illicit category called "fighting words" has similarly morphed since its initial articulation in *Chaplinsky* as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[11] Later cases closely cabined the fighting words exception.[12] Today, fighting words narrowly include only personally

[5] 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Other key cases in the series of decisions in which the Court refined the requirements for convicting a person for obscenity include *Smith v. California*, 361 U.S. 147 (1959), and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413 (1966).

[6] 413 U.S. 15 (1973). The *Miller* test for obscenity focuses on whether content: (1) appeals to a prurient interest in sex, when considered as a whole and from the perspective of an average adult applying contemporary community standards; (2) depicts in a patently offensive manner the display of sexual conduct, as defined by state law; and (3) lacks serious literary, artistic, political, or scientific value. *See id.* at 24.

[7] 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

[8] *Id.* People often omit "falsely" from this statement. *See, e.g.*, Carlton F.W. Larson, *"Shouting 'Fire' in a Theater": The Life and Times of Constitutional Law's Most Enduring Analogy*, 24 Wm. & Mary Bill of Rts. J. 181 (2015).

[9] 395 U.S. 444 (1969).

[10] *Id.* at 447.

[11] *Chaplinsky*, 315 U.S. at 572.

[12] *See* Cohen v. California, 403 U.S. 15 (1971); Hess v. Indiana, 414 U.S. 105 (1973).

abusive epithets, directed in person at specific individuals, that are inherently likely to make their targets swing back and hit the speaker (hence the moniker "fighting words"). That likelihood is determined based on the context of the words' utterance and the characteristics of their targets.[13]

This all renders unsurprising the comparably protracted development of true threats, a newer category of unprotected speech at issue in *Counterman v. Colorado*. As described later in this article, *Counterman* is a criminal stalking case centering on hundreds of unsolicited direct messages sent via Facebook by a stranger, Billy Raymond Counterman, to Colorado singer-songwriter Coles Whalen. Counterman was convicted of stalking Whalen, but he claimed that the First Amendment protected his messages because they weren't true threats. The U.S. Supreme Court took the case to decide exactly when threats fall beyond First Amendment protection.

Before delving deeper, it's useful to clarify in non-legalese the fundamental differences among three already-noted types of unprotected expression—incitement, fighting words, and true threats. Here's a broad-brushstrokes encapsulation:

- **Incitement:** I say something to you to get you to commit violence or an unlawful act against someone else. For instance: Did Donald Trump unlawfully incite violence at the Capitol when he spoke to supporters, shortly before it erupted, at a nearby rally on January 6, 2021?
- **Fighting Words:** I say something to you that's very likely to make you hit me. For instance: A white person angrily and repeatedly calling a Black person the N-word in a face-to-face encounter is "a classic case" of fighting words, according to North Carolina's Supreme Court.[14]

[13] *See* Clay Calvert, *Taking the Fight Out of Fighting Words on the Doctrine's Eightieth Anniversary: What "N" Word Litigation Today Reveals About Assumptions, Flaws and Goals of a First Amendment Principle in Disarray*, 87 Mo. L. Rev. 493 (2022) (addressing the evolution of the fighting words doctrine and the factors that courts consider in determining whether speech constitutes fighting words).

[14] *In re* Spivey, 480 S.E.2d 693, 699 (N.C. 1997). The Court added that "[n]o fact is more generally known than that a white man who calls a black man [an N-word] within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate." *Id.*

- **True Threats:** I say something to you that, given the context in which I say it, puts you in fear of imminent violence or death. For instance: Several menacing posters mailed to a person's residence—one depicting "a man in a skull mask holding a Molotov cocktail in front of a burning house" and reading "your actions have consequences our patience has its limits," and another including swastikas and stating "we are watching . . . we know where you live do not fuck with us"—were recently dubbed true threats by a federal appellate court.[15] A brief origin story of the true threats doctrine that led to that outcome and paved the path to *Counterman* follows.

B. The Evolving True Threats Doctrine

In the 1969 case of *Watts v. United States*, the Supreme Court held for the first time that true threats of violence are not shielded by the First Amendment.[16] The Court concluded that 18-year-old Robert Watts did not make an illegal threat during a 1966 anti-war rally near the Washington Monument. Responding to being drafted and reporting for a physical exam, Watts told the crowd of teens and others in their early twenties, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."[17] Watts and his audience then laughed.[18]

The Supreme Court, in a short unsigned opinion, deemed Watts's words protected "political hyperbole," thereby reversing his conviction for threatening President Lyndon Baines Johnson.[19] But the Court didn't define true threats. It reasoned only that the "context" of Watts's speech (a political rally), the "expressly conditional nature of the statement" (his use of "if"), and the audience's reaction (laughter) all suggested that it was merely a crude form of political opposition.[20]

In the 1992 cross-burning case of *R.A.V. v. City of St. Paul*, the Court explained why the First Amendment does not safeguard true

[15] United States v. Cole, 2023 U.S. App. LEXIS 8757, at *2 (9th Cir. Apr. 12, 2023).

[16] 394 U.S. 705, 707 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech.").

[17] *Id.* at 706.

[18] *See id.* at 707.

[19] *Id.* at 708.

[20] *Id.*

threats.[21] Justice Antonin Scalia wrote that "threats of violence are outside the First Amendment" due to concerns about "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[22] In short, the acute harms that threats cause justify jettisoning threats from constitutional protection.

In 2003, the Court reinforced the principle that the First Amendment does not safeguard true threats in another cross-burning case, *Virginia v. Black*.[23] The Court there elaborated a bit more definitionally, noting that true threats include "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."[24] This definition may seem clear, but as the next section reveals, it raised complicated questions that the Supreme Court ultimately resolved in *Counterman*.

C. Does a Speaker's Subjective Mental State about or Awareness of a Statement's Threatening Nature Matter?

What exactly does "intent" refer to in the quotation from *Black* immediately above? Does it simply mean an intent to communicate a statement? Or does it mean something more—an intent by the speaker for the statement to be understood as a serious expression of a threat of violence?

In other words, the Court in *Black* didn't clarify what the government must prove regarding a defendant-speaker's state of mind or understanding about a message's threatening character for it to be unprotected by the First Amendment.[25] Must the government prove

[21] 505 U.S. 377 (1992).

[22] *Id.* at 388.

[23] 538 U.S. 343 (2003). Citing the Court's decision in *Watts* for support, Justice Sandra Day O'Connor wrote that "the First Amendment . . . permits a State to ban a 'true threat.'" *Id.* at 359.

