THE MENS REA OF TRUE THREATS: REVISITING *COUNTERMAN V. COLORADO*

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TABLE OF CONTENTS

INTRODUCTION

In an era of heightened political polarization, threats of violence have become increasingly prevalent in online discourse.[1] With the rise of social media and increasing connectivity through the internet, there has been a surge in the number and scope of threats against private individuals and against public officials, judges, and presidential candidates.[2] Society's

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[1] Joseph Palmer, *When Does Online Speech Become a Federal Crime?*, 77 DEPT. OF JUST. FED. L. & PRAC. 77, 77 (2023).

[2] *Id.* at 77; *see also* United States v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011) (discussing online threats an individual made against then-Presidential candidate Barack

tacit acceptance of threats and the standard for considering what a threat may entail has evolved: in the 1940's, calling someone a 'fascist' could have been a fighting word,[3] whereas today, the word 'fascist' is commonly used in political discourse.[4] Indeed, the "rapid changes in the dynamics of communication and information transmission," especially in communicating online, have changed what "society accepts as proper behavior."[5]

The ever-expanding types of forums for making threatening speech have created a large pool of victims. Over time, an increasing number of people in the United States have experienced "hate or harassment" online, with many experiencing severe harassment.[6] The victims of these threats suffer fear and stress, forcing some to adopt protective measures that reduce their "ability to live and travel freely."[7] To public officials and law enforcement officers, threats can impede their ability to conduct their official duties and deter others from engaging in public service.[8] Consequently, law enforcement officials have devoted significant resources to detect and mitigate serious and dangerous threats.[9]

As such, prosecutors face questions whether these threats cross "the line from constitutionally protected speech" under the First Amendment "to violations of federal law."[10] While the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech,"[11] the Supreme Court has consistently held that the freedom of speech is not

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Obama).

[3] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (finding a statute did not violate the First Amendment that criminalized an individual calling someone else a "damned Fascist," as it was a fighting word exempt from First Amendment protections).

[4] *See, e.g.*, Rich Barlow, *Are Trump Republicans Fascists?*, BU TODAY (Feb. 11, 2022), https://www.bu.edu/articles/2022/are-trump-republicans-fascists/.

[5] Counterman v. Colorado, 600 U.S. 66, 87 (2023) (Sotomayor, J. concurring in part) (quoting Ontario v. Quon, 560 U.S. 746, 759 (2010)).

[6] *See* CTR. FOR TECH. AND SOC'Y, AM. DEFAMATION LEAGUE, ONLINE HATE AND HARASSMENT: THE AMERICAN EXPERIENCE 2023 8 (2023) (discussing a survey in which fifty-two percent of American adults surveyed "reported experiencing hate or harassment online at some point in their lives" while thirty-seven percent reported experiencing "severe harassment," including "physical threats, sustained harassment, stalking, sexual harassment, doxing, and swatting").

[7] Palmer, *supra* note 1, at 77; *see also Counterman*, 600 U.S. at 109 n.1 (Barrett, J. dissenting) ("The statutory findings explain that stalking, harassment, and threats have 'an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim.'" (quoting COLO. REV. STAT. §§ 18–3–601(1)(f), 18–3–602(1) (2022))).

[8] Palmer, *supra* note 1, at 77.

[9] *Id.* at 77.

[10] *Id.* at 78.

[11] U.S. CONST. amend. I.

absolute.[12] When speech is exempted from First Amendment protection, it is because that speech plays "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [that speech] is clearly outweighed by the social interest in order and morality."[13] The government can punish words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace,"[14] which includes what the Court has called "true threats."[15] The Court distinguishes between a true threat from what they term "jests" or "hyperbole," defining true threats as "'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'"[16]

To hold a person criminally liable for a true threat, the Supreme Court held in *Counterman v. Colorado* that the individual making the true threat must have an "understanding" of the "statements' threatening character" with a mens rea[17] of recklessness.[18] To meet the recklessness standard, the individual must "consciously disregard a substantial risk that the conduct will cause harm to another."[19] While the *Counterman* majority explains the benefits of their remedy,[20] this Note argues that the Court strikes the wrong balance that sweeps in too much conduct and imposes a one-size-fits-all remedy to all speech under the true threats exception to the First Amendment.

To better balance First Amendment speech while also holding individuals criminally liable for making true threats, I argue that the recklessness standard that sweeps in *all* speech considered a "true threat" is too broad and unworkable. Instead, I posit that (1) repeated or sustained[21] speech categorized as true threats should be not be held to the recklessness standard announced in *Counterman* for criminal liability, as it should instead be held to an objective test, and (2) to impose criminal

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[12] *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666–67 (1925).
[13] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (discussing fighting words).
[14] *Id.*
[15] *See e.g.* Counterman v. Colorado, 600 U.S. 66 (2023).
[16] *Id.* at 74 (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).
[17] Mens rea, or "guilty mind," refers to the mind state of a defendant required to impose criminal liability. Paul H. Robinson, *Mens Rea*, *in* ENCYCLOPEDIA OF CRIME & JUSTICE 995, 995 (2nd ed., 2002).
[18] Counterman v. Colorado, 600 U.S. 66, 73 (2023).
[19] Voisine v. United States, 579 U.S. 686, 691 (2016) (citing ALI, MODEL PENAL CODE § 2.02(2)(c) (1962)).
[20] *Counterman*, 600 U.S. at 82 (explaining that the majority's standard "offers 'enough "breathing space" for protected speech,' without sacrificing too many of the benefits of enforcing laws against true threats").
[21] I define repeated or sustained as threatening speech or conduct that occurs more than once over a longer period of time, such as a pattern of behavior akin to stalking or harassment.

liability on isolated or discrete[22] speech categorized as a true threat, the mens rea of knowledge[23] is the correct path forward.

