

**STALKING, TRUE THREATS AND THE EVOLVING  
MEANING OF INTENT UNDER THE FIRST AMENDMENT:  
THE SIGNIFICANCE OF *COUNTERMAN V. COLORADO***

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## INTRODUCTION

In *Counterman v. Colorado*, the Supreme Court held that in a prosecution in which a defendant is accused of engaging in a “true threat,” the government must establish recklessness, meaning “that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.”<sup>1</sup>

The seemingly straightforward doctrinal decision carries profound real-world ramifications. What those ramifications will be, however, is a matter that remains disputed and uncertain. Some argue that the decision will make it too easy for stalkers and harassers to get away with crime, and too easy, as well, to escape civil liability for their actions. Others argue that the decision will make it too easy for the government to successfully prosecute or for civil plaintiffs to successfully sue defendants for intemperate or offensive speech that does not in fact pose any palpable threat of harm, opening the door to criminal and civil liability for engaging in what ought to be deemed protected speech.

The seemingly straightforward doctrinal decision in *Counterman* also carries profound ramifications implicating the larger theoretical architecture of First Amendment law. Justice Kagan’s decision for the majority, Justice Sotomayor’s concurring opinion, joined by Justice Gorsuch, and the dissents of Justice Thomas and Justice Barrett reveal deep rifts in the fundamental jurisprudence of modern free speech law.

This Article explores *Counterman* and its likely impact *on the street* as well as *in the books* against the backdrop of the larger march of modern free speech law.

## I. STALKING AND TRUE THREATS CONSIDERED IN REAL WORLD TERMS

Considered in real-world terms, stalking and true threats might be described through story-telling narratives, or through a compilation of social science statistics and data. It is worth considering both. I begin with two stories. The first is the story of Yvonne “Vonnie” Flores, the person for whom “Vonnie’s Law” was enacted. Vonnie’s Law is the Colorado law under which the defendant, Billy Raymond Counterman, was prosecuted. I then tell the story of that very prosecution, and how Counterman stalked his prey, Coles Whalen, and ultimately was convicted and sentenced to jail for stalking her. After telling those two stories, I offer some broader social science data on stalking in modern American life.

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1. *Counterman v. Colorado* (*Counterman*), 143 S. Ct. 2106, 2111–12 (2023).

*A. Vonnie's Law*

Vonnie was a kindergarten teaching assistant at Margaret J. Pitts Elementary School, who lived with her husband, Dave, in Leadville, Colorado.<sup>2</sup> Vonnie and Dave had a next-door neighbor, Anthony Medina, who lived with his mother. Medina became infatuated and obsessed with Vonnie. For two years Medina stalked Vonnie. Medina would do things like walk slowly by Vonnie's home, look through her windows, watch Vonnie leave her home and then follow her, and approach her on the streets of Leadville.<sup>3</sup> Once Medina went so far as to follow Vonnie and Dave to a shopping trip 30 miles away from their home, in Frisco, Colorado. Medina would at times engage in unwelcome touching of Vonnie and make inappropriate comments to her.

Medina was ultimately arrested and charged for his behavior, and Vonnie obtained a temporary restraining order requiring that Medina stay away from her. The order recited that Medina constituted a "credible threat" to Vonnie and that "an imminent danger" existed to her life and health.<sup>4</sup> Medina was released on \$2,500 bail.<sup>5</sup> But he did not stay away from Vonnie. Instead, on July 8, 2010, Medina laid in wait for Vonnie in her driveway, and opened fire on her as she arrived home from an errand, shooting her through the head and chest, murdering her with a .38 Taurus revolver.<sup>6</sup> Medina then took his own life, shooting himself through the head.<sup>7</sup>

Vonnie's sister, Vicki Kadlick, who lived in Casper, Wyoming, believed that the lax manner in which Medina was so easily released on bail, and the seemingly ineffectual impact of the protective order, were indicators of weaknesses in how the legal system responded to dangerous stalkers. Vicki took it upon herself to crusade for tougher laws to deter

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2. The facts in this narrative surrounding Vonnie's story are taken primarily from *The Denver Post* article cited in this footnote, and the *Cowboy State Daily* article. See *infra* notes 3–5 and accompanying text; see also Howard Pankratz, *Sheriff Says Leadville Woman Killed by Stalker Out on Bail*, DENVER POST (July 8, 2010), <https://www.denverpost.com/2010/07/08/sheriff-says-leadville-woman-killed-by-stalker-out-on-bail/>.

3. *Casper Woman Seeking Justice for Murdered Sister by Strengthening Wyoming Stalking Laws*, COWBOY STATE DAILY (Mar. 23, 2022), <https://cowboystatedaily.com/2022/03/23/casper-woman-seeking-justice-for-murdered-sister-by-strengthening-wyoming-stalking-laws/>.

4. Pankratz, *supra* note 2.

5. *Id.*

6. *Id.*

7. *Id.*

stalkers.<sup>8</sup> Vicki's crusade led to the adoption in Colorado of what became known as Vonnie's Law.<sup>9</sup>

It was a provision of Vonnie's Law, as later amended and strengthened by the Colorado legislature in 2015, that would play center stage in *Counterman*. That provision included in the definition of stalking actions by one who:

Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress.<sup>10</sup>

### B. Coles Whalen's Story

Coles Whalen grew up in Colorado, then moved to Los Angeles to start a rock band and attend the University of Southern California.<sup>11</sup> After graduating in 2002, she traveled the country with her boyfriend for about four years, earning a living by playing music.<sup>12</sup> Coles was able to land a record deal in 2007 with the Borders bookstore chain, performing in Borders coffee shops and stages seven days a week, sometimes three shows a day.<sup>13</sup> She eventually took root in Nashville, honing her skills as a singer-songwriter and going on tour.<sup>14</sup> Coles began to develop a fanbase, using a Facebook page as the social media anchor for keeping fans informed of her music and tour performances.<sup>15</sup>

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8. COWBOY STATE DAILY, *supra* note 3.

9. COLO. REV. STAT. § 18-3-602 (2023).

10. *Id.* § 18-3-602(1)(c).

11. In the *Counterman* litigation, Coles Whalen is referred to only by her initials, "C.W." In this narrative, which is taken from her interview and story in Denver's *Westword* magazine, I use her complete name. See Kyle Harris, *How Singer Coles Whalen Stopped a Stalker in Denver's Music Scene*, WESTWORD (Oct. 25, 2017), <https://www.westword.com/music/how-denver-singer-coles-whalen-stopped-stalker-billy-counterman-9622947>.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

In 2010, Coles was back home in Colorado doing a gig at PrideFest in Denver.<sup>16</sup> After the show she received a Facebook message from Billy Counterman, who claimed to be a Denver promoter who was interested in getting her to perform a benefit show.<sup>17</sup> Coles politely replied, and that's when the trouble started.<sup>18</sup> Counterman wrote back to her with a message that struck Coles as bizarre, so from that point on she ignored him.<sup>19</sup> But Counterman did not ignore her. Over the next several months he bombarded Coles with Facebook messages.<sup>20</sup> Coles, following the advice of other musicians in her band, just ignored him.<sup>21</sup> As she told the Denver arts magazine *Westword*, “[w]e really thought he was an alcoholic, in his basement, writing messages.”<sup>22</sup>

But ignoring Counterman did not work. Nor did blocking him. Every time Coles blocked Counterman's messages, he would simply create a new Facebook profile and message Coles again.<sup>23</sup>

In 2012, Coles decided to leave Nashville and return to Denver, planning to make the Denver music scene her base.<sup>24</sup> But this also brought her back to Counterman's home territory, and his Facebook messaging intensified. His messages, which Coles estimated as thousands, included rambles, invitations to coffee and requests to connect and talk, and even offering her homegrown tomatoes.<sup>25</sup> Counterman described his loneliness and depression and threatened to kill himself.<sup>26</sup>

At times Counterman would drop details about Coles's life, such as the color of her car, or saying he spied on her while she was out with her mother or at a library.<sup>27</sup> Counterman also claimed to have watched Coles perform—which made Coles increasingly anxious about public music performances, worried that Counterman might show up.<sup>28</sup> As the messages became increasingly aggressive and detailed, Coles finally sought legal advice from lawyers who were family relatives.<sup>29</sup> At first they suggested

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

Coles just try to ignore Counterman's messages.<sup>30</sup> But as the messages relentlessly persisted, her relatives advised her to go to the police.<sup>31</sup> This led to the discovery that Counterman "had been arrested in 2002 and again in 2011 for threatening to harm women and saying things like, 'I'll put your head on a fuckin sidewalk and bash it in,' and 'I will rip your throat out on sight.'"<sup>32</sup>

Shocked when she learned of Counterman's background, Coles finally filed a formal complaint against him.<sup>33</sup> The police responded by arresting Counterman.<sup>34</sup> He was charged and prosecuted.<sup>35</sup> The trial was painful for Coles. On the witness stand she was only six feet from him.<sup>36</sup>

From the avalanche of messages Counterman had sent Coles, prosecutors focused on the following messages, which became the critical messages at issue in the trial and for the record on appeal:

- "Was that you in the white Jeep?"
- "Five years on Facebook. Only a couple physical sightings."
- "Seems like I'm being talked about more than I'm being talked to. This isn't healthy."
- "I've had tapped phone lines before. What do you fear?"
- An image of stylized text that stated, "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless."
- An image of liquor bottles that was captioned "[a] guy's version of edible arrangements."
- "How can I take your interest in me seriously if you keep going back to my rejected existence?"
- "Fuck off permanently."

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

- “Your arrogance offends anyone in my position.”
- “You’re not being good for human relations. Die. Don’t need you.”
- “Talking to others about me isn’t prolife sustaining for my benefit. Cut me a break already . . . . Are you a solution or a problem?”
- “Your chase. Bet. You do not talk and you have my phone hacked.”
- In a message sent the following day from the “[y]our chase” message, an apology that stated, “I didn’t choose this life.”
- “Staying in cyber life is going to kill you. Come out for coffee. You have my number.”
- “A fine display with your partner.”
- “Okay, then please stop the phone calls.”
- “Your response is nothing attractive. Tell your friend to get lost.”<sup>37</sup>

Coles regarded these messages as “weird” and “creepy.”<sup>38</sup> And seriously, who would not? Who would not feel discomfiture and distress at receiving some thousand unwanted messages from a stranger? Who would not feel that distress heightened when after innumerable efforts to block the harasser, the harasser repeatedly changes profiles and repeats the messages, again and again? The sheer *determination* to keep at it is alone enough to instill fear and loathing in the most reasonable among us—the notion that “some creep I’ve never met before is obsessed with me and won’t let go.”