[24] *Id.*

[25] *See* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I[redacted]U: Considering the Context of Online Threats*, 106 Calif. L. Rev. 1886, 1889–90 (2018) ("The Court has failed . . . to answer fundamental questions regarding the 'true threats exception' to First Amendment protection, including whether courts should view threats from the vantage of the speaker, a reasonable recipient, a reasonable disinterested reader, or all of the above; and what mens rea the First Amendment requires in threats cases.") (footnote omitted).

something about a speaker's subjective mental state—a speaker's mens rea, in legal parlance[26]—regarding whether a message might be understood as a threat? Is that subjective mental state relevant under a First Amendment–based true threats inquiry?

The questions, however, don't stop there. If a speaker's mental state about a threatening meaning *is* relevant, then another issue arises: What *level* of mens rea on a speaker's part must the government prove for a threat to fall beyond First Amendment shelter? Must the government prove: (1) that the speaker acted *purposely* to put the target in fear (the highest level of mens rea); or (2) that the speaker *knew* the target would be fearful (a slightly lower level); or (3) merely that the speaker acted *recklessly* as to whether the target would experience fear (a still lower level of mens rea, requiring a speaker's awareness of a substantial risk of conveying a threatening meaning and ignoring it)? Spoiler alert: A five-Justice majority in *Counterman* concluded that a speaker's state of mind *is* relevant in the true threats calculus and, more specifically, that the government must prove that a speaker recklessly conveyed a threat.

But, stepping back, why do these differences even matter? Because the higher the level of mens rea that applies, the more difficult it is for prosecutors to demonstrate that statements are unprotected by the First Amendment. Put differently, requiring prosecutors to prove that a defendant *purposely* conveyed a threatening meaning is a more free-speech-friendly standard than requiring them only to prove that a defendant *recklessly* conveyed a threatening meaning.

Conversely, if a speaker's subjective mental state about a threatening meaning were totally irrelevant, then prosecutors would only need to prove that an objectively reasonable person in the target's position would find the message threatening. An objective, reasonable person standard is known as a negligence test.[27]

[26] *See* Andrew Ingram, *Out of Sight and Out of Mind: Criminal Law's Disguised Moral Culpability Requirement*, 56 U. Rich. L. Rev. 491, 499 (2022) ("The mens rea inquiry asks what the defendant believed, intended, or knew at the time that he acted. It is shorthand for the mental state element of a crime."); Erik Luna, *Mezzanine Law: The Case of a Mens Rea Presumption*, 53 Ariz. St. L.J. 565, 565 (2021) (calling mens rea "the mental state element of crime").

[27] *See* Elonis v. United States, 575 U.S. 723, 738–39 (2015).

As Justice Sonia Sotomayor explained during oral argument in *Counterman*, "a pure negligence standard . . . doesn't take into account any of the intentions of the speaker when we prosecute for speech."[28]

If courts completely ignore a speaker-defendant's subjective understanding of a message's threatening meaning, there is a danger (from a free-speech perspective) that the meaning either intended or understood by a speaker and the meaning understood by the message's target will be different. In short, intended meanings might get lost in translation, and speakers might be convicted for conveying threatening meanings they neither understood nor intended.

Furthermore, risk-averse speakers who fear being convicted for misunderstood messages may self-censor, stifling their expression of statements that would actually be safeguarded by the First Amendment. In other words, fear of liability might produce a chilling effect on protected expression. Justice Elena Kagan explained for the *Counterman* majority how self-censorship and a chilling effect may arise whenever speech is banned:

> Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. . . . Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a "cautious and restrictive exercise" of First Amendment freedoms.[29]

In short, requiring a prosecutor to prove that a defendant-speaker had *some* level of mental awareness (some degree "of a culpable mental state,"[30] as Justice Kagan wrote) about a statement's threatening nature provides a buffer against self-censorship.

[28] Transcript of Oral Argument at 20, Counterman v. Colorado, 143 S. Ct. 2106 (2023) (No. 22-138), https://tinyurl.com/3xcz2mv3.

[29] *Counterman*, 143 S. Ct. at 2114–15.

[30] *Id.* at 2115.

D. Counterman *Resolves the Speaker's State of Mind Issues: A Synopsis of the Opinions*

The issues described above sparked the question that the Supreme Court agreed to answer in January 2023, when it granted review in *Counterman v. Colorado*:

> Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.[31]

On June 27, 2023, the Court issued its ruling, which included a five-Justice majority opinion, a two-Justice concurrence, and two dissents. Here's a synopsis of those opinions.

1. Justice Kagan's Opinion for the Court

The Court concluded that the First Amendment guarantee of free speech demands proving *more* than just that an objectively reasonable person would understand a message's threatening nature. Specifically, it requires proving that a speaker recklessly conveyed a threatening meaning.[32]

Penning the Court's opinion, Justice Kagan explained that prosecutors must prove a "defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence."[33] She elaborated that "reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm."[34] In short, a defendant's mental state about a message's threatening meaning *does* determine if a threat is unprotected by the First Amendment.

As noted earlier, recklessness is a less demanding mental-state standard than proving that speakers either *purposely* placed people in fear or *knew* they were placing people in fear. The majority, however,

[31] Question Presented, Counterman v. Colorado, 143 S. Ct. 2106 (2023) (No. 22-138), https://tinyurl.com/mry8fc6j.

[32] *See Counterman*, 143 S. Ct. at 2111.

[33] *Id.* at 2112.

[34] *Id.* at 2118.

believed that recklessness "is enough"[35] to balance two competing interests. There is, on the one hand, a First Amendment interest in preventing self-censorship of, and a chilling effect on, fully protected, non-threatening expression (dangers described earlier). But there are also "the profound harms, to both individuals and society, that attend true threats of violence."[36] Imposing a higher mens rea standard—purpose or knowledge—would make it too difficult to convict "morally culpable defendants."[37] Recklessness, instead, provides a constitutionally sufficient guardrail against chilling protected expression. Justice Kagan's opinion was joined by Chief Justice John Roberts and Justices Samuel Alito, Brett Kavanaugh, and Ketanji Brown Jackson.

If you're keeping tabs, that's five Justices nominated by four Presidents from two parties: George W. Bush (Roberts and Alito), Barack Obama (Kagan), Donald Trump (Kavanaugh), and Joe Biden (Jackson). Free-speech cases thus sometimes unite Justices despite perceived ideological differences. That wasn't the situation, however, in the same-sex wedding website case of *303 Creative v. Elenis*, which was decided within days of *Counterman* (*303 Creative* is also analyzed in this edition of the *Cato Supreme Court Review*).

2. Justice Sotomayor's Concurrence

Justice Sotomayor wrote a concurrence joined in several parts by Justice Neil Gorsuch.[38] She agreed with the Court's judgment that a recklessness mens rea standard was appropriate in the *Counterman* case specifically because, as she saw it, *Counterman* was a case about *stalking* that just happened to involve *threats*. But Justice Sotomayor contended that a mens rea level *higher* than recklessness is likely warranted under the First Amendment "to prosecute true threats *generally*."[39]

She suggested that in typical threats (not stalking) cases, the government must prove "that an individual desires to threaten or is substantially certain that her statements will be understood as

[35] *Id.* at 2113.

