

NOTE

COUNTING ON *COUNTERMAN*: BALANCING THE THREAT OF SPEECH AND THE SPEECH OF THREATS IN TRUE THREATS JURISPRUDENCE*

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I. INTRODUCTION

The First Amendment¹ is a hallmark of the Constitution, with courts emphasizing its importance time and again.² Nevertheless, the rise of the internet has complicated the process of determining the extent to which speech should be protected.³ In *People v. Counterman*, the Colorado Court of Appeals affirmed the conviction of Billy Raymond Counterman, a man who inundated a local musician, C.W., with unsettling messages over a period of two years.⁴ The Court utilized an objective test to determine whether the communication constituted a true threat.⁵

This Note argues that the Court's ruling was erroneous as the proposed standard to determine what constitutes a true threat is unworkable, primarily due to its failure to adequately consider Counterman's mens rea. A better standard would add a requirement for prosecution to prove that a defendant recklessly sent the alleged threat, in addition to the standard set by Colorado.

This Note criticizes the Colorado Court of Appeals decision in *People v. Counterman* ahead of the Supreme Court ruling on the case, with emphasis on the intersection of free speech and protection against online stalking. Part II examines Counterman's lawsuit. Part III highlights the history of the First Amendment's true threats jurisprudence. Part IV analyzes alternative standards and their implications in order to establish a balanced standard that effectively reconciles the competing demands of free expression

1. The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

2. Renee Griffin, *Searching for Truth in the First Amendment's True Threat Doctrine*, 120 MICH. L. REV. 721, 725 (2022).

3. Jordan Strauss, *Context Is Everything: Towards A More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 SW. U. L. REV. 231, 231–32 (2003) (stating that "Advances in communicative technology . . . have further contributed to the decay of a jurisprudence that has already shown signs of aging.").

4. *People v. Counterman*, 2021 COA 97, ¶ 17, 497 P.3d 1039, 1044, *cert. denied*, No. 21SC650, 2022 WL 1086644 (Colo. Apr. 11, 2022), and *cert. granted sub nom.* *Counterman v. Colorado*, 143 S. Ct. 644 (U.S. argued April 19, 2023).

5. *Id.* ¶ 29.

and victim protection. Part V concludes the discussion by briefly reiterating the implications of getting this decision right.

II. COUNTERMAN’S CONVICTION: A SUMMARY OF *PEOPLE V. COUNTERMAN*

A. *Procedural and Factual Background*

1. *Facts.* C.W. was a local musician with two Facebook profiles – one professional public profile, and one private account for personal use.⁶ Counterman, an individual that C.W. did not know, sent a friend request to C.W. in 2014.⁷ Unbeknownst to C.W. at the time she accepted the request, Counterman then spent the next two years bombarding C.W.’s accounts with clusters of messages that she deemed “weird” and “creepy.”⁸

C.W. did not respond to any of the messages.⁹ Instead of taking the hint, Counterman consistently opened new accounts to go on communicating despite C.W.’s repeated attempts to erase the messages and block Counterman.¹⁰ In 2016, C.W. confided in a family member about Counterman’s messages, explaining that she was “fearful” of Counterman and that she was “‘extremely scared’ of being hurt or killed.”¹¹ C.W., out of fear, canceled her music shows and obtained a protective order against Counterman.¹²

Counterman was arrested and charged for stalking under Colorado statute section 18-3-602(1)(c).¹³ Specifically, Counterman was charged with stalking (credible threat), stalking (serious emotional distress), and harassment.¹⁴

2. *Trial Court.* By the time the case went to trial, prosecution dismissed the count of stalking (credible threat).¹⁵ At trial, Counterman then moved to dismiss the remaining counts, claiming that his texts to C.W. were not true threats and thus, his

6. *Id.* ¶ 5.

7. *Id.* ¶ 6.

8. *Id.*

9. *Id.* ¶ 6.