Some of the messages were banal—or to use the phrase Justice Kagan adopted in her opinion for the majority in the Supreme Court, “utterly prosaic.”<sup>39</sup> Counterman thus sent Coles such banalities as “[g]ood morning

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37. *People v. Counterman*, 497 P.3d 1039, 1044 (Colo. App. 2021), *vacated and remanded sub nom. Counterman v. Colorado*, 143 S. Ct. 2106 (2023) (alterations in original).

38. *Id.* at 1043.

39. *Counterman*, 143 S. Ct. at 2112.

sweetheart” and “I am going to the store would you like anything?”<sup>40</sup> Perhaps such messages would be innocuous if the recipient knew the sender. But in Coles’s case—think about it—she had never met the man!

Looking at the prosecution’s list of greatest hits, there are messages from Counterman to Coles that go way past the merely banal or creepy. Many of the messages would instill fear of physical attack on any reasonable person. Take: “I’m currently unsupervised. I know, it freaks me out too, but the possibilities are endless.”<sup>41</sup> Take: “Staying in cyber life is going to kill you. Come out for coffee. You have my number.”<sup>42</sup> Take: “You’re not being good for human relations. Die. Don’t need you.”<sup>43</sup> And take: “Fuck off permanently.”<sup>44</sup>

Add one more reality check. Coles performed in hundreds of venues before hundreds of audiences. On two occasions—and thankfully only two—men in the audience came on to her with inappropriate advances following a performance.<sup>45</sup> Coles shut them down—and again thankfully—they retreated.<sup>46</sup> Boorishly hitting on a singer-songwriter you don’t know is way past civilized, but at least these two men got the memo and backed off when Coles made it clear that the advances were unwelcome. Here, however, she was confronted with someone who would not back down after repeated rejections. To add to the scare, Counterman lurked in the shadows, slipping in information about her personal life, suggesting he was, to conjure the lyrics of *Sting* and *The Police*: “[E]very step you take, I’ll be watching you.”<sup>47</sup>

Coles’s story is about music culture. The creepy stalking of Counterman calls to mind the creepiest and most haunting portrayal of stalking in music culture, by the famous director Robert Altman, in his masterpiece film, *Nashville*.<sup>48</sup> In it (spoiler alert for those who have not watched but might now just choose to watch this magnificent film—skip to the next paragraph), a central character is a country singer named Barbara Jean.<sup>49</sup> A stalker, named Kenny, is obsessed with Barbara Jean.<sup>50</sup>

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40. *Id.*

41. *People v. Counterman*, 497 P.3d at 1044.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See Harris*, *supra* note 11.

46. *Id.*

47. THE POLICE, *Every Breath You Take*, on SYNCHRONICITY (A&M 1983).

48. *See generally* NASHVILLE (Paramount Pictures 1975) (depicting stalking and obsession in American music culture).

49. *Id.*

50. *Id.*



At a concert being held at the Pantheon in Nashville, Kenny opens fire, shooting Barbara Jean.<sup>51</sup> The movie *Nashville* was fiction. But we know from Vonnie Flores that what was depicted in *Nashville*, while fiction, was not fantasy. We know from the statistical portraiture of stalking in the United States, set forth in the next subpart of this article, that stalking leading to violence is not only not fantasy, but also it is not unusual. Abhorrent, yes. Irrational, yes. Aberrational, no.

### *C. Statistics Here Don't Lie*

How do we know that Vonnie's story and Coles's story are not aberrations? It is a truism that sometimes statistics *do lie*, in that they may be manipulated and spun. But the statistics on stalking as a national problem, even discounting for advocacy, paint a devastating picture. Data published by the Stalking, Awareness, and Prevention Resource Center, a group devoted to compiling data on stalking and promoting awareness, reveals the following highlights:

- It is estimated that “13.5 million people are stalked in a one-year period in the United States.”<sup>52</sup>
- Women are more likely to be stalked, though women and men are both often victims. “Nearly 1 in 3 women and 1 in 6 men have experienced [being stalked] at some point in their lifetime.”<sup>53</sup>
- Persons between the ages of 18 and 24 have the highest rate among adults of stalking victimization.<sup>54</sup>

In short, unfortunately the stalking experiences of Vonnie and Coles are common. Stalkers often use unwanted phone calls, texts, emails, or social media messaging; engage in unwanted and uninvited approaches in public places; engage in following and spying on victims; and use technology to monitor or track victims.<sup>55</sup> Many stalkers are shockingly

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51. *Id.*

52. STALKING PREVENTION, AWARENESS, & RES. CTR., STALKING FACT SHEET (2018), [https://www.stalkingawareness.org/wp-content/uploads/2019/01/SPARC\\_StalkngFactSheet\\_2018\\_FINAL.pdf](https://www.stalkingawareness.org/wp-content/uploads/2019/01/SPARC_StalkngFactSheet_2018_FINAL.pdf).

53. *Id.*

54. *Id.*

55. *Id.*

persistent. As many as 11% of victims have reported being stalked for five years or more.<sup>56</sup>

## II. TRUE THREATS AND THE FIRST AMENDMENT

### A. *Virginia v. Black*

The landmark First Amendment case dealing with the true threat doctrine prior to *Counterman* was *Virginia v. Black*.<sup>57</sup> I was the lead First Amendment lawyer in that litigation and argued the case in the United States Supreme Court.

*Black* involved a challenge to Virginia's law prohibiting cross-burning. That law provided:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.<sup>58</sup>

I have written about the case, and my involvement in it, very extensively in other publications, and will not retread that discourse here.<sup>59</sup> In a nutshell, I argued, on behalf of the American Civil Liberties Union, that the Virginia law violated the First Amendment. I argued first that in singling out "cross-burning" as one particularized symbol, the law violated the First Amendment's proscription against viewpoint discrimination.<sup>60</sup> As a fallback argument, I argued that the prima facie evidence provision of the law rendered it unconstitutional, because it operated as a short-circuit to the usual First Amendment requirement of intent by making the expression itself sufficient evidence of intent.<sup>61</sup>

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56. *Id.*

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

58. VA. CODE ANN. § 18.2-423 (1996), *invalidated by Virginia v. Black*, 538 U.S. 343 (2003).

59. *See generally* RODNEY A. SMOLLA, *CONFESSIONS OF A FREE SPEECH LAWYER: CHARLOTTESVILLE AND THE POLITICS OF HATE* (2020) (analyzing the conflict between the value of free speech and the protection of civil rights surrounding Charlottesville).

60. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992).

61. SMOLLA, *supra* note 59, at 194.

After a tumultuous oral argument, the Supreme Court issued a splintered opinion. The plurality four-Justice opinion of Justice O'Connor held that the law was invalid insofar as it permitted conviction based on the prima facie evidence provision alone.<sup>62</sup> Three Justices, in an opinion by Justice Souter, joined by Justices Kennedy and Ginsburg, accepted my viewpoint discrimination argument, and would have struck down the law on that more forceful ground.<sup>63</sup> Justice Scalia wrote to partially concur and dissent, arguing principally that the prima facie evidence should first be construed by the Virginia Supreme Court.<sup>64</sup> Justice Thomas dissented forcefully, arguing that cross-burning was such a unique symbol in American history—the symbol of a reign of terror—that it should be treated as inherently threatening.<sup>65</sup>

For two decades, lower courts struggled with how to interpret and apply *Black*. Everyone understood and accepted that *Black* established the essential truism that the First Amendment does not protect “true threats.” The question left unanswered—and the question over which lower courts were divided—was what was or was not appropriately treated as a true threat. The judicial opinion on the issue was typically divided between whether: (1) in order to be a true threat, a defendant had to harbor some subjective intent to threaten, or at least some subjective awareness of the threatening nature of his or her statement, or (2) whether it was enough that viewed objectively, the recipient of the threat would reasonably perceive it as threatening. Many lower court opinions addressed the issue, with widely divergent results.<sup>66</sup>

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62. *Black*, 538 U.S. at 347, 364–67 (plurality opinion).

63. *Id.* at 380–82 (Souter, J., concurring in the judgment in part and dissenting in part).

64. *Id.* at 368 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

65. *Id.* at 388–91, 394–95 (Thomas, J., dissenting).

66. Compare *United States v. Martinez*, 736 F.3d 981, 986 (11th Cir. 2013) (“[W]e find that *Black* does not alter our precedent.” (quoting *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013) (internal quotation marks omitted)), *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013) (joining the majority of circuits which have held that, in the wake of *Black*, “§ 875(c) does not require the government to prove a defendant specifically intended his or her statements to be threatening”), and *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012).

A careful reading of the requirements of § 875(c), together with the definition from *Black*, does not, in our opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement into § 875(c) and thus overruled our circuit’s jurisprudence, as well as the jurisprudence of most other circuits, which find § 875(c) to be a general intent crime and therefore require application of an objective test in determining whether a true threat was transmitted.

*Id.*, with *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (holding that *Black* requires a subjective-intent analysis), and *Maier v. Smith*, 912 F.3d 1064, 1072 (7th Cir. 2019) (“After *Black*,

As I witnessed the confusion among lower court decisions over the years, I often harkened back to the *Black* oral argument. Throughout the entire argument, various Justices focused upon whether particular words, such as “I’m going to kill you,” may or may not be proscribed consistent with the First Amendment.<sup>67</sup> In the back-and-forth banter between the Justices and me as an advocate, my position remained resolute. The answer, I believed then and continue to believe now, must be “no.” The First Amendment does not permit the government to say that anytime a person states words to the effect of “I am going to kill you,” that person automatically commits a crime, or is civilly liable in tort or for some statutory civil cause of action. At the very least, the words used in context must be objectively understood as actually threatening to kill or cause other legal injury.