[36] *Id.* at 2117.

[37] *Id.* at 2118.

[38] *Id.* at 2119 (Sotomayor, J., concurring in part and concurring in the judgment).

[39] *Id.* at 2132 (emphasis added).

threatening."[40] In short, an "intent to threaten" element should be included in a true threats analysis. This renders Justice Sotomayor's stance more free-speech friendly than Justice Kagan's in safeguarding unintentional threats.[41]

Justice Sotomayor reasoned that this higher mental-state standard was necessary partly because "in a climate of intense polarization, it is dangerous to allow criminal prosecutions for heated words based solely on an amorphous recklessness standard."[42] Additionally, Sotomayor cited rap music as a concrete example of how "[m]embers of certain groups, including religious and cultural minorities, can . . . use language that is more susceptible to being misinterpreted by outsiders. And unfortunately yet predictably, racial and cultural stereotypes can also influence whether speech is perceived as dangerous."[43] In short, Sotomayor was concerned about "overcriminalizing upsetting or frightening speech."[44] This included speech on the internet, which "lack[s] many normal contextual clues, such as who is speaking, tone of voice, and expression."[45]

3. The Dissents of Justices Barrett and Thomas

Justice Amy Coney Barrett authored a dissent joined in full by Justice Clarence Thomas.[46] They believed that *no* subjective mens rea standard of any level is required. The First Amendment is satisfied by a purely objective test—one requiring the government to "show that a reasonable person would regard the statement as a threat of violence."[47]

Justice Barrett reasoned that because an objective analysis already "captures (among other things) the speaker's tone, the audience, the medium for the communication, and the broader exchange in which the statement occurs," it sufficiently "weed[s] out protected speech from true threats."[48] Reflecting both Justice Thomas's and her own

[40] *Id.* at 2120.
[41] *Id.* at 2129.
[42] *Id.* at 2132
[43] *Id.* at 2123.
[44] *Id.* at 2122.
[45] *Id.*
[46] *Id.* at 2133 (Barrett, J., dissenting).
[47] *Id.*
[48] *Id.* at 2137.

embrace of historicism, Barrett added that Billy Raymond Counterman was "plainly not asking the Court to enforce a historically sanctioned rule, but rather to fashion a new one."[49] In other words, the Court shouldn't function as a legislative body and adopt interest-balancing rules untethered from history and tradition.

Justice Thomas issued a brief solo dissent lambasting the Court's landmark 1964 defamation decision of *New York Times Co. v. Sullivan*[50] for adopting the "actual malice" fault standard.[51] How is *Sullivan* even remotely related to a true threats case? Because the definition of actual malice embraced in *Sullivan* requires considering a defamation defendant's subjective *recklessness* about publishing reputation-harming falsities.[52] In short, Justice Thomas objects to recklessness (as part of the actual malice standard) in defamation law because it's a judicially created rule, *not* a historically grounded one. And he equally opposes extending recklessness to the true threats realm on the same grounds.

With this understanding of true threats, as well as the issues and outcome in *Counterman* in mind, this article now digs deeper into both the doctrine and *Counterman*'s facts. The next part briefly reviews two cases decided prior to *Counterman*—*Elonis v. United States*[53] in 2015 and *Perez v. Florida*[54] in 2017—where the Supreme Court passed on resolving the speaker's state-of-mind question. Understanding the facts of these cases is important because they illustrate why *Counterman*'s incorporation of a recklessness mental-state element into the test for true threats is beneficial. The recklessness element will support free-speech interests in situations involving ambiguous messages and lost-in-translation meanings.

The article then reviews *Counterman*'s facts in more detail and the Colorado appellate court's ruling that preceded the Supreme Court's decision. It also addresses oral argument before the nation's highest court, including concerns raised by the Justices and key points made by the attorneys who addressed them: (1) John Elwood, arguing for

[49] *Id.* at 2139.

[50] 376 U.S. 254 (1964).

[51] *Counterman*, 143 S. Ct. at 2132 (Thomas, J., dissenting).

[52] *See Sullivan*, 376 U.S. at 280 (defining actual malice as publishing a statement "with knowledge that it was false or with *reckless disregard* of whether it was false or not") (emphasis added).

[53] 575 U.S. 723 (2015).

[54] 580 U.S. 1187 (2017).

Billy Raymond Counterman, the defendant in the underlying criminal case; (2) Philip Weiser, the Colorado Attorney General, on behalf of the prosecution in *Counterman*; and (3) Eric Feigin, a U.S. Deputy Solicitor General who argued as a friend-of-the-court on Colorado's behalf.

Finally, the article recaps the outcome in *Counterman* and explores a bone of contention between Justice Kagan's majority opinion and the dissenters. That dispute centers on whether the Supreme Court's ruling in the defamation case noted earlier, *New York Times Co. v. Sullivan*, provides relevant support for the adoption of a recklessness requirement in true threats cases.

I. The Road to *Counterman*: When Alleged Rap Lyrics and Drunken Jokes Might Be Misunderstood as True Threats of Violence

The Supreme Court punted twice on answering the speaker's state-of-mind question shortly before resolving it in *Counterman*. The facts in these cases reveal how incorporating *Counterman*'s now-mandated recklessness mental-state requirement into the true threats doctrine may sometimes safeguard speakers against threats convictions.

A. Elonis v. United States

In the early 2010s, Anthony Elonis was convicted under a federal threats statute for several violent-themed Facebook posts, including ones about his estranged wife and an FBI agent. Elonis claimed that his posts were merely fictitious rap lyrics inspired by Eminem.[55] Posting them under his rap alias, "Tone Dougie," Elonis contended his words were therapeutic, helping him cope with his collapsing marriage.[56] In short, Elonis said he didn't intend the posts to be taken as threats.

Elonis was convicted under a statute that criminalizes transmitting "any threat to injure the person of another" in interstate commerce.[57] Elonis requested a jury instruction that the government had to prove that he subjectively intended to threaten violence, but the trial court judge denied that request. The only intent on Elonis's part that the jury considered was simply whether he intended to communicate a statement.

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

[56] *Id.* at 727.

[57] 18 U.S.C. § 875(c).

In brief, whether Elonis intended to threaten was irrelevant. What mattered, per the instructions, was whether "a reasonable person would foresee that the statement[s] would be interpreted by those to whom the maker communicates the statement[s] as a serious expression of an intention to inflict bodily injury or take the life of an individual."[58] This is an objective test; it focuses only on how an objectively reasonable—albeit hypothetical—person would understand a message.