10. *Id.*

11. *Id.* ¶ 7.

12. *Id.*

13. Colorado Revised Statute § 18-3-602(1)(c) prohibits “knowingly. . .[r]epeatedly. . .mak[ing] any form of communication with another person. . .in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person. . . to suffer serious emotional distress.” COLO. REV. STAT. § 18-3-602(1)(c) (2014).

14. *Counterman*, ¶ 10.

15. *Id.* ¶ 10.

free expression was protected by the First Amendment and the Colorado constitution.¹⁶ The trial court denied Counterman's motion.¹⁷

Prosecution later dismissed the harassment count, leaving only the count of stalking (serious emotional distress).¹⁸ Counterman renewed the motion to dismiss the remaining charge and moved for a judgment of acquittal.¹⁹ However, once again, the trial court denied both motions, finding that a reasonable jury could find the statements rise to the level of a true threat.²⁰

The jury found Counterman guilty under the statute and sentenced him to four and a half years in prison.²¹

3. *Colorado Court of Appeals.* Counterman appealed the conviction in state appellate court,²² arguing that the state's stalking statute was unconstitutionally broad because it does not require the criminalized speech to be a true threat.²³

B. *The Majority's Reasoning*

In response, the Colorado Court of Appeals argued that Counterman's characterization of a true threat "ignor[es] the importance of context in which a statement is made."²⁴

1. *Colorado Legal Principles.* The majority's reasoning began with a discussion of the legal principles governing true threats.²⁵ The Court relied on the guidance provided by the Colorado Supreme Court in *People In Interest of R.D.* in determining whether a statement is a true threat.²⁶

In *People In Interest of R.D.*, the Colorado Supreme Court declined to require a speaker's subjective intent when classifying a

16. *Id.* ¶ 11. Article II, section 10 of the Colorado Constitution provides in relevant part: "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject." COLO. CONST. art. II, § 10.

17. *Counterman*, ¶ 11.

18. *Id.* ¶ 12.

19. *Id.* ¶ 21.

20. *Id.* ¶ 22.

21. *Id.* ¶ 13.

22. Counterman also raised two other issues on appeal regarding the jury instruction given regarding true threats and the burden imposed on the prosecution. *Id.* ¶¶ 15, 60, 74. However, this Note will instead focus on the constitutional issue.

23. *Id.* ¶ 17. Counterman argued that the trial court had also erred in applying an objective standard. *Id.*

24. *Id.* ¶ 54.

25. "The Supreme Court has defined 'true threats' as statements where the speaker 'means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" *Id.* ¶ 26 (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

26. *Id.* ¶ 29.

communication as a true threat, thus adopting an objective test.²⁷ The court set forth guidelines to determine what a true threat is.²⁸ The court held that a reviewing court must examine the language used²⁹ and the context in which the statement is made.³⁰ When evaluating the context, particularly if the exchange was online, courts should consider factors such as (1) the statement's role in a broader exchange and surrounding events; (2) the platform used for communication; (3) whether the statement was conveyed anonymously, privately, or publicly; (4) the relationship between the speaker and receiving parties; and (5) the subjective reaction of the statement's intended or foreseeable recipient.³¹

2. *Application of the Test Established by People In Interest of R.D.* When evaluating the plain language of the communication, the Court determined that Counterman's messages telling C.W. to "die" or "fuck off permanently" reflect a disregard for her life.³² Next, the Court found that the references to C.W.'s physical sightings heightened the credibility of the threat as they may indicate that Counterman was secretly watching her.³³ Additionally, the Court found that none of Counterman's statements or actions undermined his threats, even a supposed apology.³⁴

After evaluating the plain statements of the communication, the Court found that the context surrounding the communication supported a finding of true threat, using factors laid out in *R.D.*³⁵ First, the Court found that there was no broader exchange between Counterman and C.W. because Counterman's messages were uninvited and C.W. never replied or engaged in conversation with him.³⁶ Second, the Court noted that the communication occurred via Facebook to both C.W.'s private and public accounts.³⁷

27. *People In Int. of R.D.*, 2020 CO 44 n.21, 464 P.3d 717, 731 (declining to say that "a speaker's subjective intent to threaten is necessary for a statement to constitute a true threat for First Amendment purposes.").