As will be seen in the next subpart of this article, *Counterman* made clear what the oral argument in *Virginia v. Black*, if not the somewhat confusing opinions of the Justices, anticipated. It absolutely cannot be and is not the law that the government may make merely uttering the words “I am going to kill you” a crime, or the predicate for civil liability. The first step must be, as both *Virginia v. Black* and *Counterman* establish, that considered “in context” the statement “I am going to kill you,” or any other statement, must *objectively* be capable of being construed as an actual threat to kill or cause otherwise legally cognizable harm to the target of the statement. The remaining question, however, is what more is required.

### B. The Counterman Holding

#### 1. The Colorado Trial and Appeal

Now back to Coles Whalen and the trial of Billy Counterman. The prosecution charged Counterman with a violation of that provision of Vonnie’s Law prohibiting stalking in a manner that would cause “a reasonable person to suffer serious emotional distress” and does cause that person such distress.<sup>68</sup> Coles herself testified. Just giving her testimony was distressing, as she took the stand just six feet away from where Counterman sat as a defendant.<sup>69</sup>

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however, we and other courts have wondered whether speech only qualifies as a true threat if the speaker subjectively intended his words to be threatening.”).

67. SMOLLA, *supra* note 59, at 198–207; *see also* Transcript of Oral Argument at 7, 38, 41–42, 44–45, 47, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107).

68. COLO. REV. STAT. § 18-3-602(1)(c) (2023).

69. Harris, *supra* note 11.

Counterman was convicted and sentenced to four-and-a-half years in jail.<sup>70</sup> It is easy to understand why the jury would convict. Surely a reasonable person would suffer distress as a result of Counterman's dogged and obnoxious stalking, and surely Coles in fact felt that distress.

Counterman argued, however, that more was required than mere evidence that his conduct was objectively threatening. The First Amendment, he claimed, required additional proof that he subjectively intended to threaten Coles.<sup>71</sup> The trial court rejected Counterman's First Amendment argument, as did the Colorado Court of Appeals.<sup>72</sup> The Colorado appellate court observed that Counterman's messages telling Coles to "'die' or to '[f]uck off permanently'" may not have explicitly threatened Coles's life, but still did "imply a disregard for her life and a desire to see her dead."<sup>73</sup> The court also noted the sinister cast to his statement that he was "unsupervised" and that the "possibilities are endless."<sup>74</sup> The court also observed that Counterman projected "a feeling of entitlement" toward Coles, as if she was duty bound to respond to him, and when met instead with her silence, his hostility escalated.<sup>75</sup> The court also pointed to the messages that referenced surveilling or watching Coles, and the messages indicating that Counterman suspected that Coles had contacted authorities, which the court described as "concerning because they indicate a potential trigger for further escalated behavior."<sup>76</sup> Finally, the court noted Counterman's erratic mood swings as his messages fluctuated between professions of affection and hostility, which the court characterized as evidence of delusion, paranoia, and unpredictability.<sup>77</sup> Against this backdrop, and applying the objective test, the appellate court affirmed Counterman's conviction.<sup>78</sup>

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70. *People v. Counterman*, 497 P.2d 1039, 1044 (2021), *vacated and remanded sub nom. Counterman v. Colorado*, 143 S. Ct. 2106 (2023).

71. *See id.*

72. *Id.*

73. *Id.* at 1047.

74. *Id.*

75. *Id.* Counterman expressed his feelings through various messages:

[W]hen met with silence, [Counterman would] turn quickly to hostility toward her: "[s]eems like I'm being talked about more than I'm being talked to," "[y]our arrogance offends anyone in my position," "[h]ow can I take your interest in me seriously if you keep going back to my rejected existence," "[y]ou're not being good for human relations," "[y]ou do not talk," "[s]taying in cyber life is going to kill you," and "[y]our response is nothing attractive."

*Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1056.

## 2. The Supreme Court's Opinion

### a. The Majority Opinion of Justice Kagan

The Supreme Court granted review, finally addressing the split among lower courts that had been vexing First Amendment jurisprudence since *Black*. Justice Kagan wrote the majority opinion for the Court, joined by Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson.

The Court's opinion began by reciting the proposition that from the adoption of the First Amendment in 1791 to the present day, restrictions on the content of speech had been permitted in certain confined areas.<sup>79</sup> The Court referred to these "historic and traditional categories" as "long familiar to the bar" and "perhaps, too, the general public."<sup>80</sup> The Court then cited as three examples incitement,<sup>81</sup> defamation,<sup>82</sup> and obscenity.<sup>83</sup> The Court observed that it had often described these "historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest' in their proscription."<sup>84</sup> This sentence, which might to the casual and unassuming reader seem a simple matter-of-fact recitation of existing law, is actually packed with robustly contested and controversial subtexts. I will address those in the final part of this Article, critiquing the Court's opinion.<sup>85</sup>

The Court then turned to one of the critical initial steps in its analysis. True threats, the Court argued, relying on *Black*, are yet a fourth example of an "unprotected category" of speech.<sup>86</sup> The Court observed that the "true" in the true threat doctrine functions to distinguish true threats from "jests, 'hyperbole,' or other statements that when taken in context do not convey a real possibility that violence will follow."<sup>87</sup> Rather, true threats are

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79. *Counterman v. Colorado*, 143 S. Ct. 2106, 2113–14 (2023) ("From 1791 to the present,' the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'" (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010))).

80. *Id.* at 2114 (quoting *Stevens*, 559 U.S. at 468) (internal quotation marks omitted).

81. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

82. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974)).

83. *Id.* (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

84. *Id.* (quoting *United States v. Stevens*, 559 U.S. at 470).

85. *See infra* Part II.C.

86. *Counterman*, 143 S. Ct. at 2114 (first citing *Virginia v. Black*, 538 U.S. 343, 359 (2003); and then citing *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (plurality opinion)).

87. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).

“serious expression[s]” conveying the message “that a speaker means to ‘commit an act of unlawful violence.’”<sup>88</sup>

Here is where the Court’s opinion in *Counterman* took its first fateful turn. Prior to *Counterman*, courts dealing with the true threat doctrine spoke in the parlance of intent, debating whether, to be a true threat, a statement had to be uttered with a subjective intent to threaten, or whether it was enough that a reasonable recipient of the threat would objectively regard it as threatening.<sup>89</sup>

The opinion in *Counterman* approached the problem somewhat differently. Whether something is or is not a true threat, the Court reasoned, remains an entirely “objective” inquiry.<sup>90</sup> One can look at the statements at issue, consider them in their full context, and decide whether an ordinary reasonable person could or could not regard them as objectively threatening.<sup>91</sup> But that determination, *Counterman* held, does not decide whether the First Amendment permits “liability” to be imposed for the making of the statement.<sup>92</sup> An additional step is required, and that is where subjective fault kicks in.<sup>93</sup>

This form of analysis is exactly what current law requires in defamation cases. At the threshold of every defamation case is the preliminary question of whether the statements at issue are actionable defamation at all. There are essentially three filters through which the statement must pass. First, the statement must be *factual*, and not mere opinion, name-calling, or rhetorical hyperbole.<sup>94</sup> Second, the statement must be of the sort that tends to damage reputation, and not the sort of statement that the law treats as insufficiently reputation-damaging to be credited as defamatory.<sup>95</sup> And third, the statement must be false, and not substantially true.<sup>96</sup>

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88. *Id.* (quoting *Black*, 538 U.S. at 359). I should note that cases such as *Black* and *Counterman* focused on true threats of *violence*. Criminal or civilly actionable threats, however, could easily involve other forms of lawless action such as a blackmail threat that if one does not pay ransom, the defendant will release to the public some embarrassing or humiliating fact. Because *Counterman* and *Black* used the parlance of violence, I adopt that vocabulary throughout this article.

89. See cases cited *supra* note 66.

90. *Counterman*, 143 S. Ct. at 2113.

91. *Id.* at 2114.

92. *Id.*

93. *Id.* at 2114–15 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

94. See *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 17 (1990).

95. See, e.g., *Cannon v. Peck*, 36 F.4th 547, 559 (4th Cir. 2022); *Yeatts v. Zimmer Biomet Holdings, Inc.*, 940 F.3d 354, 359 (7th Cir. 2019) (“A statement is defamatory if it ‘tends to harm a person’s reputation by lowering the person in the community’s estimation or deterring third persons from dealing or associating with the person.’”); *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 743 (5th Cir. 2019) (“A statement is defamatory ‘if it tends to injure a person’s reputation and thereby

When these preconditions are met, the statement may be regarded as *actionable* defamation. But that does *not* mean that the plaintiff (or in a case of criminal defamation, the government) will win. Some actionable defamation is nonetheless insulated from liability under the First Amendment. In cases which implicate issues of public concern and the plaintiff is a public official or public figure, the plaintiff must prove through clear and convincing evidence that the defendant published the statement with “actual malice,” defined as knowledge of falsity or “reckless disregard” for truth or falsity.<sup>97</sup> In cases in which the statement is on a matter of public concern but the plaintiff is a private figure, the First Amendment requires that the plaintiff prove at least that the defendant acted negligently in publishing the statement.<sup>98</sup> Or to put it more simply, current First Amendment law protects *some* actionable defamation, but does not protect *all* actionable defamation. The lines separating protected defamation from unprotected defamation are defined by fault—actual malice or negligence, depending on the public or private status of the plaintiffs.

*Counterman* created an essentially identical regime for true threats. Whether a statement is or is not a true threat is an objective determination.<sup>99</sup> The Court thus opined that the “existence of a threat depends not on ‘the mental state of the author,’ but on ‘what the statement conveys’ to the person on the other end.”<sup>100</sup> Moreover, in saying that the true in true threat is designed to differentiate actually threatening statements from mere jest or hyperbole, the Court was using a distinction identical to one of the classic filters for defamation law, which similarly distinguishes between statements

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expose the person to public hatred, contempt, ridicule, or financial injury or to impeach any person’s honesty, integrity, virtue, or reputation.”); *Croce v. N.Y. Times Co.*, 930 F.3d 787, 792 (6th Cir. 2019) (“Under Ohio law, ‘defamation occurs when a publication contains a false statement made with some degree of fault, reflecting injuriously on a person’s reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.’”).