A federal appellate court affirmed Elonis's conviction.[59] It reasoned that the Supreme Court's decision in *Virginia v. Black* (noted earlier) "does not say that the true threats exception requires a subjective intent to threaten."[60] This teed up the case for the Supreme Court to consider the relevance, if any, of Anthony Elonis's alleged intent not to threaten via his supposed rap lyrics.

The Supreme Court heard the case but avoided the constitutional question. The Court did not decide what the First Amendment requires the government to prove about a defendant-speaker's state of mind regarding a threatening meaning. It passed on this issue by focusing *only* on what the federal threats statute under which Elonis was convicted requires the government to prove about a defendant-speaker's state of mind. The Court thereby resolved *Elonis* on *statutory*—not *constitutional*—grounds.

Writing the majority opinion, Chief Justice Roberts reasoned that while "the statute does not specify any required mental state, [that] does not mean that none exists."[61] Indeed, the majority concluded that the statute implicitly requires the government to prove some level of mental awareness—some quantum of mens rea—on a defendant's part "to the fact that the communication contains a threat."[62] The jury, however, wasn't instructed to consider this; it only evaluated how a reasonable person would understand Elonis's Facebook posts.[63] This instructional error regarding the federal statute allowed the Court to

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

[59] United States v. Elonis, 730 F.3d 321 (3rd Cir. 2013), *rev'd sub nom*. Elonis v. United States, 575 U.S. 723 (2015).

[60] *Id.* at 332.

[61] *Elonis*, 575 U.S. at 734.

[62] *Id.* at 737.

[63] *Id.*

conclude that "Elonis's conviction cannot stand."[64] Chief Justice Roberts, in turn, reckoned it "not necessary to consider any First Amendment issues,"[65] thereby letting the Court punt on whether the First Amendment true threats doctrine—not just a federal statute—also requires some level of mental awareness on a speaker's part.

This limited outcome in *Elonis* comports with a doctrine called constitutional avoidance.[66] That doctrine holds that the Court should refrain from addressing constitutional questions when a case can be decided on statutory grounds.[67] In sum, *Elonis* was a narrow statutory decision, with the Court kicking the constitutional can down the road. That missed opportunity was thoroughly unsatisfying, a colleague and I observed, because "[i]f one First Amendment doctrine screams out the loudest for clarification, it may well be true threats."[68]

Elonis's claim that his posts were rap lyrics also gave the Court another opportunity it elided. It could have explored the ambiguities of meaning and the problems with deploying an objectively reasonable person standard that arise when "a complex genre"[69] like rap—which melds "art, poetry and fantasy,"[70] "sometimes is political,"[71] and "carries with it the heavy baggage of negative controversy"[72]—is in play. A key problem, as two former students (now attorneys) and I explained nearly a decade ago, is this: "What should courts and jurors expect a reasonable person to know and understand about rap music?"[73] The danger in only considering how a supposedly reasonable person would interpret rap lyrics is

[64] *Id.* at 740.

[65] *Id.*

[66] *See* Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 Wm. & Mary Bill of Rts. J. 943, 945 (2016).

[67] *See id.*

[68] *Id.* at 957.

[69] Clay Calvert, Emma Morehart & Sarah Papadelias, *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 Colum. J.L. & Arts 1, 20 (2014).

[70] *Id.* at 19.

[71] *Id.* at 18.

[72] *Id.* at 17.

[73] *Id.* at 22.

that an innocent meaning intended by a rap-literate speaker will get lost in translation by a rap-illiterate jury and taken as an illicit threat. Recall here Justice Sotomayor's concern about rap music in her *Counterman* concurrence.[74]

Furthermore, problems with interpreting rap surfaced during the oral argument before the Court in *Counterman*. Justice Sotomayor—telegraphing her concurrence that would call for a mental-state level higher than recklessness in typical true threats cases—broached the topic of rap. She suggested that possible societal biases are embedded in a reasonable person standard due to jurors' beliefs about a particular community's interpretive norms, such as a community of rappers versus non-rappers.[75] John Elwood, who represented Counterman and who had also represented Anthony Elonis before the Court, responded that "fringe speech" and "fringe art[s] tend[] to be viewed as threatening . . . to people who are unfamiliar with it."[76] In short, the danger of wrongful convictions increases when courts deploy an objective, reasonable person test regarding a threatening meaning.

B. Perez v. Florida

Two years after the Court dodged the speaker's state-of-mind issue in *Elonis*, it did so again in *Perez v. Florida*.[77] The Court summarily declined to review a Florida appellate court ruling[78] affirming Robert Perez's conviction for violating a state threats statute.[79]

Although Justice Sotomayor "reluctantly concur[red]"[80] with denying Perez's petition, she wrote separately—the only Justice who penned a signed opinion—expressing dismay that "Perez is serving more than 15 years in a Florida prison for what may have been nothing more than a drunken joke."[81] That's because, as Sotomayor

[74] *See supra* note 43 and accompanying text.

[75] *See* Transcript, *supra* note 28, at 35–36.

[76] *Id.* at 36.

[77] 580 U.S. 1187 (2017).

[78] Perez v. State of Florida, 189 So.3d 797 (Fla. Dist. Ct. App. 2016).

[79] Fla. Stat. § 790.162 (making it a second-degree felony "to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person").

[80] *Perez*, 580 U.S. at 1188 (Sotomayor, J., concurring).

[81] *Id.* at 1187.

explained, the instructions given in Perez's case permitted the jury "to convict Perez based on what he 'stated' alone—irrespective of whether his words represented a joke, the ramblings of an intoxicated individual, or a credible threat."[82] Thus, for Sotomayor, "the jury instruction—and Perez's conviction—raise[d] serious First Amendment concerns worthy of this Court's review."[83] But because both Perez (in his pro se petition to the Supreme Court) and the Florida courts (in addressing his case) had not focused on the First Amendment–based mens rea question (only on the statutory one), she agreed the Court should not hear the case.

So, how might a jury instruction requiring the government to prove "*some* level of intent,"[84] as Sotomayor put it, have led to a different result and Robert Perez's possible acquittal? Because, if one believes Perez's story, his only offense was making a misunderstood joke while at a Publix liquor store to buy vodka after a long day of beach drinking.[85] The joke dealt with a drink Perez called a Molotov cocktail—referenced, he pointed out, in Eagle-flying-solo Don Henley's 1980s hit song, "All She Wants to Do Is Dance."[86] According to Perez, a Molotov cocktail (the drink, that is) consists of "ruby red grapefruit juice and vodka."[87]

His joke, told to a Publix employee after Perez and others (including a different employee) had laughed about the drink's name and how it wasn't to be confused with an incendiary weapon, was that

> he had only "one Molotov cocktail" and could "blow the whole place up." . . . Perez later returned to the store and allegedly said, "'I'm going to blow up this whole [expletive] world.'" Store employees reported the incident to police the next day.[88]

[82] *Id.* at 1188.