28. *Id.* ¶ 52.

29. When evaluating the language used, the court should consider whether the threat contains details "tending to heighten [its] credibility" and "whether the speaker said or did anything to undermine the credibility of the threat." *Id.* at ¶ 53.

30. *Id.* at ¶ 52.

31. *Id.* at ¶ 53.

32. *Counterman*, ¶ 36 (internal quotations omitted). The Court also found that other messages show a feeling of entitlement and hostility if C.W. did not respond, such as "[s]eems like I'm being talked about more than I'm being talked to." *Id.*

33. *Id.* ¶ 41.

34. *Id.* ¶ 42.

35. *Id.* ¶ 49.

36. *Id.* ¶ 44.

37. *Id.* ¶ 45.

Third, when considering the manner of communication, the Court noted that the messages were all directed at C.W., thus implying Counterman's specific intent to affect C.W.³⁸ Fourth, the Court noted that the relationship between Counterman and C.W. was "at best, of a fan ceaselessly pursuing a public figure."³⁹ Fifth, when considering C.W.'s subjective reaction, the Court noted that C.W. was increasingly worried about physical harm and she feared for her life and safety.⁴⁰

Thus, the Court held that Counterman's messages were true threats and his conduct and messages can be prosecuted under the Colorado statute.⁴¹ Judge Román and Judge Brown concurred.⁴²

III. SOURCING THE CIRCUIT SPLIT: THE HISTORY OF TRUE THREATS JURISPRUDENCE

A. Background

The debate of whether to apply a subjective or objective standard for determining threatening speech dates back to the early twentieth century.⁴³ The Supreme Court has emphasized the importance of limiting the true threat doctrine within the context of a fundamental national commitment to the principle of unrestricted and vigorous debate on public issues.⁴⁴ However, the Supreme Court has only heard three cases focused on this issue of intent in true threats: *Watts v. United States*, *Virginia v. Black*, and *Elonis v. United States*.⁴⁵

38. *Id.* ¶ 50.

39. *Id.* ¶ 51.

40. *Id.* ¶ 52.

41. *Id.* ¶ 53.

42. *Id.* ¶ 115. The judges' concurrence[s] are not available publicly. Therefore, they are not discussed in this Note.

43. Scott Hammack, *The internet Loophole: Why Threatening Speech on-Line Requires A Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 68 (2002) (analyzing evidence of the true threats doctrine from the early twentieth century).

44. See *Watts v. United States*, 394 U.S. 705, 708 (1969) ("[W]e must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open [sic], and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" (quoting *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

45. Renee Griffin, *Searching for Truth in the First Amendment's True Threat Doctrine*, 120 MICH. L. REV. 721, 726 (2022).

B. Before Black: Watts v. United States

In *Watts v. United States*, the Supreme Court reversed the conviction of a man who was overheard speaking in a group setting saying “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.”⁴⁶ The court found that the speech could not be interpreted as anything more than political speech occurring in a political debate, and thus was not a true threat.⁴⁷

C. Breaking Down Virginia v. Black

In *Black*, the eight justices overturned a defendant’s cross burning conviction because the statute allowed the jury to presume the defendant had the intent to intimidate the victim.⁴⁸ The Supreme Court found that historically, some cross-burnings fit within the definition of intimidation discussed in the dicta of *R.A.V. v. City of St. Paul*.⁴⁹ However, the Supreme Court clearly drew a line between burning crosses with the intent to threaten a victim versus for the purpose of “creating anger or resentment.”⁵⁰

The court clarified that the First Amendment allows for a limitation on banning true threats, which refers to statements where the speaker “means” to convey a serious expression of intending to commit an unlawful act of violence against a specific individual or group.⁵¹ However, the court held that a “speaker need not actually intend to carry out the threat” to be considered unprotected.⁵² The Supreme Court reasoned that by eliminating the need to find that the defendant had an intent to intimidate in order to convict her, the defendant could be convicted for an act of “lawful political speech at the core of what the First Amendment is designed to protect” and therefore, the defendant’s conviction overturned.⁵³

46. *Watts*, 395 U.S. at 706 (internal quotations omitted).