In Part I, I provide a brief background of true threats jurisprudence. In Part II, I discuss the relevant background of *Counterman* and how the *Counterman* court resolved lingering questions within the true threats exception. In Part III, I argue that the *Counterman* holding is too broad. To remedy this broad holding, I present the case for excluding repeated or sustained speech from *Counterman*'s suggested subjective standard. In Part IV, I evaluate speech that is isolated or discrete, concluding that the proper standard to hold an individual criminally liable for this type of speech should be raised to knowledge as a constitutional floor, not recklessness. Finally, I offer additional considerations that courts ought to look to in evaluating criminal liability of speech within the context of the evolving landscape of American discourse.

I. OVERVIEW OF TRUE THREATS

While the First Amendment exempts certain forms of speech for lack of societal value, "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[24] Even so, the Court has held that the First Amendment does not protect intentional advocacy to "incite imminent lawless action,"[25] speech incident to criminal conduct,[26] and true threats.[27] In defining what makes a threat a 'true' threat, the Court in *Virginia v. Black* explained that true threats amount to "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."[28] The government can prohibit true threats in order to protect a victim from "the

[22] I define isolated or discrete as threatening speech or conduct that occurs once that happens in a discrete time frame, akin to a threatening utterance or political protest.

[23] A mens rea of knowledge would entail that an individual is "aware" that a specific "result is practically certain to follow," that is, that an individual knows "to a practical certainty that others will take his words as threats." *Counterman*, 600 U.S. at 79.

[24] Texas v. Johnson, 491 U.S. 397, 414 (1989); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377 (holding a statute prohibiting cross burning as facially unconstitutional, as it imposed prohibitions on speakers expressing views on disfavored subjects); Virginia v. Black, 538 U.S. 343, 347–48 ("[W]hile a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision . . . treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.").

[25] Palmer, *supra* note 1, at 79 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).

[26] United States v. Williams, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection.").

[27] *See* Watts v. United States, 394 U.S. 705 (1969) (per curiam).

[28] Virginia v. Black, 538 U.S. 343, 359 (2003).

fear of violence and from the disruption that fear engenders," as well as "from the possibility that the threatened violence will occur."[29] The speaker need not actually "intend to carry out the threat."[30] These true threats undeniably "lie outside the bounds of the First Amendment's protection."[31]

True threats are distinguished from "political hyperbole,"[32] "jests," or "other statements that when taken in context do not convey a real possibility that violence will follow."[33] For example, in *Watts v. United States*, the statement at issue, made during the Vietnam War, was: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[34] Despite the violent nature of the statement, the Court explained that this "kind of political hyperbole" was not a true threat and was instead a "crude offensive method of stating a political opposition to the President."[35] Additionally, taking into account the "expressly conditional nature of the statement" and the "reaction of listeners," the Court explained they 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 wideopen [sic], and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"[36]

After the Court defined the contours of what is included and excluded within the definition of true threats, circuit courts continued to question what mental state the Constitution required to prosecute someone making a true threat. Some circuits, specifically the Ninth and Tenth Circuits, held that the defendant needed to show a subjective intent in order to make a true threat.[37] That is, the circuits' subjective standard questioned whether the speaker intended to make the recipient of the threat feel threatened.[38] The majority of circuits, however, used an objective test[39] that asked

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[29] *Id.* at 359–60 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)) (internal quotations omitted).
[30] *Id.*
[31] Counterman v. Colorado, 600 U.S. 66, 72 (2023).
[32] *Watts*, 394 U.S. at 708.
[33] *Counterman*, 600 U.S. at 74.
[34] *Watts*, 394 U.S. at 706.
[35] *Id.* at 708.
[36] *Id.*
[37] Palmer, *supra* note 1, at 80; *see* U.S. v. Bachmeier, 8 F.4th 1059, 1064 (9th Cir. 2021) ("[T]he First Amendment allows criminalizing threats only if the speaker intended to make 'true threats.'"); U.S. v. Heineman, 767 F.3d 970, 975 (10th Cir. 2014) ("Does the First Amendment, as construed in *Black,* require the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened? We conclude that it does.").
[38] *See Bachmeier*, 8 F.4th at 1064; *Heineman*, 767 F.3d at 975.
[39] Palmer, *supra* note 1, at 80.

whether a reasonable person, in light of the context of the situation, would consider the communication as a "serious expression of intent to inflict bodily injury."[40] This sharp split in evaluating true threats created an opportunity for Supreme Court resolution, ultimately leading to *Counterman*.