[83] *Id.*

[84] *Id.* at 1189 (emphasis in original).

[85] Petitioner's Reply to Brief in Opposition at 1–2, Perez v. State of Florida, 580 U.S. 1187 (2017) (No. 16-6250), https://tinyurl.com/mu9mhvpj.

[86] *Hear* Don Henley, *All She Wants to Do is Dance*, *on* Building the Perfect Beast (Geffen Records 1984) (including the lyric "Molotov cocktail – the local drink").

[87] Petitioner's Reply, *supra* note 85, at 1.

[88] *Perez*, 580 U.S. at 1187 (Sotomayor, J., concurring).

For Perez, shopping at Publix was not, contrary to the supermarket's slogan, a pleasure.[89] More importantly, Sotomayor was disturbed that the jury was not instructed to consider either Perez's subjective mental state about what he said or the context in which he said it—only the statement itself. She pointed out that even "the prosecutor acknowledged that Perez may have been 'just a harmless drunk guy at the beach,' . . . and it appears that at least one witness testified that she did not find Perez threatening."[90] This raised grave First Amendment concerns for Sotomayor because she believed that the Court's decisions in *Watts* and *Black*

> make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—some level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.[91]

In closing, Sotomayor urged her fellow Justices to "decide precisely what level of intent suffices under the First Amendment"[92] to deem speech an unprotected true threat. As I wrote elsewhere, her concurrence strongly suggested that she wanted "her colleagues to recognize the real-life implications of repeatedly avoiding the intent question in true threats cases"[93] because "[i]ncarceration of fifteen years is a steep price to pay for what may have been a drunken joke lost in translation."[94]

Unfortunately, the Court waited another half-dozen years before heeding her advice and finally sorting out the speaker-intent quandary in *Counterman*. But when it did, Justice Sotomayor returned to her observations in *Perez*, crisply encapsulating them with the

[89] *See* Jennifer B., *How Publix's Slogan Came to Be*, The Publix Checkout (Mar. 11, 2019), https://tinyurl.com/yyvddnr9 (describing the advent of Publix's "Where Shopping is a Pleasure" slogan).

[90] *Perez*, 580 U.S. at 1189–90 (Sotomayor, J., concurring).

[91] *Id.* at 1189.

[92] *Id.* at 1190.

[93] Clay Calvert, *Beyond Headlines & Holdings: Exploring Some Less Obvious Ramifications of the Supreme Court's 2017 Free-Speech Rulings*, 26 Wm. & Mary Bill of Rts. J. 899, 910 (2018).

[94] *Id.* at 907.

ominous observation that "'[a] drunken joke' in bad taste can lead to criminal prosecution."[95]

II. *Counterman*: From the Facts and Colorado State Court Rulings to Oral Argument before the U.S. Supreme Court

A. The Facts and Trial Court Ruling

The facts in *Counterman v. Colorado* are disturbing. As described in 2021 by the Colorado appellate court that affirmed Billy Raymond Counterman's conviction,[96] he sent clusters of unsolicited and unwanted direct messages via Facebook over several years to musician Coles Whalen, leaving her "fearful" and "extremely scared."[97] Some of the messages the jury considered were:

- "How can I take your interest in me seriously if you keep going back to my rejected existence?"
- "Fuck off permanently."
- "Your arrogance offends anyone in my position."
- "You're not being good for human relations. Die. Don't need you."
- "Staying in cyber life is going to kill you. Come out for coffee. You have my number."[98]

In her friend-of-the-court brief filed with the Supreme Court, Whalen—identified only as "C.W." in all of the opinions—called herself "the survivor of a terrifying years-long stalking campaign by . . . Counterman, who sent her thousands of disturbing, alarming, and threatening messages. The messages were life threatening and life altering."[99] While they began in 2014, Whalen explained that "things came to a head in spring 2016, after Counterman told [her] to '[d]ie, don't need you,' to '[f]uck off permanently,' and that '[s]taying in cyber life is going to kill you.' . . . He also made clear that

[95] *Counterman*, 143 S. Ct. at 2122 (Sotomayor, J., concurring in part and concurring in the judgment) (quoting *Perez*, 580 U.S. at 1187 (Sotomayor, J., concurring)).

[96] People v. Counterman, 497 P.3d 1039 (Colo. App. 2021), *rev'd*, Counterman v. Colorado, 143 S. Ct. 2106 (2023).

[97] *Id.* at 1042–43.

[98] *Id.* at 1044.

[99] Brief of Coles Whalen as *Amicus Curiae* in Support of Respondent at 1, Counterman v. Colorado, 143 S. Ct. 2106 (2023) (No. 22-138), https://tinyurl.com/4wwmah4z.

he'd been watching her—describing her car and the people around her."[100] Whalen blocked Counterman on Facebook at least four times, but he "created new profiles to resume messaging her and turned to other platforms, like the contact function on her website."[101] Terrified that Counterman would appear at her shows[102] and "paralyzed by anxiety and fear,"[103] Whalen cancelled some performances and declined new ones.[104]

She ultimately got a protective order against Counterman, who was arrested in May 2016.[105] A jury convicted him under a Colorado statute for stalking causing serious emotional distress.[106] The statute criminalizes repeatedly contacting or communicating with another person "in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress."[107]

So, how did the constitutional true threats issue arise if *Counterman* was a stalking case, not a threats case? Counterman contended that his messages were protected by the First Amendment because they did not reach the level of true threats.[108] He thus asserted that prosecuting him under Colorado's stalking statute violated his First Amendment right of free expression.[109] The trial court judge rejected that argument, but Counterman raised it again on appeal.[110]

B. The Colorado Appellate Court Ruling

The Colorado appellate court analyzed whether Counterman's messages were true threats unprotected by the First Amendment.[111] In doing so, it considered several Supreme Court rulings described

[100] *Id.* at 3.

[101] *Id.* at 10.

[102] *See id.* at 10–13.

[103] *Id.* at 13.

[104] *See id.*

[105] *See Counterman*, 497 P.3d at 1043.

[106] *See id.* at 1044.

[107] Colo. Rev. Stat. § 18-3-602(c).

[108] *See Counterman*, 497 P.3d at 1044–45.

[109] *See id.*

[110] *See id.*

[111] *See id.* at 1045–50.

earlier, including *Watts*, *Black*, *R.A.V.*, and *Elonis*.[112] It also relied on a recent Colorado Supreme Court decision, *People in the Interest of R.D.*[113] The Centennial State's highest court there defined a true threat as "a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence."[114]

That definition, which both the Colorado appellate court and the parties in *Counterman* deemed controlling on the true threats issue, is purely objective. It concentrates on how a person ("an intended or foreseeable recipient") would reasonably interpret a message (would the person "perceive [it] as a serious expression of intent to commit an act of unlawful violence"?). The definition ignores a speaker's state of mind and intent regarding the meaning his statements convey. Whether Counterman intended, knew, or recklessly disregarded the risk that his Facebook messages would be understood as threats of violence was irrelevant.