47. *Id.* at 708.

48. *Virginia v. Black*, 538 U.S. 343, 366 (2003).

49. *Id.* at 360. In *R.A.V. v. City of St. Paul*, the Supreme Court explained in dicta that threats of violence are prohibited under the First Amendment for several reasons, including shielding individuals from the fear of violence, the disruption that fear causes, and the potential that violence could occur. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992).

50. *Virginia*, 538 U.S. at 365-66.

51. *Id.* at 344. The Court in *Counterman* compared *Counterman* to *Elonis* in its analysis. *People v. Counterman*, 2021 COA 97, ¶ 27, *cert. denied*, No. 21SC650, 2022 WL 1086644 (Colo. Apr. 11, 2022), and *cert. granted sub nom.* *Counterman v. Colorado*, No. 22-138 (U.S. argued April 19, 2023).

52. *Virginia*, 538 U.S. at 360.

53. *Id.* at 365.

D. After Black: Elonis v. U.S.

In *Elonis*, the defendant was convicted for sharing Facebook posts with “crude, degrading, and violent material about his soon-to-be ex-wife” and other material that threatened former coworkers, police officers, and an FBI agent.⁵⁴ The Supreme Court considered whether a federal provision prohibiting communication including a threat to injure someone was lawful when applied to a defendant who made threatening Facebook posts.⁵⁵ The court held that a defendant could only be convicted under the federal threat statute only if the prosecution demonstrated that the defendant communicated with the intent or knowledge that the comment would be interpreted as a threat.⁵⁶

IV. COUNTERING *COUNTERMAN*: AN IMPROVED STANDARD

A. The Circuit Split

Stemming from the lack of clarity of the Supreme Court’s decisions in *Black* and *Elonis*,⁵⁷ federal courts of appeals and state courts remain divided on whether to apply the subjective, objective test, or some combination test, to determine whether a communication is a true threat.⁵⁸

B. The Objective Standard

Most circuit courts use an objective test.⁵⁹ The objective test determines a true threat based on whether a reasonable person

54. *Elonis v. United States*, 575 U.S. 723, 737 (2015).

55. *Id.* at 726.

56. *Id.* at 740 (holding that “Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.”).

57. Petition for Writ of Certiorari, *Counterman v. Colorado*, No. 22-138 (U.S. argued April 19, 2023) at 15-16.

58. See *United States v. Turner*, 720 F.3d 411, 420 n.4 (2d Cir. 2013) (observing that “disagreement has arisen among [the] circuits regarding whether *Black* altered or overruled the traditional objective test for true threats by requiring that the speaker subjectively intend to intimidate the recipient of the threat”); *United States v. Clemens*, 738 F.3d 1, 2-3 (1st Cir. 2013) (noting that “there is a circuit split on the question of intent in the aftermath of *Virginia v. Black*.”) (internal citations omitted).