96. *See Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991) (“Put another way, the statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’” (first quoting *ROBERT SACK, LIBEL, SLANDER, AND RELATED PROBLEMS* 138 (1980)); and then citing *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506, 509 (5th Cir. 1983)); 1 *RODNEY A. SMOLLA, LAW OF DEFAMATION* § 5.8 (2d ed. 2023).

97. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

98. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

99. *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (“Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat, as this Court recently explained.”) (citing *Elonis v. United States*, 575 U.S. 723, 733 (2015)).

100. *Id.* (quoting *Elonis*, 575 U.S. at 733).



that convey false statements of fact from statements that are jokes, jests, name-calling, opinion, or rhetorical hyperbole.<sup>101</sup>

More importantly, *Counterman* established a second step.<sup>102</sup> Once the alleged true threat is identified objectively as a true threat, *Counterman* now requires an additional inquiry, much as the First Amendment fault requirements in defamation law have long required an additional inquiry. It is not enough that the alleged true threat in fact be a true threat. Some true threats will still be sheltered under the First Amendment, while others will not. The divide is fault. True threats uttered with the requisite recklessness will not be protected, while true threats without the requisite recklessness will be protected. Again, this new test is remarkably similar in its structure and its logic to the First Amendment principles that have been superimposed on modern defamation law.

And so, if some *subjective* First Amendment fault requirement must now be superimposed on *objective* true threat determinations, what should that subjective fault requirement be? In addressing this question, the Court began by pruning away some of the brushwood in the bramble bush, stating in a significant footnote that there is a “difference between awareness of a communication’s contents and awareness of its threatening nature.”<sup>103</sup> There was no question that the government must be aware of the communication’s contents.<sup>104</sup> The issue, rather, was what the rule should be when the defendant “understands the content of the words, but may not grasp that others would find them threatening.”<sup>105</sup>

The Court held that the First Amendment “may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect.

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101. *Bauer v. Brinkman*, No. 20-0563, 2020 WL 7021558, at \*3 (Iowa Ct. App. Nov. 30, 2020), *aff’d*, 958 N.W.2d 194 (Iowa 2021).

The common law has always differentiated sharply between genuinely defamatory communications as opposed to obscenities, vulgarities, insults, epithets, name-calling, and other verbal abuse. It has thus been held that a libel does not occur simply because the subject of the publication finds the publication annoying, offensive, or embarrassing. . . .

No matter how mean or vulgar, such language is not defamatory. It is not defamatory, for example, to call someone a “bastard,” or a “son of a bitch,” or an “idiot.” No matter how obnoxious, insulting, or tasteless such name-calling, it is regarded as a part of life for which the law of defamation affords no remedy.

*Id.* (quoting 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* §§ 4.7–4.8 (2d ed. 2020) (footnotes omitted)).

102. *Counterman*, 143 S. Ct. at 2116–17.

103. *Id.* at 2113 n.2.

104. *Id.*

105. *Id.*

Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries,” the Court explained.<sup>106</sup> “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.”<sup>107</sup>

“The same reasoning,” the Court opined, “counsels in favor of requiring a subjective element in a true-threats case.”<sup>108</sup> The Court held that a solely “objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats ‘a wide berth.’”<sup>109</sup> The Court then emphasized the entire concept behind fault standards designed to prevent a chilling effect inconsistent with First Amendment values:

The reasoning—and indeed some of the words—came straight from this Court’s decisions insisting on a subjective element in other unprotected-speech cases, whether involving defamation, incitement, or obscenity. No doubt, the approach in all of those cases has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. And the balance between those two effects may play out differently in different contexts, as the next part of this opinion discusses. But the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression.<sup>110</sup>

But what level of subjective intent ought to be required? Historically, the Court explained, the law of *mens rea* offers three basic choices. The most culpable level in the taxonomy of mental-state hierarchy, the Court held, is *purpose*, and it is concomitantly also the hardest to prove.<sup>111</sup> The next lowest stage, the Court held, “though not often distinguished from purpose, is knowledge.”<sup>112</sup> “A person acts knowingly when ‘he is aware that [a] result is practically certain to follow.’”<sup>113</sup> Thirdly, and with a

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106. *Id.* at 2114.

107. *Id.* at 2214–15 (citing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)).

108. *Id.* at 2116.

109. *Id.* at 2116 (quoting *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)).

110. *Id.* at 2117.

111. *Id.* (“A person acts purposefully when he ‘consciously desires’ a result—so here, when he wants his words to be received as threats.”) (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980)).

112. *Id.*

113. *Id.* (alteration in original) (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980)).

significant gap separating the first two, the Court opined, is the standard of recklessness. A person is commonly regarded as having acted recklessly, the Court explained, when the person “consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.”<sup>114</sup> The recklessness standard “involves insufficient concern with risk, rather than awareness of impending harm.”<sup>115</sup> Yet still, the Court observed, “recklessness is morally culpable conduct, involving a ‘deliberate decision to endanger another.’”<sup>116</sup>

The Court concluded that the recklessness standard was the best approach among the three. In adopting the recklessness standard, the Court drew heavily on what it regarded as the important lessons to be drawn from First Amendment doctrines surrounding the law of defamation. This analogy, as noted below, particularly irked Justice Thomas, who has come out as a devoted champion for overruling the entire body of First Amendment defamation law.<sup>117</sup> First Amendment defamation principles are all about chilling effect, the Court argued, designed to protect speakers from self-censorship because they cannot tell where the line is to be drawn, or feel sure that the legal system will interpret the line properly.<sup>118</sup> The Court accepted that the imposition of a recklessness standard admittedly comes at a cost, because “[i]t will shield some otherwise proscribable . . . speech because the State cannot prove what the defendant thought.”<sup>119</sup> Labeling this “strategic protection,” the Court argued that this was an appropriate price to pay in order to avoid the hazards of self-censorship.<sup>120</sup> The Court thus again cited defamation law as “the best known and best theorized example.”<sup>121</sup> False and defamatory statements of fact, the Court noted, had been held to have “no constitutional value.”<sup>122</sup> Yet, the Court argued, “a public figure cannot recover for the injury such a statement causes unless the speaker acted with ‘knowledge that it was false or with reckless disregard of whether it was false or not.’”<sup>123</sup> Reinforcing yet again the parallels to the driving principles behind First Amendment

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114. *Id.* (alterations in original) (quoting *Voisine v. United States*, 579 U.S. 686, 691 (2016)) (internal quotation marks omitted).

115. *Id.* (citing *Borden v. United States*, 141 S. Ct. 1817, 1823–24 (2021) (plurality opinion)).

116. *Id.* (quoting *Voisine*, 579 U.S. at 694).

117. *See infra* notes 165–66.

118. *Counterman*, 143 S. Ct. at 2114–15.

119. *Id.* at 2115.

120. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

121. *Id.*

122. *Id.* (quoting *Gertz*, 418 U.S. at 340).

123. *Id.* (first quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); and then citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (using the same standard for criminal libel)).

defamation law, the Court again emphasized that the “rule is based on fear of ‘self-censorship’—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements.”<sup>124</sup>

While defamation law featured most prominently in the Court’s analysis, the Court also claimed that its analysis found parallels in First Amendment principles governing obscenity and incitement. As with threats, the Court reasoned, incitement inheres in particular words used in particular contexts: “Its harm can arise even when a clueless speaker fails to grasp his expression’s nature and consequence.”<sup>125</sup> Even so, the Court reasoned, First Amendment doctrine requires that the speaker *intended* for the speech to produce imminent disorder.<sup>126</sup> So too, the Court argued, obscenity was not protected expression, but First Amendment law required *scienter* as to the defendant’s knowledge of the character and nature of the materials being distributed.<sup>127</sup>

The Court’s invocation of the *Brandenburg* incitement test in support of its ruling was curious, because *Brandenburg*, as the Court readily admitted, required actual subjective “intent,” not mere recklessness.<sup>128</sup> But there was a reason to treat the two bodies of law differently, the Court insisted. The Court then sought to justify a lower standard for true threats than incitement by arguing that incitement cases typically involve political advocacy, and so there is an important First Amendment value in ensuring that incitement prosecutions not be allowed to “bleed over” into censorship of core political speech.<sup>129</sup> Incitement, the Court reasoned, is often just a “hair’s-breadth” away from protected political advocacy.<sup>130</sup> The Court

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124. *Id.* (quoting *Sullivan*, 376 U.S. at 279).

125. *Id.*

126. *Id.* (first citing *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam); then citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); and then citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927–29 (1982)).

127. *Id.* at 2115–16. The Court stated:

And for a similar reason, the First Amendment demands proof of a defendant’s mindset to make out an obscenity case. Obscenity is obscenity, whatever the purveyor’s mental state. But we have repeatedly recognized that punishment depends on a “vital element of scienter”—often described as the defendant’s awareness of “the character and nature” of the materials he distributed.

*Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 122–23 (1974)).

128. *Id.* at 2118.

129. *Id.* (first citing *Whitney v. California*, 274 U.S. 357 (1927); then citing *Gitlow v. New York*, 268 U.S. 652 (1925); and then citing *Abrams v. United States*, 250 U.S. 616 (1919)).

130. *Id.* (“In doing so, we recognized that incitement to disorder is commonly a hair’s-breadth away from political ‘advocacy’—and particularly from strong protests against the government and prevailing social order.”) (first quoting *Brandenburg*, 395 U.S. at 447; then citing *Hess*, 414 U.S. at 108; and then citing *Claiborne Hardware*, 458 U.S. at 888).

contrasted the strong protection embodied in the modern *Brandenburg* standard with the Court’s failure, earlier in history, to protect abstract advocacy of lawless activity.<sup>131</sup>

In a somewhat conclusory passage, however, the Court, largely by fiat, simply declared that true threats do not pose the same “bleed over” problem:

But the potency of that protection is not needed here. For the most part, the speech on the other side of the true-threats boundary line—as compared with the advocacy addressed in our incitement decisions—is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions. It is not just that our incitement decisions are distinguishable; it is more that they compel the use of a distinct standard here.<sup>132</sup>

The Court candidly recognized that the decision was a compromise. And as with any compromise, something is lost on both sides: “The rule we adopt today is neither the most speech-protective nor the most sensitive to the dangers of true threats.”<sup>133</sup> Yet, the Court argued, its compromise was the best choice among the alternatives: “Not ‘having it all’—because that is impossible—but having much of what is important on both sides of the scale.”<sup>134</sup>

The Court remanded Counterman’s specific case to the Colorado Court of Appeals for application of the standard.<sup>135</sup>

Three other Justices wrote opinions in *Counterman*.