The Colorado appellate court applied this objective test to determine whether a person in Whalen's position would reasonably understand Counterman's messages as serious expressions of an intent to violently harm her. The court focused on both the "plain language" of the messages and five contextual variables. Those factors were:

1. The fact that Counterman's statements weren't part of some broader exchange of messages between himself and Whalen, but rather were uninvited missives to which Whalen never responded;
2. The medium of Facebook on which the statements were made, including how Counterman repeatedly created new accounts to send Whalen messages after she blocked him, with her blocking signaling "an unequivocal indication that she wished not to be contacted by him";
3. The manner in which Counterman made the statements, including how they were private messages directly targeting Whalen on both her public and private Facebook accounts;

[112] *See id.* at 1045–46.

[113] 464 P.3d 717 (Colo. 2020).

[114] *Id.* at 734.

4. The nature of the relationship between Counterman and Whalen, which the appellate court characterized as a stranger "ceaselessly pursuing a public figure" via "unanswered and increasingly disturbing messages"; and
5. Whalen's actual reaction—one of "escalating alarm and fear of Counterman" and "fear[] for her life and safety," prompting her to speak with an attorney and law enforcement, plus cancel scheduled performances.[115]

The appellate court concluded that Counterman's messages were true threats unshielded by the First Amendment from prosecution.[116] Colorado's Supreme Court declined to review the decision,[117] setting the table for Counterman's request in August 2022 for the U.S. Supreme Court to examine his case.[118]

Counterman's petition called on the Court to settle the disagreement among both state and federal appellate courts about "what constitutes a true threat under the Constitution."[119] Specifically, the lower courts disagreed about the relevance of a speaker's subjective state of mind regarding a statement's threatening meaning.

Such a split of authority enhances the odds the Supreme Court will hear a case. Counterman's petition stressed that this disagreement among the lower courts was particularly troubling where online communications are concerned because those communications "can be read anywhere, subjecting online speakers to different constitutional standards based on geographical chance."[120] Additionally, the petition pointed to Justice Sotomayor's call in *Perez* to answer the state-of-mind issue.[121] Furthermore, Counterman contended that "[t]he purely objective test [used] in Colorado and some other jurisdictions is incompatible with this Court's true threats jurisprudence."[122]

[115] *Counterman*, 497 P.3d at 1047–50.

[116] *See id.* at 1050.

[117] Counterman v. People, 2022 Colo. LEXIS 292 (Colo. Sup. Ct. Apr. 11, 2022).

[118] *See* Petition for a Writ of Certiorari, Counterman v. Colorado, 143 S. Ct. 2106 (2023) (No. 22–138), https://tinyurl.com/3jd9vxh9.

[119] *Id.* at 3.

[120] *Id.* at 24.

[121] *See id.* at 3–4, 21.

[122] *Id.* at 18.

In January 2023, the Supreme Court agreed to hear *Counterman v. Colorado* to resolve what, if anything, the government must prove about a speaker's mindset regarding a statement's threatening nature for it to be unprotected by the First Amendment.[123] After the Court decided to hear the case, Counterman's opening brief revealed how the trial might have been affected if the jury had considered his mindset. The brief alleged that Counterman "suffers from mental illness [and] thought that [Coles Whalen] was regularly corresponding with him through other websites and did not understand—much less intend—his messages as threatening."[124] In brief, Counterman claimed ignorance of the threatening nature of his messages.

C. Oral Argument in the Supreme Court

Oral argument occurred on April 19, 2023.[125] It involved not only the attorneys for Counterman (John Elwood) and Colorado (Philip Weiser), but also Eric Feigen, a deputy solicitor general for the U.S. Department of Justice who represented the Unites States as a friend of the court, supporting Colorado. The following are some of their key points, as well as various lines of questions by the Justices.

1. John Elwood's Argument for Counterman

In his opening remarks, Elwood stressed that unless a speaker's mental state about a message's meaning is considered, there is a danger of "criminalizing misunderstanding."[126] In other words, the meaning either intended or known by a speaker might not be the one a jury determines a reasonable person would understand. The alleged joke gone wrong in *Perez* (the "Molotov cocktail" case) was purportedly a disconnect of meaning—illustrating one possibility of criminalizing misunderstanding.

Additionally, Elwood focused heavily on the chilling effect on free expression caused by using only an objective standard to impose criminal liability—one centering on an objectively reasonable

[123] 143 S. Ct. 644 (2023). *See* Question Presented, *supra* note 31 (framing the issue the Court agreed to address).

[124] Brief for the Petitioner at 2, Counterman v. Colorado, 143 S. Ct. 2106 (2023) (No. 22-138), https://tinyurl.com/tm43x8kj.

[125] *See* Transcript, *supra* note 28, at unnumbered cover page.

[126] *Id.* at 5.

person's supposed understanding of a message.[127] The chilling effect concern clearly resonated with Justice Kagan and the *Counterman* majority, as noted earlier.

In a nutshell, Elwood asserted that speakers will stifle their own speech (they will self-censor) because they must "tailor their views to suit their audience" to stay out of prison.[128] Elwood elaborated that the chilling effect comes from "a speaker being told it doesn't matter what you think, you have to think about the reaction of your audience."[129] He explained that adding a subjective-intent element is "a bulwark in speech cases" because "the thing that speakers know . . . [is] their intent. They don't know . . . what a reasonable person standard means."[130] Elwood added that "[w]e could talk about it for another hour and still not know who a reasonable person is in this case or how a reasonable person would interpret that."[131]

Elwood wasn't the only person questioning the merits of the reasonable person standard, however. Several conservative-leaning Justices intimated that today's "reasonable person" may be too sensitive to provide robust protection for free speech. To wit, Justice Thomas asserted that "we're more hypersensitive about different things now, and people could feel threatened in different ways."[132] Addressing Colorado's attorney Philip Weiser, Thomas queried, "I don't know how you're monitoring for that—what if it's now that people are more sensitive, that that is now considered the reasonable person?"[133] Similarly, Justice Gorsuch contended that "[w]e live in a world in which people are sensitive . . . and maybe increasingly sensitive,"[134] noting the use of trigger warnings in classrooms. More bluntly, Justice Barrett asked Weiser, "Who is the reasonable person?"[135] She

[127] *See id.* at 5, 10, 28–30, 39–40.

[128] *Id.* at 5.

[129] *Id.* at 28–29.

[130] *Id.* at 110.