59. See generally John Sivils, *Online Threats: The Dire Need for A Reboot in True-Threats Jurisprudence*, 72 SMU L. REV. FORUM 51 (2019) (stating that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth, and Eleventh Circuit Courts apply an objective test, while the Ninth and Tenth Circuit Courts apply a subjective test.).

would find the communication threatening and ignores the speaker's actual intent.⁶⁰

The objective standard, which Colorado follows, neglects the mens rea of the defendant. In doing so, the standard goes against the purpose of the First Amendment – to protect against unnecessary regulation of freedom of expression⁶¹ – making the Colorado standard unworkable. Under a purely objective standard, defendants can be prosecuted for communication that they were not reasonably aware could be perceived as a threat and thus, individuals may steer clear of potentially questionable speech to avoid being criminalized.⁶² This concern becomes exacerbated with communication via the internet because communication occurs immediately, potentially creating a false sense of immediate danger. Additionally, the speaker can be anonymous, or have a profile that is not reflective of who they are, thus creating a false sense of context surrounding the speech.⁶³

Criminalizing such communication unnecessarily goes against what courts have held in the past. Although *Black* left ambiguity about the level of scienter necessary for true threats, it did not get rid of the requirement.⁶⁴ Similarly, *Watts* emphasized the importance of content and context when analyzing protected versus unprotected tests⁶⁵ and seemingly attempts to impose a factor “beyond general intent.”⁶⁶ Therefore, an addition of a mens rea requirement would be consistent with precedent.

60. G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 938, 939 n.328.

61. Griffin, *supra* note 2, at 725.

62. See generally Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J. L. & PUB. POL'Y 283, 316–317 (2001) (arguing that Speakers may be discouraged from speaking even if their speech is protected since it is difficult to predict what would be interpreted as a threat by a jury.)

63. Hammack, *supra* note 43, at 83.

64. See generally *Virginia v. Black*, 538 U.S. 343, 359 (2003) (discussing that what a speaker “means” from the communication should be considered, but not including discussion to suggest eliminating intent.).

65. Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 559 (2004).

66. See We the People, *What Are True Threats Under the First Amendment?*, NATIONAL CONSTITUTION CENTER, at 32:16 (April 27, 2023), <https://constitution-center.org/news-debate/podcasts/what-are-true-threats-under-the-first-amendment> (observing that “in *Watts*, the court does not definitively say that a specific intent standard is required, but [when] you look at the holding of the case, it's quite clear that something more than a general intent is required.”).

C. *The Subjective Standard*

Other courts apply a subjective test. The subjective test relies on the speaker's intent while making the alleged threat, thus increasing the burden of proof on prosecution.⁶⁷

However, determining what the speaker's intent was at the time of communication can be difficult and convoluted. Additionally, advocates defending women who face online harassment are concerned about how an intent standard would allow more potential stalkers to escape punishment.⁶⁸ When the criminal justice system lacks the ability to charge and prosecute individuals who make objectively threatening statements, it may result in law enforcement having to wait until these threats manifest as actual acts of violence.⁶⁹

This delay can be concerning, particularly in cases of domestic violence where studies have shown that a substantial majority of victims are subjected to stalking before they experience physical assault.⁷⁰ Domestic violence victims are increasingly subjected to threats via the internet.⁷¹ As a result, it is vital that the new test not cause additional delay in the legal process to protect these victims and other victims of harassment, as a subjective standard requiring showing speaker's intent will almost certainly do.

Additionally, subjective tests focusing on the speaker's intent might be challenging due to the inherent difficulties in determining one's true intentions. The growth of the internet exacerbates this challenge by not only identifying the speaker but also assessing their intentions or predictability.⁷²

67. See generally Kyle A. Mabe, *Long Live the King: United States v. Bagdasarian and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 GOLDEN GATE U. L. REV. 51, 53 (2013) (explaining a court's use of a subjective intent standard).

68. See Katherine Speller, *How a New Supreme Court Decision Could Make Life More Dangerous for Victims of Stalking*, SHEKNOWS (May 1, 2023 at 2:54 PM), <https://www.she-knows.com/health-and-wellness/articles/2764476/supreme-court-stalking-counterman-v-colorado/> (explaining that advocates for victims are concerned of "how victims and survivors of stalking can actually continue to defend themselves.").