#### b. Justice Sotomayor’s Concurrence

Justice Sotomayor, joined in part by Justice Gorsuch, wrote an opinion concurring in part and concurring in the judgment.<sup>136</sup> Justice Sotomayor did not believe that “stalking” cases should be analyzed in the same manner as typical true threat cases.<sup>137</sup> True threats, she argued, typically involved one-

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131. *Id.* (first citing *Whitney*, 274 U.S. 357 (1927); then citing *Gitlow*, 268 U.S. 652 (1925); and then citing *Abrams*, 250 U.S. 616 (1919)).

132. *Id.*

133. *Id.* at 2119.

134. *Id.*

135. *Id.*

136. *Id.* at 2119–32 (Sotomayor, J., concurring in part and concurring in the judgment).

137. *Id.* at 2120–21.

off expressions of “pure speech.”<sup>138</sup> Stalking, on the other hand, was an entirely different animal, often involving a long string of activity, including messages that indicated repeated efforts to surveil or have “direct contact with [Coles].”<sup>139</sup> Stalking, Justice Sotomayor argued, “can be carried out through speech but need not be, which requires less First Amendment scrutiny when speech is swept in.”<sup>140</sup> Justice Sotomayor would have thus avoided using the *Counterman* case as a vehicle for pronouncing broadly on the constitutional rules governing true threats in the stalking context. She would have affirmed *Counterman*’s conviction and saved the larger issues for another day.<sup>141</sup>

Even so, Justice Sotomayor then went on to engage on the ultimate merits, and when she did, parted ways with the entire analytic framework employed by the Court, arguing instead that First Amendment law reflected the “commonsense understanding that threatening someone is an intentional act.”<sup>142</sup> Justice Sotomayor took issue with what she called the “order of operations.”<sup>143</sup> Unlike the majority opinion of Justice Kagan, which separated the objective definition of true threat from the fault requirement to then be added on top of it, Justice Sotomayor argued that the inquiries were in fact all one thing, and that First Amendment law and the law more generally had *always* understood true threats as true *intentional* threats, requiring subjective intent.<sup>144</sup> The subjective intent standard, she argued, had already been established as the governing standard in *Black*.<sup>145</sup> This understanding of *Black* was compelled, she maintained, by adding the votes of the various Justices.<sup>146</sup> She thus described what she called the “through-line” of *Black*, in three parts: (1) “unprotected true threats include a subjective *mens rea* requirement”; (2) “Virginia’s statute did not run afoul of the First Amendment insofar as it banned cross burning with intent to intimidate”; and (3) “a conviction could not stand if it had categorically dispensed with that intent requirement, or if the jury had insufficiently considered ‘intent to intimidate.’”<sup>147</sup>

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138. *Id.* at 2120 (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam)).

139. *Id.* at 2121, 2121 n.1 (citing *People v. Counterman*, 497 P.3d 1039, 1043 (Colo. App. 2021)).

140. *Id.* at 2121.

141. *Id.* at 2132 (“Yet I would stop there, leaving for another day the question of the specific *mens rea* required to prosecute true threats generally.”).

142. *Id.* at 2120.

143. *Id.* at 2123.

144. *Id.* at 2120.

145. *Id.* at 2124.

146. *Id.* at 2125.

147. *Id.* (citations omitted).

Moreover, Justice Sotomayor argued, the intent requirement that in her view was endorsed in *Black* was consistent with the requirement of intent that had for centuries dominated English law in the colonial period, and in American states in the 19th century.<sup>148</sup>

Justice Sotomayor also criticized the majority opinion for its seeming willingness to employ a “categorical” approach to deciding what speech was protected and what speech was unprotected, an approach that in her view the Court had come to eschew. The Court, she wrote, “has already warned about the danger of creating new categories of ‘unprotected speech’ exempt from the ordinary First Amendment framework for balancing our society’s commitment to free expression with other interests.”<sup>149</sup> Justice Sotomayor saw this as opening the door to expanding the list of categories of speech deemed unworthy of First Amendment protection, arguing that “[i]f courts were at liberty to redefine what counts as a ‘threat’ or ‘defamation’ at will, this would achieve the same results as creating new categories of unprotected speech.”<sup>150</sup>

Justice Sotomayor’s opinion also elaborated at length on what she perceived as the dangerous real-world consequences of a recklessness standard, and why in her view a subjective intent standard was necessary to avoid those dangers. Much of modern First Amendment law, she argued, operates to protect speech that is of “low[]value.”<sup>151</sup> Yet, she maintained, “First Amendment vigilance is especially important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it.”<sup>152</sup> Justice Sotomayor gave as examples *Black*’s protection of cross-burning, the decision in *Snyder v. Phelps*,<sup>153</sup> in which the Court protected the vicious and hateful rhetoric of the Westboro Church in its protests at military funerals, and the holding in *Ashcroft v. Free Speech Coalition*,<sup>154</sup> protecting computer-generated images of children engaged in sex.<sup>155</sup>

Moreover, Justice Sotomayor argued, the risks attendant to over-criminalizing speech have increased because of the internet, where so much of our discourse now occurs.<sup>156</sup> Different corners of the internet, she argued,

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148. *Id.* at 2125–27.

149. *Id.* at 2123 (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

150. *Id.*

151. *Id.* at 2121.

152. *Id.* at 2121–22.

153. *Snyder v. Phelps*, 562 U.S. 443, 448, 458 (2011).

154. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002).

155. *Counterman*, 143 S. Ct. at 2122 (Sotomayor, J., concurring in part and concurring in the judgment) (citing *Ashcroft*, 535 U.S. at 239–40, 258).

156. *Id.*

have developed different norms around what is or is not appropriate speech.<sup>157</sup> So too, she maintained, “[o]nline communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression.”<sup>158</sup> Furthermore, “it is easy for speech made in . . . one context to inadvertently reach a larger audience.”<sup>159</sup>

On top of this, Justice Sotomayor argued, true threat cases often arise in the context of politically charged speech. *Black* involved the Klan and race; its predecessor, *Watts v. United States*,<sup>160</sup> involved protest against the Vietnam War; and *Rogers v. United States*<sup>161</sup> involved protest against President Nixon’s policies toward China.

What is likely to happen, Justice Sotomayor predicted, is that over-criminalization of speech through the use of the true threat doctrine will fall disproportionately on fringe groups, minorities, and cultures unfamiliar to the mainstream: “Members of certain groups, including religious and cultural minorities, can also use language that is more susceptible to being misinterpreted by outsiders.”<sup>162</sup> Citing scholarship on the threatening nature of rap music, Justice Sotomayor added that we may unfortunately predict that cultural stereotypes will play an influence.<sup>163</sup>

### c. Justice Thomas’s Dissent

Justice Thomas joined the dissenting opinion of Justice Barrett in its entirety, but he wrote a very brief separate dissent in *Counterman* to reiterate what has become one of Justice Thomas’s pet crusades: his effort to get the Court’s 1964 decision in *New York Times v. Sullivan*<sup>164</sup> overturned.<sup>165</sup>

In a series of recent opinions, Justice Thomas, and later Justice Gorsuch, have argued that *Sullivan* should be reconsidered.<sup>166</sup> As I

157. *Id.*

158. *Id.*

159. *Id.*

160. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

161. *Rogers v. United States*, 422 U.S. 35, 41–42 (1975).

162. *Counterman*, 143 S. Ct. at 2123 (Sotomayor, J., concurring in part and concurring in the judgment).

163. *Id.* (“And unfortunately yet predictably, racial and cultural stereotypes can also influence whether speech is perceived as dangerous.” (citing A. Dunbar et al., *The Threatening Nature of “Rap” Music*, 22 J. PSYCH. PUB. POL’Y. & L. 281, 281–82, 288–90 (2016))).

164. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

165. *Counterman*, 143 S. Ct. at 2132–33 (Thomas, J., dissenting).

166. *See* *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari); *Berisha v. Lawson*, 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting from denial of certiorari); *see also* *Berisha*, 141 S. Ct. at 2428–30 (Gorsuch, J., dissenting from denial of certiorari).



note in the final critique Part of this Article, there are signals in *Counterman* that Justice Thomas at present does not have the allies he would need on the Court to succeed in this project.<sup>167</sup>

#### d. Justice Barrett's Dissent

Justice Barrett, joined in full by Justice Thomas, dissented, arguing that the objective standard followed by Colorado is all that the First Amendment should be construed to require.<sup>168</sup> Justice Barrett, most strongly among the members of the Court, completely embraced the reasoning and ethos of *Chaplinsky v. New Hampshire*,<sup>169</sup> the Court's famous 1942 decision that declared certain categories of speech to be entirely outside of First Amendment protection. *Chaplinsky* reasoned that whatever marginal value speech within those categories may have, that value is outweighed by society's interests in order and morality. Here is the famous passage from *Chaplinsky*, in its entirety:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>170</sup>

For Justice Barrett, the roadmap supplied by *Chaplinsky* made the *Counterman* case easy. "True threats," she argued, "carry little value and impose great cost."<sup>171</sup> Any benefit that might derive from true threats, Justice Barrett reasoned, is "clearly outweighed by the social interest in order and morality."<sup>172</sup> And true threats, she maintained, are examples of

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167. See *infra* note 230 and accompanying text.

168. *Counterman*, 143 S. Ct. at 2133 (Barrett, J., dissenting).

169. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

170. *Id.* (footnotes omitted).

171. *Counterman*, 143 S. Ct. at 2133 (Barrett, J., dissenting) (citing *Chaplinsky*, 315 U.S. at 572).