[131] *Id.* at 110–111.

[132] *Id.* at 72.

[133] *Id.* at 72–73.

[134] *Id.* at 65.

[135] *Id.* at 79.

suggested that "there's no protection built in"[136] to the reasonable person standard for speakers if, in accord with Thomas's assertion, "it's the case that nowadays people would be more sensitive."[137]

Ironically, as described earlier, Thomas and Barrett turned out to be the only Justices to conclude that a speaker's subjective mental state about a threatening meaning is completely irrelevant. In dissent, they embraced a purely objective reasonable person test. So much, then, for oral argument questions tipping a Justice's hand.

Elwood argued that the solution to these problems was to incorporate into the true threats doctrine "a subjective intent requirement at least at the knowledge level,"[138] specifically requiring "knowledge of the thing that makes the conduct wrongful."[139] Fleshing out this standard, Elwood explained that "[i]n most threat statutes, that's knowledge that the words you use are going to cause fear. I could see with the Colorado statute that it would be knowledge that it would cause a reasonable person to suffer emotional distress."[140] As discussed earlier, this is a lower level of mens rea than needing to prove a speaker *purposefully intended* to put a person in fear; it only requires *knowledge* on the speaker's part that a statement would make a person fearful.[141] Recall here, however, that a five-Justice majority ultimately adopted a *recklessness* mens rea standard (one lower than either purpose or knowledge) to balance free-speech interests (preventing a chilling effect and self-censorship) with the harms caused by true threats (life-disrupting fear and terror).

Elwood suggested that adding a subjective knowledge element to the true threats doctrine likely would not "make a big difference in a lot of cases" because "in most cases, what . . . words normally mean is going to be the . . . mental state of the defendant too."[142]

[136] *Id.* at 81.

[137] *Id.* at 82.

[138] *Id.* at 7.

[139] *Id.* at 14.

[140] *Id.*

[141] Elwood made this point explicit in responding to a question from Justice Sotomayor, stating "[w]e are only arguing for a knowledge standard, that they knew that the words would cause fear." *Id.* at 49. He also responded "yes" when Justice Alito asked, "So you don't think purpose is required, but knowledge is required? It has to be knowing as to that?" *Id.* at 14.

[142] *Id.* at 17.

Put differently, the floodgates that prevent people from escaping liability for alleged threats would not suddenly open by adding a subjective knowledge mandate. That's because, Elwood contended, speakers must mount "a persuasive argument [to a jury] for why [their] words meant something different to them"[143] in order to affect the outcome of a threats case.[144] Pushing back against the notion that speakers would soon get away with threats simply by claiming they were only joking, Elwood asserted that "[i]t's not enough to say it's a joke. You have to put together a persuasive reason why you didn't know it would cause fear." In other words, without such persuasive evidence, a jury will reject a speaker's claim of not knowing his words would make someone fearful.

2. Philip Weiser's Argument for Colorado

In stark contrast to Elwood, Philip Weiser argued that a speaker's subjective mental state about meaning is irrelevant.[145] Only Justices Thomas and Barrett bought that stance in their dissents. Adding such a requirement to the true threats doctrine, Weiser contended, "would thwart the goals of the First Amendment, enabling more harm and leading to less valuable discourse."[146]

How so? It would enable more harm by shielding both delusional and devious speakers from liability.[147] As Weiser explained, "requiring specific intent in cases of threatening stalkers would immunize stalkers who are untethered from reality. It would also allow devious stalkers to escape accountability by insisting that they meant nothing by their harmful statements."[148]

The harm, in turn, is borne by the terrorized stalking victims of these delusional and devious individuals whose speech "doesn't come close to contributing to the marketplace of ideas,"[149] the metaphor

[143] *Id.*

[144] Elwood reiterated this point later, stating "this is not going to make a difference in the run of cases because, ordinarily, the way a reasonable person would view remarks is the way that the defendant probably viewed the remarks, unless they can present some sort of persuasive reason why it meant something different to them." *Id.* at 41.

[145] *See id.* at 83.

[146] *Id.* at 51.

[147] *See id.* at 69.

[148] *Id.* at 50.

[149] *Id.* at 52.

that underlies much of today's First Amendment jurisprudence.[150] Weiser elaborated that "threats made by stalkers terrorize victims and for good reason. Ninety percent of actual or attempted domestic violence murder cases begin with stalking."[151] Weiser attempted to focus the Justices' attention on the victims and the real-world consequences they suffer, asserting that they "routinely face scores and scores, hear hundreds and hundreds of unwanted, invasive engagements from somebody, and the consequence in stalking cases is, if you don't give me what I want, I can turn violent, and that, indeed, does happen a significant amount of the time."[152] The "nature of the harm"[153] against which the true threats doctrine guards—"protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur," as the Court explained in *R.A.V.*[154]—thus renders speakers' subjective beliefs irrelevant.

Weiser also illustrated how some of Counterman's statements would constitute true threats under an objective, reasonable person standard, taking into account both text (the words uttered) and context (the circumstances surrounding the words, including Counterman's ongoing stalking and Whalen's repeated efforts to block him). For instance, Chief Justice Roberts asked Weiser about the following message Counterman sent to Whalen: "Staying in cyber life is going to kill you. Come out for coffee. You have my number."[155] Roberts questioned how it could be construed as a threat, drawing some laughter when he quipped, "'Staying in cyber life is going to

[150] *See* Jared Schroeder, *Fixing False Truths: Rethinking Truth Assumptions and Free-Expression Rationales in the Networked Era*, 29 Wm. & Mary Bill of Rts. J. 1097, 1098 (2021) (noting that "a line of prominent Justices, beginning with Oliver Wendell Holmes, wed their understandings and justifications for free expression to the marketplace of ideas theory, which assumes truth will generally succeed and falsity will fail in a relatively unregulated exchange of ideas"); Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 Commc'n L. & Pol'y 437, 437 (2019) (asserting that the marketplace of ideas has "assumed the status of seminal secular scripture, becoming to First Amendment law what Genesis is to the Bible").

[151] Transcript, *supra* note 28, at 50.

[152] *Id.* at 54.

[153] *Id.* at 64.

[154] *See supra* notes 21–22 and accompanying text (addressing *R.A.V.*'s discussion of the harms caused by true threats).

[155] Transcript, *supra* note 28, at 53.

kill you.' I can't promise I haven't said that."[156] Weiser countered, explaining "[t]he threat in that is, if you don't come out and meet me, your life's in danger. And the stalking context here, like many stalking situations, has someone who believes they're entitled to the attention and the affection of a victim."[157]

Weiser additionally addressed a key question from Justice Kavanaugh: Why wouldn't adding a level of mens rea slightly *lower* than the knowledge standard Elwood had argued for—namely, the recklessness standard that the *Counterman* majority ultimately adopted—strike the proper balance between safeguarding free-speech interests and preventing the harms with which the true threats doctrine is concerned?[158] The question presciently suggested that some of the Justices believed that proving *some* level of mens rea on a speaker's part was essential, but that the level shouldn't be as high as proving that a speaker *knew* his statement would make a person fearful.