69. Brief on the Merits for Respondent at 48, *Counterman v. Colorado*, No. 22-138 (U.S. argued April 19, 2023) (stating that "As a practical matter, Petitioner's proposed standard will affect how law enforcement agencies and prosecutors' offices allocate limited resources in deciding when to pursue the perpetrators of threats.").

70. *Id.*

71. Jessica Miles, *Straight Outta Scotus: Domestic Violence, True Threats, and Free Speech*, 74 U. MIAMI L. REV. 711, 714 (2020).

72. See Hammack, *supra* note 43, at 96 ("The internet exacerbates the problem of ascertaining subjective intent by making it difficult even to identify the speaker, much less what he or she intended or foresaw.").

D. *The Hybrid Standard*

Lastly, some courts apply a hybrid test.⁷³ The hybrid test considers both the speaker's subjective mental state and whether the statement can reasonably be viewed as a threat, with most requiring proof of the "intent to cause fear of violence."⁷⁴

Some legal scholarship argues for both an objective and subjective analysis of internet communication.⁷⁵ However, the same concerns arise as adding a subjective test. The increased burden on prosecution to prove subjective intent may unnecessarily delay the legal process, thus potentially creating danger for victims of harassment.

E. *The Improved Standard: Adding a Mens Rea Requirement to Colorado's Standard*

In light of the confusion impacting First Amendment jurisprudence nationwide, the Supreme Court should take the opportunity to refine and set a national standard for determining when a communication constitutes an unprotected true threat.⁷⁶ This Note proposes that the Supreme Court adopts a standard that maintains Colorado's objective standard as described in *Counterman*, including the factors to consider the plain language and context of the speech to a reasonable person, and adds a requirement to prove that the speaker was reckless. Specifically, prosecution must be able to prove that the speaker had a mens rea of at least recklessness to communicate a statement which would intimidate or frighten a recipient with physical force, violence, or destruction of property.⁷⁷ This standard would adequately balance the interests between protecting the safety of individuals and avoiding prosecuting protected speech.

73. *Id.*

74. Petition of Writ of Certiorari, *supra* note 57, at 12. (citing *State v. Boettger*, 450 P.3d 805, 818 (Kan. 2019)).

75. See, e.g., G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 1076-77 (arguing that "(1) an intent to threaten unlawful conduct and (2) objectively threatening speech or expressive conduct should courts be free to act to suppress speech or expressive conduct.").

76. In *Perez v. Florida*, Justice Sonia Sotomayor argued that "states must prove more than the mere utterance of threatening words – some level of intent is required." *Perez v. Fla.*, 137 S. Ct. 853, 855 (2017) (Sotomayor, S., concurring). Justice Sotomayor also urged the court to decide the level of intent necessary in this determination. *Id.*

77. Rothman, *supra* note 62, at 333-334 (arguing in favor of the recklessness standard to shield speakers who are unaware that their remarks may be interpreted as threats by others.).

Just as the need for contextual analysis has grown, so has the need for a mens rea standard in the online age.⁷⁸ *Black* did not consider the implications of internet communication. However, since *Black*, internet use has significantly increased,⁷⁹ and so has the need for clear guidance from the Supreme Court on how to approach true threats in light of increased internet communication.

Online, people have the potential to communicate to the general public with unfettered discretion over the types of communication. The internet's ability to facilitate the rapid distribution of communications to massive audiences makes the internet an "ideal tool for harassment, threats, and the dissemination of hateful messages."⁸⁰ Online and in-person speech are fundamentally different because online communication does not necessarily have to have a social context to occur.⁸¹

Additionally, to preserve ample space for vigorous public discourse, it is imperative for the Supreme Court to require prosecution to inquire into the speaker's mental state, so that individuals do not feel pressured to censor unprotected speech.⁸² In analyzing the speaker's mens rea, factors proposed by Professor Jennifer E Rothman would be a useful tool⁸³ to provide a solid foundation of factors to consider and would help avoid ambiguity among states on analyzing the mental state of the speaker.