172. *Id.* at 2133–34 (quoting *Chaplinsky*, 315 U.S. at 572).

words which by “their very utterance” inflict injury engendering fear of violence, creating disruption, and giving rise to “the possibility that the threatened violence will occur.”<sup>173</sup>

True threats, Justice Barrett argued, deserve no “pride of place among unprotected speech.”<sup>174</sup> Instead, she contended, true threats are akin to “fighting words,” which, she maintained, have always been defined under an objective test.<sup>175</sup> Similarly, Justice Barrett argued, First Amendment commercial speech cases treat false, deceptive, or misleading speech as outside the protection of the First Amendment, without imposing any additional fault standard.<sup>176</sup> Likewise, Justice Barrett argued obscenity prosecutions do not require any fault standard over and above the requirement that the speech at issue be legally obscene under the test established in *Miller v. California*.<sup>177</sup> This is entirely an objective inquiry, Justice Barrett argued. The speech at issue is either obscene or it is not, and it is a *jury*’s assessment, not the *speaker*’s assessment, that dictates policy: “The speaker’s ‘belief as to the obscenity or non-obscenity of the material is irrelevant.’”<sup>178</sup> Justice Barrett conceded that the defendant must have “knowledge of the contents of the material[],” but that knowledge, she argued, should not be conflated with knowledge of how an average person would view the material.<sup>179</sup> An adult bookstore owner cannot be prosecuted for selling an obscene book unless the bookstore owner knows what is in the book.<sup>180</sup> But whether the contents of the book qualify as obscene, Justice Barrett argued, depends not on the intent of the bookstore owner,

173. *Id.* at 2134 (quoting *Chaplinsky*, 315 U.S. at 572).

174. *Id.* at 2134 (quoting *Elonis v. United States*, 575 U.S. 723, 767 (2015) (Thomas J., dissenting)).

175. *Id.* (Barrett, J., dissenting).

176. *Id.* at 2135 (first citing *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 638 (1985); then quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982) (“Truthful advertising . . . is entitled to the protections of the First Amendment,” but “[m]isleading advertising may be prohibited entirely.”); and then quoting *Ibanez v. Fla. Dept. of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 142 (1994) (“[F]alse, deceptive, or misleading commercial speech may be banned.”)).

177. *Id.* at 2135 (Barrett, J., dissenting) The Court held:

Speech qualifies as obscene if “the average person, applying contemporary community standards,” would conclude that “the work, taken as a whole, appeals to the prurient interest[.]” . . . [that] the speech “depicts or describes” sexual conduct “in a patently offensive way,” and [that the speech] “lacks serious literary, artistic, political, or scientific value.”

*Id.* (first citing *Roth v. United States*, 354 U.S. 476, 481 (1957); and then quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

178. *Id.* at 2135 (Barrett, J., dissenting) (quoting *Hamling v. United States*, 418 U.S. 87, 120–21 (1974)).

179. *Id.* (quoting *Hamling*, 418 U.S. at 123).

180. *Id.* (citing *Smith v. California*, 361 U.S. 147, 149 (1959)).

but on whether a jury, applying the objective obscenity test, determines it is obscene.<sup>181</sup>

Justice Barrett most heavily attacked the excessive reliance placed by Justice Kagan and the Court on First Amendment defamation decisions. While it was true that public officials and public figures needed to show actual malice (knowing or reckless falsehood) to recover, Justice Barrett pointed out, “private figure” plaintiffs did not. Mere negligence was enough in such cases.<sup>182</sup> And if the speech is not on a matter of public concern, such plaintiffs may even recover punitive damages without proving recklessness.<sup>183</sup>

Under this logic, Justice Barrett argued, First Amendment defamation cases do not justify any heightened *mens rea* for true threats, because such threats are not “typically proximate to debate on matters of public concern.”<sup>184</sup> Moreover, she argued, “perversely, private individuals now have less protection from true threats than from defamation—even though they presumably value their lives more than their reputations.”<sup>185</sup> Justice Barrett concluded that the “Court has therefore extended *Sullivan* in a way that makes no sense on *Sullivan*’s own terms.”<sup>186</sup>

The only point on which Justice Barrett *did* agree with the Court’s majority opinion was in accepting that the *Brandenburg* incitement test—which she admitted did require intent—was not the appropriate test for true threats.<sup>187</sup> Justice Barrett’s dissent distinguished incitement from true threats by adopting the same theory as the majority opinion, arguing that incitement cases typically involve political advocacy, thereby necessitating a strict intent test in order to protect that advocacy, whereas true threats typically did not.<sup>188</sup> The difference between Justice Barrett and the Court majority, however, was over what to do with this distinction. The Court agreed that intent was not required but insisted that recklessness should be. Justice Barrett argued that once it is agreed that intent is not required, the

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181. *Id.* at 2135–36 (first citing *Smith v. California*, 361 U.S. 147, 149, 155 (1959); then citing *Mishkin v. New York*, 383 U.S. 502, 511–12 (1966); and then citing *Ginsberg v. New York*, 390 U.S. 629, 643–44 (1968)).

182. *Id.* at 2136 (“A private person need only satisfy an objective standard to recover actual damages for defamation.” (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–50 (1974))).

183. *Id.* (“And if the defamatory speech does not involve a matter of public concern, she may recover punitive damages with the same showing.” (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1985) (plurality opinion))).

184. *Id.* at 2136.

185. *Id.* (citing *Gertz*, 418 U.S. at 347–50).

186. *Id.*

187. *Id.* at 2136–37.

188. *Id.* at 2137.

standard should be moved all the way down to the objective reasonable person test.<sup>189</sup> In an impish jibe at the majority, Justice Barrett chided: “The reality is that recklessness is not grounded in law, but in a Goldilocks judgment: Recklessness is not too much, not too little, but instead ‘just right.’”<sup>190</sup> Justice Kagan seemed to take the diss in good humor, responding: “But in law, as in life, there are worse things than being ‘just right.’”<sup>191</sup>

Turning to the reality on the street, Justice Barrett argued that the Court was wrong in its conception of how the objective true threats test actually works in practice. Indeed, this was the true soul of Justice Barrett’s opinion. Two features of true threat law, she maintained, serve as guardrails that fully protect First Amendment values without the necessity of a subjective intent requirement.

First, Justice Barrett argued, only a very narrow class of statements actually fall within the definition of a true threat. “To make a true threat, the speaker must express ‘an intent to commit *an act of unlawful violence*.’”<sup>192</sup> This statement in Justice Barrett’s dissent might be confusing, since it refers to “intent.” But the next sentence in her dissent makes it clear what she really means, and why she italicized the phrase “*an act of unlawful violence*.”<sup>193</sup> Justice Barrett thus clarified that “[s]peech that is merely ‘offensive,’ ‘poorly chosen,’ or ‘unpopular’ does not qualify.”<sup>194</sup> Relatedly, Justice Barrett argued, the statement “must also threaten violence ‘to a particular individual or group of individuals’—not just in general.”<sup>195</sup> Thus, Justice Barrett argued, while “defamatory statements can cover an infinite number of topics, true threats target one: unlawful violence.”<sup>196</sup>

The second guardrail, Justice Barrett argued, is that “the statement must be deemed threatening by a reasonable listener who is familiar with the ‘entire factual context’ in which the statement occurs.”<sup>197</sup> In capturing such factors as the “speaker’s tone, the audience, the medium for the communication, and the broader exchange in which the statement occurs,”

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189. *Id.*

190. *Id.* at 2140.

191. *Id.* at 2119 n.7 (majority opinion).

192. *Id.* at 2137 (Barrett, J., dissenting) (emphasis added by Barrett, J.) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

193. *Id.*

194. *Id.* (quoting Brief for Petitioner at 31, 36, 42, *Counterman v. Colorado*, 143 S. Ct. 2106 (2023) (No. 22-138)).

195. *Id.* (quoting *Black*, 538 U.S. at 359).

196. *Id.*

197. *Id.* (quoting *State v. Taveras*, 271 A.3d 123, 129 (Conn. 2022)).

she argued, these considerations help “weed out protected speech from true threats.”<sup>198</sup>

The decision in *Virginia v. Black*,<sup>199</sup> Justice Barrett argued, illustrated her point. It was the prima facie evidence presumption, she maintained, that caused the plurality in *Black* to rule in favor of the Klan leader Barry Black, because of the many different ways in which cross-burning could occur, from directing a burning cross to an individual, to a group of like-minded believers, or at a public rally.<sup>200</sup> Because the prima facie evidence presumption blurred the distinction and ignored context, Justice Barrett argued, it was unconstitutional.<sup>201</sup> The *Black* plurality opinion, Justice Barrett argued, could be distilled to one insight: “When context is ignored, true threats cannot be reliably distinguished from protected speech.”<sup>202</sup> But, Justice Barrett reasoned, “[t]he reverse also holds.”<sup>203</sup> “When context is properly considered, constitutional concerns abate.”<sup>204</sup>

Concluding that *Counterman* knew what his words meant, and that those words upended Coles’s life, causing her to fear for it, Justice Barrett concluded that the First Amendment offered him no shelter.<sup>205</sup>

### *C. Critiquing Counterman and Observations for its Future Application*

#### 1. Ideology Did Not Matter

It is common to think of the Supreme Court, as currently constituted, as polarized along ideological lines with six conservative Justices, Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, Gorsuch, and Barrett, pitted against the three liberals, Justices Kagan, Sotomayor, and Jackson. And to be sure, some of the major “culture war” decisions in recent terms have divided along precisely those ideological lines. This was the split in *Dobbs v. Jackson Women’s Health Organization*,<sup>206</sup> overruling the right to abortion established in *Roe v. Wade*,<sup>207</sup> as well as the split in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*

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198. *Id.*

199. *Black*, 538 U.S. 343.

200. *Counterman*, 143 S. Ct. at 2137–38 (Barrett, J., dissenting).

201. *Id.* at 2138.

202. *Id.*

203. *Id.*

204. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

205. *Id.* at 2141.

206. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

207. *Roe v. Wade*, 410 U.S. 113 (1973).

*College*,<sup>208</sup> eviscerating race-conscious affirmative action in higher-education admissions.

Not so in *Counterman*. The five-Justice majority included two of the liberals, Justices Kagan and Jackson, joined by the conservatives, Chief Justice Roberts and Justices Alito and Kavanaugh. The most “pro-free speech” position—at least the only one of the opinions that openly called for subjective intent as the appropriate true threat standard—was the opinion of liberal Justice Sotomayor joined by conservative Justice Gorsuch. Justice Sotomayor’s position was qualified, however, by her suggestion that pure “stalking” cases ought not require intent.