Pushing back (unsuccessfully, as it turned out) on recklessness, Weiser returned to the problem of letting delusional speakers walk free: "[R]ecklessness does require some proof of what a defendant knew. He then or she then would disregard it. But proving knowledge in a case of someone who can say, because they're untethered from reality, I didn't mean it, could still allow them to escape accountability."[159]

3. Eric Feigin's Friend-of-the-Court Argument Supporting Colorado

Eric Feigin, in accord with Weiser, asserted that "our frontline position is that there shouldn't be a recklessness standard at all."[160] Yet, he suggested that what a speaker thought when he made a statement actually might be relevant under an objective, reasonable person standard. Specifically, he suggested that a speaker's thoughts could provide contextual evidence to help a jury suss out what exactly a reasonable interpretation of a message is.[161] Justice Gorsuch responded

[156] *Id.* at 53.

[157] *Id.* at 54.

[158] *See id.* at 77–79.

[159] *Id.* at 78.

[160] *Id.* at 84.

[161] *See id.* at 89.

that Counterman "wasn't allowed to produce any evidence about his mens rea. And I think you just admitted that, even under your version of the objective standard, that's relevant contextual evidence."[162]

Also in line with Weiser's argument, Feigin emphasized the difficulties that would arise in prosecuting "delusional stalkers" and "delusional threateners" if a subjective mens rea element were required under the First Amendment true threats doctrine.[163] Furthermore, adding a mens rea component would delay prosecutors in filing charges, because they would have to develop more circumstantial evidence to prove a speaker's guilty mindset.[164] As Feigin stated, "we have to wait quite a while before the statements rise to the level where we are comfortable bringing the prosecution and sure that we're going to get a guilty verdict."[165] Given the *Counterman* majority's imposition of a recklessness mens rea standard, it will be interesting to see how Feigin's fears now play out.

III. Bones of Contention about the Majority's Reliance on a Defamation Case to Reach Its Decision about True Threats

To recap, a five-Justice majority in *Counterman* held that to convict a speaker for a threat, the government must prove that the speaker recklessly conveyed that threat. The majority concluded that this requirement appropriately balances the First Amendment interest in preventing a chilling effect on protected expression with punishing morally culpable individuals who engender fear of violence and disrupt lives. Put differently, demonstrating that defendants were aware of and consciously disregarded a substantial risk of communicating threats adequately accounts for both free-speech interests and speech-caused harms. Recklessness provides greater protection for speakers than a purely objective, reasonable person standard, under which they could be convicted for conveying threatening meanings of which they were unaware.

Counterman thus is a victory for free speech, but a relatively minor one. It is *not* as big of a win for free speech as it would have been had the Court required prosecutors to prove a level of mens rea higher

[162] *Id.* at 90.

[163] *See id.* at 99.

[164] *See id.* at 100–101.

[165] *Id.* at 100.

than recklessness—one demanding proof that a defendant-speaker *purposely* put a person in fear or *knew* his statements would cause fear. The majority's balancing-of-interests (rather than all-or-nothing) approach, however, united Justices from across the ideological spectrum.

Because the *Counterman* jury wasn't instructed to consider *anything* about Billy Raymond Counterman's awareness of the threatening nature of his messages, his conviction violated the First Amendment. The case now returns to Colorado, where Counterman can be retried, with the prosecution needing to prove that he consciously disregarded the substantial risk that his messages would be understood by Whalen as threats.

One final point—a contentious one regarding a long-standing First Amendment rule noted earlier—merits brief consideration. In determining that recklessness was the appropriate mental-state requirement, Justice Kagan and four other Justices relied partly on the Court's 1964 defamation decision of *New York Times Co. v. Sullivan*.[166] The Court there adopted "actual malice" as a buffer against a chilling effect on journalists who report on the official conduct of public officials. Actual malice protects journalists from civil liability for false and defamatory statements about public officials (and, today, public figures more broadly) unless the journalists either know the statements are false or recklessly disregard the possibility that they are false.[167]

Adopting this recklessness standard in *Sullivan* gave the press "breathing space"[168] to make innocent mistakes and to promote "uninhibited, robust, and wide-open"[169] debate about public officials. The *Sullivan* Court reasoned that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'"[170] In short, the *Sullivan* Court's use of a recklessness standard (as part of actual malice) to thwart a chilling effect on speech supported the *Counterman* majority's deployment of a recklessness standard to similarly guard against self-censorship.

[166] 376 U.S. 254 (1964).

[167] *Id.* at 280.

[168] *Id.* at 272.

[169] *Id.* at 270.

[170] *Id.* at 279.

This didn't sit well with the dissenters. Justice Thomas decried both the *Counterman* majority's reliance on *Sullivan* and, as a precursory matter, the *Sullivan* Court's embrace of recklessness within actual malice.[171] Thomas reiterated his prior concern that actual malice is nothing more than a judicially created, policy-driven rule that conflicts with "the First Amendment as it was understood at the time of the Founding."[172] This is important because it indicates Thomas's continuing desire to roll back actual malice—a move that would strip investigative journalists of a key defense against liability for innocent errors when reporting on public officials and public figures. The good news, however, for free-speech and free-press proponents is that no one joined Justice Thomas's dissent.

Justice Barrett also criticized the majority's reliance on *Sullivan* in her dissent (joined by Thomas), which contended that no subjective mental-state standard is required under the true threats doctrine. For Justice Barrett, *Sullivan*'s defamation-law buffer against a chilling effect when reporting on public officials and their conduct supports a far different and more laudable goal than *Counterman*'s prevention of a chilling effect in the context of threats. "Because true threats are not typically proximate to debate on matters of public concern, the Court's newly erected buffer zone does not serve the end of protecting heated political commentary," she opined.[173] For Justice Barrett, *Counterman*'s embrace of recklessness needlessly raises the bar for prosecuting low-value speech (threats); *Sullivan*, in contrast, deals with safeguarding speech of "high social value" relating to "public discourse."[174] In short, Justice Barrett panned the majority's borrowing of recklessness from actual malice and defamation law, but for a very different reason than Justice Thomas. For now, then, the actual malice standard in defamation law seems safely ensconced, despite Justice Thomas's continuous carping in a solo dissent.

[171] *Counterman*, 143 S. Ct. at 2132 (Thomas, J., dissenting).

[172] *Id.*

[173] *Id.* at 2136 (Barrett, J., dissenting).

[174] *Id.*