A recklessness standard is nonetheless "morally culpable," as the threat can cause damage regardless of the speaker

78. Jordan Strauss, *Context Is Everything: Towards A More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 SW. U. L. REV. 231, 262 (2003) (arguing that a more stringent rule is required because of a lack of context surrounding them).

79. See Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-2015*, PEW RSCH. CTR. (June 26, 2015), <https://www.pewresearch.org/internet/2015/06/26/americans-internet-access-2000-2015/>.

80. Thomas DeBauche, *Bursting Bottles: Doubting the Objective-Only Approach to 18 U.S.C. S 875(c) in Light of United States v. Jeffries and the Norms of Online Social Networking*, 51 HOUS. L. REV. 981, 1009 (2014) (citing Sally Greenberg, *Threats, Harassment, and Hate On-Line: Recent Developments*, 6 B.U. PUB. INT. L.J. 673, 673 (1997)).

81. P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening internet Messages*, 37 HASTINGS COMM'N & ENT. L. J. 37, 50 (2015).

82. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner at 6, *Counterman v. Colorado*, No. 22-138 (U.S. argued April 19, 2023).

83. Rothman, *supra* note 62, at 334 (listing the following factors to determine the mental state of a speaker: "a. Whether it was likely that the threat would reach the target or his associates. Actual receipt is irrelevant; b. Whether the speaker told others of his intentions; c. Whether the speaker made prior threats; d. Whether the alleged threat violates the speaker's known beliefs, such as an avowed belief in nonviolence; and e. Whether the statement is rhetorical hyperbole.").

intentionally threatening the individual, or recklessly doing so.⁸⁴ Although a recklessness standard makes it “difficult to show the kind of subjective knowledge that recklessness requires,”⁸⁵ the level of burden on prosecution is lower, making it less likely to allow communication otherwise classified as true threats to prevail. However, prosecution would be required to consider the mindset of the speaker, thus balancing out concerns of unnecessarily criminalizing protected speech. Additionally, *Watts* has also set a precedent of establishing a range of contextual factors to consider,⁸⁶ which supports the inclusion of *Counterman*’s context additions to its objective analysis.

When balancing the needs of both parties, *Counterman*’s true threats standard, with the addition of a recklessness requirement for the prosecution to prove, will prevent overcriminalization of potentially protected speech, while protecting victims of online harassment.

84. Brief for United States as Amicus Curiae Supporting Respondent at 11, *Counterman v. Colorado*, No. 22-138 (U.S. argued April 19, 2023) at 8. *Accord* Transcript of Oral Argument, *Counterman v. Colorado*, No. 22-138 (U.S. argued April 19, 2023).

85. We the People, *supra* note 66, at 50:42.

86. Kevin F. O’Neill, David L. Hudson Jr., *True Threats*, FIRST AMENDMENT ENCYCLOPEDIA (June 2017), <https://www.mtsu.edu/8443/first-amendment/article/1025/true-threats> (“Courts have identified what have come to be known as ‘the Watts factors’ in true-threat analysis: (1) the context of the statement or statements in question; (2) the conditional nature of the supposed threat; and (3) the reaction of the recipient or listeners”, many of whom laughed when they heard Watts’ comments.).

V. CONCLUSION

The Supreme Court has a heavy weight on its shoulders to make the right decision to resolve decades worth of splits among the courts, and the decision has only become more critical in the online age. As the Supreme Court prepares to address the role of intent in analyzing true threats, it must adequately balance protecting speakers and protecting victims of harassment. The best way to do so is to adopt Colorado's standard and add a burden on prosecution that the speaker recklessly sent the threat. Doing so would protect speakers from being prosecuted they were not aware was threatening, while still keeping the burden of proof low enough for victims to confidently bring suit against their harassers. While *Counterman*'s decision was incorrect, a small addition to the standard can improve the scale and conflict between these two interests.

Areeba Amer