Which of the opinions in the case was the most “progressive”? Answering that, of course, depends on what progressive means in the context of stalking and true threat cases. Some might say the progressive position is the position that lends the most protection to speech. Others might say that the most progressive position is the position that is most protective of stalking victims—and most protective of young women victims—the group of persons most prone to being stalked. Under that second view of progressive, it would be the position taken by Justices Barrett and Thomas, two of the Court’s conservative Justices, that would win the prize.

## 2. The Resurgence of Categorical First Amendment Thinking

In my opinion, one of the most regrettable aspects of *Counterman* rests in its resurgence of what I call the “categorical” approach to First Amendment analysis. I have long been a strong critic of this approach to First Amendment thinking.<sup>209</sup> The categorical approach traces its lineage to the famous passage from *Chaplinsky* previously quoted,<sup>210</sup> particularly the passage that included the infamous “list” of the unprotected, reciting that these “include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>211</sup> Believe it or not, I once wrote an *entire law review article* devoted to dissecting this *one paragraph* in *Chaplinsky*, in which I purported to demonstrate that neither

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208. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

209. See 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2:70 (2023).

210. See *supra* text accompanying note 170.

211. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

the categories on the list—nor the entire categorical approach—were any longer good law.<sup>212</sup>

This Smolla “categories are dead” thesis was buttressed by two proofs. First, I argued, if one takes a sober second look at the categories on the *Chaplinsky* list, it turns out that now almost all speech falling within each category on the list currently receives robust First Amendment protection. If by “lewd” we mean vulgar, dirty language, the decisions in *Cohen v. California*<sup>213</sup> finding the phrase “fuck the draft” constitutionally protected, or *Hustler Magazine v. Falwell*<sup>214</sup> finding a crude parody depicting Reverend Jerry Falwell having sex with his mother in an outhouse, appear to take care of that one. If by “profane” we mean sacrilegious, the Supreme Court has struck down prohibitions on the profane as well.<sup>215</sup> As to the libelous, the many hardy First Amendment protections that now shelter libelous speech, emanating from *New York Times v. Sullivan*<sup>216</sup> and its progeny, have put that member of the list to rest.<sup>217</sup> And as to fighting words, while the doctrine does still technically remain on the books, it has been dramatically narrowed by subsequent Supreme Court decisions, most notably *Cohen*,<sup>218</sup> *Gooding v. Wilson*,<sup>219</sup> *Lewis v. City of New Orleans*,<sup>220</sup> and lower court decisions applying them.<sup>221</sup> Indeed, even Justice Kagan’s

212. Rodney A. Smolla, *Words “Which by Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317 (2009).

213. *Cohen v. California*, 403 U.S. 15, 26 (1971).

214. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

215. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502, 506 (1952).

216. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

217. While *Sullivan* is the case where it all started, in fact a large part of modern First Amendment law is laden with constitutional protection for otherwise defamatory speech. See generally 1 SMOLLA, *supra* note 209, § 1:16.

218. *Cohen*, 403 U.S. at 20 (limiting “fighting words” to those “personally abusive epithets” that, “when addressed to the ordinary citizen, are . . . inherently likely to provoke a violent reaction”); see also *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

219. *Gooding v. Wilson*, 405 U.S. 518, 519–20 n.1, 528 (1972) (striking down under the overbreadth doctrine a conviction for saying to a policeman, “[y]ou son of a bitch, I’ll choke you to death”).

220. *Lewis v. City of New Orleans*, 415 U.S. 130, 130–33, 130 n.1 (1974) (striking down under the overbreadth doctrine a conviction for saying to a policeman, “you god damn m. f. police”).

221. See *United States v. Bartow*, 997 F.3d 203, 211 (4th Cir. 2021). The First Amendment allows the government to make “abusive language” unlawful, but only if the government can show that the language had a “direct tendency” to incite “immediate acts of violence by the person to whom” it was directed. *Id.* at 205. Bartow’s obscene racial insult clearly constituted highly “abusive language.” *Id.* Bartow’s conviction cannot stand because the government failed to prove (or even give proof) that his use of this highly offensive term tends to induce imminent acts of violence by anyone. *Id.* at 205, 211. The Fourth Circuit stated:

majority opinion in *Counterman*, which generally seemed willing to revive the categorical approach to First Amendment analysis, did not go so far as to breathe much vitality into the fighting words doctrine. In response to Justice Barrett's invocation of the doctrine, the majority opinion thus responded: "This Court has not upheld a conviction under the fighting-words doctrine in 80 years. At the least, that doctrine is today a poor candidate for spinning off other First Amendment rules."<sup>222</sup>

My second proof that the categorical approach is dead came from what I regarded as the Supreme Court's abandonment of the entire form of analysis *Chaplinsky* embraced, weighing the value of speech against its perceived social harm to order and morality. On this point, I regarded the Supreme Court's animal cruelty decision, *United States v. Stevens*,<sup>223</sup> as the clincher. *Stevens* was an 8-1 decision written by Chief Justice Roberts. The Court struck down a federal statute prohibiting trafficking in depictions of animal cruelty, a statute Congress was spurred to enact when the so-called "crush videos," containing sickening depictions of animals being cruelly tortured or killed, began to surface on the internet. As gross and disgusting as these crush videos were, the Court still struck down the federal statute, finding it unconstitutionally overbroad under the First Amendment. Only Justice Alito dissented. For my purposes here, however, what was most

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The Court has so narrowed the "fighting words" exception that it has not upheld a criminal conviction under the doctrine since *Chaplinsky* itself. . . . Over the decades, the Court has repeatedly determined that the First Amendment places considerable limits on the criminalization of speech. We must abide those limits, even if that means, as it does here, that shameful speech escapes criminal sanction.

*Id.* at 211; *Wood v. Eubanks*, 25 F.4th 414, 422 (6th Cir. 2022) ("We have explained that, since the *Chaplinsky* decision, its 'fighting words' doctrine has become 'very limited.'" (quoting *Greene v. Barber*, 310 F.3d 889, 896 (6th Cir. 2002))). "While calling a city marshal 'a God damned racketeer' and 'a damned Fascist' constituted fighting words in *Chaplinsky*, '[s]tandards of decorum have changed dramatically since 1942, . . . and indelicacy no longer places speech beyond the protection of the First Amendment.'" *Id.* (quoting *Greene*, 310 F.3d at 895-96 (citation omitted)). "The fighting words exception is very limited because it is inconsistent with the general principle of free speech recognized in our First Amendment jurisprudence." *Id.* at 422-23 (quoting *Baskin v. Smith*, 50 F. App'x 731, 736 (6th Cir. 2002)). "Therefore, 'profanity alone is insufficient to establish criminal behavior.'" *Id.* at 423 (quoting *Wilson v. Martin*, 549 F. App'x 309, 311 (6th Cir. 2013)); *see also* *State v. Oleston*, No. 2020AP952-CR, 2021 WL 2965038, at \*4 (Wis. Ct. App. July 15, 2021) ("Had the fighting words doctrine remained constant since *Chaplinsky* was decided in 1942, I would have no trouble determining that Oleston's speech was unprotected. However, the Supreme Court has limited its application in subsequent cases." (citation omitted)); *see also* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 10:33 (2023).

222. *Counterman v. Colorado*, 143 S. Ct. 2106, 2116 n.4 (2023).

223. *United States v. Stevens*, 559 U.S. 460, 482 (2010).



significant was the Supreme Court's seeming rejection of *Chaplinsky's* invitation to decide free speech cases by weighing costs and benefits.<sup>224</sup>

The Solicitor General charged with defending the federal statute at that time was none other than Elena Kagan. The Government's brief, signed by then Solicitor General Kagan, invited the Court to treat depictions of animal cruelty as a new category of unprotected speech. Here is how Chief Justice Roberts described the position taken by the Government under General Kagan's leadership:

The Government argues that “depictions of animal cruelty” should be added to the list. It contends that depictions of “illegal acts of animal cruelty” that are “made, sold, [sic] or [sic] possessed [sic] for commercial gain” necessarily “lack expressive [sic] value,” and may accordingly “be [sic] regulated [sic] as [sic] unprotected speech [sic].” The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a “First Amendment Free Zone.”

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... The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”<sup>225</sup>

The opinion of the Chief Justice, writing for the Court, was exceptionally sharp in its hostile rebuke of this argument stating that, as “a free-floating test for First Amendment coverage, that sentence is startling and dangerous.”<sup>226</sup> *Startling and dangerous?* Talk about fighting words. That rejection of the Government's position, and by extension the leadership of then-Solicitor General Kagan, was unusually pointed and personal. The First Amendment's guarantee of free speech, the *Stevens*

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224. *Id.* at 470–71.

225. *Id.* at 469–70 (first quoting Reply Brief for Petitioner at 4, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769); and then quoting *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)) (cleaned up).

226. *Id.* at 470.

Court elaborated, “does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”<sup>227</sup> Rather, the Court held, the “First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”<sup>228</sup> Invoking the very foundations of judicial review, the Court explained: “Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document ‘prescribing limits, and declaring that those limits may be passed at pleasure.’”<sup>229</sup>

The Court did note that to be fair, the Government’s argument in *Stevens* did not emerge from a vacuum, but rather was derived from the original statement in *Chaplinsky*. The Court thus conceded: “As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”<sup>230</sup> The Court itself italicized for emphasis the word “*described*.” And for a reason. As the Court then explained:

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.<sup>231</sup>

I had long regarded this sequence in *Stevens* as driving a dagger through the heart of the cost-benefit calculus articulated in *Chaplinsky*. But after *Counterman*, I am not so sure.

Consider how Justice Kagan for the majority, quoting *Stevens*, invoked *Stevens* to justify the Court’s analysis in *Counterman*: “This Court has ‘often described [those] historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest’ in their

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227. *Id.*

228. *Id.*

229. *Id.* (quoting *Marbury v. Madison*, 1 U.S. (1 Cranch) 137, 178 (1803)).

230. *Id.* (emphasis in original) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky*, 315 U.S. at 572)).

231. *Id.* at 471.

proscription.”<sup>232</sup> Notice any difference? In the *Counterman* quote, the original emphasis on the word “*described*” was eliminated. Now, you might say—what’s the big deal, so the Court bagged the italics? But it is a big deal. The whole point of the emphasis on “*described*” in *Stevens* was that the cost-benefit notion was *only* a description, not a valid test. The opinion for the Court in *Counterman*, however, *does* treat the cost-benefit analysis as much more than a mere description, as indeed a valid test—perhaps *the* valid test.

It was almost as if Justice Kagan was getting some revenge in *Counterman* for the rebuke in *Stevens*. Why then, would Chief Justice Roberts sign on to the opinion of Justice Kagan in *Counterman*—an opinion that seemed to rewrite and revise the central argument of his opinion for the Court in *Stevens*?

One possible explanation is that in *Stevens* the Government was arguing for depictions of animal cruelty as a “new” category of unprotected expression. In contrast, First Amendment law already treated “true threats” as unprotected, so it was a form of pre-existing category, even if its defining counters were opaque. Even so, one would have thought that the Chief Justice would have balked at the *jurisprudence* employed in Justice Kagan’s majority opinion, if not the result. He could well have written an opinion of his own holding that the appropriate fault standard for true threats was recklessness—thus joining in the result reached by Justice Kagan—yet denouncing the categorical cost-benefit analysis as an inappropriate rationale for getting there. But he did not.

Perhaps, the Chief Justice simply went along to get along in this case so there would be one controlling five-Justice majority in *Counterman*. Remember that in *Black* there was no one five-Justice controlling opinion, which is largely what led to 20 years of lower court confusion over the right fault standard in the first place. Perhaps the Chief Justice in *Counterman* thought future clarity was the better part of valor.

### 3. Justice Thomas’s Hope of Revisiting *Sullivan* is Losing Steam

The idea that the Supreme Court might be willing to revisit the actual malice defamation standard in *Sullivan* has hinged on whether, aside from Justice Thomas himself and Justice Gorsuch, both of whom had stated that the Court should reconsider *Sullivan*, there were any other takers. One possible taker in the mix had always been Justice Kagan. That is because,

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232. *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) (alteration in original) (quoting *Stevens*, 559 U.S. at 470 (internal quotation marks omitted) (emphasis omitted)).

as a law professor, she had written a law review article quite critical of *Sullivan*.<sup>233</sup> But given Justice Kagan's heavy emphasis on the wisdom of *Sullivan*'s chilling effect theory, recruiting Justice Kagan to that cause now seems implausible. Nor, one would assume, would the others who joined in the majority opinion, Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson, seem likely enthusiasts. Justice Barrett might well still be recruitable, but it is difficult to see in *Counterman* even a fourth vote on the current Court to take up such a question, let alone a fifth vote to overrule *Sullivan*.

#### 4. Memo to Prosecutors: Choose True Threats

There are often fact patterns in which criminal prosecutors have an array of possible criminal charges to choose from, which may in any given case include a choice between prosecuting for incitement to crime and prosecuting for true threats. One practical learning from *Counterman* is crystal clear; if you are a prosecutor, choose true threats. Incitement requires proof of subjective intent to incite. True threats require only proof of recklessness.

#### 5. What Recklessness Means in True Threat Cases

In summarizing its ruling at the beginning of the opinion, the Court stated that the standard was "recklessness," and then added an additional defining passage: "The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another."<sup>234</sup>

More deeply into the opinion, the Court again elaborated. A person acts recklessly when the person "consciously disregards a substantial [and unjustifiable] risk that [his] conduct will cause harm to another," the Court explained.<sup>235</sup> "That standard involves insufficient concern with risk, rather than awareness of impending harm,"<sup>236</sup> the Court added. And then, most importantly, the Court stated: "In the threats context, it means that a speaker

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233. Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 197, 207 (1993).

234. *Counterman*, 143 S. Ct. at 2111–12.

235. *Id.* at 2117 (alterations in original) (quoting *Voisine v. United States*, 579 U.S. 686, 691 (2016)).

236. *Id.* (citing *Borden v. United States*, 141 S. Ct. 1817, 1823–24 (2021)).

is aware ‘that others could regard his statements as’ threatening violence and ‘delivers them anyway.’”<sup>237</sup>

Taken together, these passages define recklessness in a manner far closer to the objective standard than might at first meet the eye. The “conscious disregard” standard focuses on how others would *perceive* the statements. The focus is on how the statements *would be viewed* and on how *others could regard* the statements. In Counterman’s specific case, for example, Colorado must prove that Counterman was consciously aware that others (or specifically Coles) would perceive his statements as threatening. It is not a defense for Counterman to claim “I did not mean to threaten.” Nor even, is it a defense for him to say “I didn’t realize that Coles would perceive my statements as threatening.” Rather, his defense is limited to the claim that “I did not ignore a *substantial risk* that Coles would perceive my statements as threatening.”

On this score, there is an important lesson to be garnered from how the actual malice “reckless disregard for truth or falsity” standard has been interpreted and applied in defamation cases. I have spent a good part of my professional career in the trenches battling in courts over what is and is not sufficient to prove reckless disregard for truth or falsity in defamation cases. Some courts come perilously close to requiring direct evidence of actual malice or smoking gun proof of subjective reckless disregard for truth or falsity, at the motion to dismiss or summary judgment stages in defamation actions. I have always thought this wrong and continue to advocate against it.<sup>238</sup> Other courts are more realistic, realizing that defendants *never* confess to reckless disregard, and therefore *objective* circumstantial evidence, while not in itself dispositive proof of reckless disregard, is nonetheless sufficiently *probative* evidence of reckless disregard to warrant the case going to a jury. In the words of the Ninth Circuit: “As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors’ actions we try to understand their motives.”<sup>239</sup> In my view, this is the only sound way to approach actual malice, because the “fact that we can’t look

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237. *Id.* (quoting *Elonis v. United States*, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part)).

238. My most recent encounter with this approach was in *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 240, 243 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 427 (2021), in which I served as lead counsel in a plaintiff’s defamation case that had many indicia of actual malice but was nonetheless lost because the District Court and Court of Appeals deemed there to be insufficient pleading of subjective awareness of probable falsity at the pleading stage. Judge Silberman dissented from this. *Id.* (Silberman, J., dissenting). I was not successful in petitioning the Supreme Court to review. *See id.*

239. *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1997).

inside the editors' minds doesn't stop us from reaching conclusions about their thoughts; subjective standards are nearly always satisfied by circumstantial proof (as in most criminal prosecutions)."<sup>240</sup>

But getting to the circumstantial evidence, that is required to engage in this examination, almost always requires getting at least past a motion to dismiss and into discovery. In federal civil litigation, this pragmatic, real-world litigation dynamic in turn places enormous stress on the proper interpretation of the federal "plausibility" pleading standard articulated in *Bell Atlantic Corporation v. Twombly*,<sup>241</sup> and *Ashcroft v. Iqbal*.<sup>242</sup> As commentators have observed: "One might wonder whether it is ever possible to survive a 12(b)(6) motion on the element of actual malice after *Iqbal* and *Twombly*."<sup>243</sup> While the answer may not be *never*, it certainly is *hardly ever*.<sup>244</sup>

I describe this division in defamation law as a cautionary tale. It is one thing to say that "recklessness" is now the governing standard for true threats. It is quite another to decide what that means in terms of real-world burdens of proof and early dispositive motions in actual criminal and civil litigation. In defamation law, many, but not all, courts swung too wildly against plaintiffs (or in criminal law, prosecutors) when demanding what must be possessed upfront to proceed. It would be a terrible thing for the victims if this pattern were to repeat itself in stalking and true threat cases.

#### CONCLUSION

Recall the lament at the end of Justice Kagan's opinion that it is in the nature of compromise that something is lost on both sides.<sup>245</sup> I repeat what Justice Kagan wrote: "Not 'having it all'—because that is impossible—but having much of what is important on both sides of the scale."<sup>246</sup>

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240. *Id.* at 1256 n.20.

241. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

242. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

243. Clay Calvert et al., *Plausible Pleading & Media Defendant Status: Fulfilled Promises, Unfinished Business in Libel Law on the Golden Anniversary of Sullivan*, 49 WAKE FOREST L. REV. 47, 69 (2014).

244. *See, e.g., Michel v. NYP Holdings, Inc.*, 816 F.3d 686 (11th Cir. 2016) (sustaining motion to dismiss for failure to plausibly plead actual malice); *Biro v. Condé Nast*, 807 F.3d 541 (2d Cir. 2015) (sustaining motion to dismiss for failure to plausibly plead actual malice); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610 (7th Cir. 2013) (sustaining motion to dismiss for failure to plausibly plead actual malice); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50 (1st Cir. 2012).

245. *Counterman v. Colorado*, 143 S. Ct. 2106, 2119 (2023).

246. *Id.*

This statement conjures the brilliant insight of those great legal philosophers, Mick Jagger and *The Rolling Stones*:

*You can't always get what you want  
You can't always get what you want  
You can't always get what you want  
But if you try sometimes  
Well, you might find  
You get what you need.*<sup>247</sup>

Neither side quite got what it wanted in *Counterman*. For stalwart free speech advocates, there was some measure of additional protection to ward off persecution of opinions for unpopular speech. For progressive advocates for the victims of stalking and true threats, the recklessness standard, while not what they wanted, may still give them what they *need*, provided that courts apply the standard with the flexibility required to enable victims to prove recklessness through circumstantial evidence. Constitutional law, like the common law before it, must partake of common sense. A jury, based on Counterman's messages *alone*, could certainly conscientiously find that he *must* have realized that his statements would engender fear of threats by Coles, or any reasonable person, whatever he might profess. If a jury chooses not to believe Counterman's self-interested claims of innocence, and if juries around the nation similarly choose not to believe other defendants when confronted with similar fact patterns of egregious stalking, then it may still prove, as the *Rolling Stones* would put it, that while perhaps *Counterman* did not deliver all that they wanted, it nonetheless gave them all that they need.

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247. THE ROLLING STONES, *You Can't Always Get What You Want*, on LET IT BLEED (ABKCO Music & Records, Inc. 1969) (emphasis added).