II. COUNTERMAN V. COLORADO: A BRIEF FACTUAL BACKGROUND

Counterman resolved the circuit split when it answered the questions (1) whether the First Amendment requires a subjective mindset standard for true threats and, (2) if so, what standard of mens rea is appropriate to hold someone criminally liable for making true threats.[41] From 2014 to 2016, Counterman "sent hundreds of Facebook messages" to a local musician he had never met.[42] The musician, C.W., never responded to the messages and blocked Counterman on multiple occasions.[43] Despite C.W.'s actions, Counterman created new Facebook accounts to continue messaging her.[44] Some of his messages were seemingly benign,[45] others seemed to suggest Counterman was surveilling C.W.,[46] and some "expressed anger at C. W. and envisaged harm befalling her."[47] The sustained harassment "upended [C.W.'s] daily existence."[48] In part, she was having "trouble sleeping," suffering from "severe anxiety," "stopped walking alone, declined social engagements," and experienced financial strain due to her canceling performances from fear of getting hurt, ultimately leading her to contact authorities.[49]

Colorado charged Counterman under a state statute that criminalizes persons in "[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."[50] While Counterman was charged under a

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[40] United States v. Jeffries, 692 F.3d 473, 477 (6th Cir. 2012).
[41] *Counterman*, 600 U.S. at 72.
[42] *Id.* at 70.
[43] *Id.*
[44] *Id.*
[45] *Id.* The Court pointed to messages such as "[g]ood morning sweetheart" and "I am going to the store would you like anything?" *Id.*
[46] *Id.* The Court highlighted messages such as "[w]as that you in the white Jeep?"; mentioned "[a] fine display with your partner"; and suggested "a couple [of] physical sightings." *Id.*
[47] *Id.* The Court specifically discussed three messages Counterman sent: "[f]uck off permanently"; "[s]taying in cyber life is going to kill you"; and "[y]ou're not being good for human relations. Die." *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*; COLO. REV. STAT. § 18–3–602(1)(c) (2022).

stalking statute, the only conduct Colorado could prove was his repeated communications; as such, the state only sought to introduce Counterman's Facebook messages as evidence.[51] Counterman argued that his messages did not satisfy the definition of a true threat and moved to dismiss the charge on First Amendment grounds.[52]

In accordance with Colorado law, the trial court used an objective reasonable person standard, where Colorado had to show "that a reasonable person would have viewed the Facebook messages as threatening," not that Counterman possessed a "subjective intent to threaten."[53] Using this test, the trial court found his statements could be considered true threats and subsequently, a jury found Counterman guilty.[54] The Colorado Court of Appeals affirmed the lower court's findings and declined to impute a subjective awareness requirement despite Counterman's insistence.[55] The Supreme Court granted certiorari after the Colorado Supreme Court denied review, certifying the questions "(1) whether the First Amendment requires proof of a defendant's subjective mindset in true-threats cases, and (2) if so, what *mens rea* standard is sufficient."[56]

The *Counterman* court resolved the question, requiring a subjective intent with the mens rea of recklessness.[57] In setting the mens rea requirement, the *Counterman* majority rested on a "Goldilocks judgment"[58]: the recklessness standard is "neither the most speech-protective nor the most sensitive to the dangers of true threats."[59]

In her dissent, Justice Barrett advocates for an objective approach. Under her objective approach, she reasons that the threat "must be deemed threatening by a reasonable listener who is familiar with the 'entire factual context' in which the statement occurs."[60] Specifically, the objective standard would take account of the "speaker's tone, the audience, the medium for the communication, and the broader exchange in which the statement occurs," which she explains would "weed out protected speech from true threats."[61]

The Court ultimately rejected the objective standard, shying away

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[51] *Counterman*, 600 U.S. at 70–71, 71 n.1.
[52] *Id.* at 71.
[53] *Id.* (quoting *In re* R. D., 464 P.3d 717, 731, n.21 (Colo. 2020)).
[54] *Id.*
[55] *Id.* at 71–72.
[56] *Id.* at 72.
[57] *Id.* at 73.
[58] *Id.* at 118 (Barrett, J. dissenting).
[59] *Id.* at 82.
[60] *Id.* at 113–14 (Barrett, J. dissenting) (quoting State v. Taveras, 271 A.3d 123, 129 (Conn. 2022)).
[61] *Id.* at 114 (Barrett, J. dissenting).

from "chilling non-threatening expression."[62] Specifically, the Court discussed a speaker's "fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; [and] his fear . . . of incurring legal costs."[63] These fears, as the Court summarized, could cause a speaker to remain silent even in cases where the potential speech would not be a true threat.[64] As such, the Court reasoned that the objective, or negligence, standard would chill speech by "criminalizing misunderstandings."[65]

Once the majority decided that true threats prosecutions required a subjective standard, the *Counterman* Court decided on the mens rea of recklessness. [66] In doing so, they declined to adopt a higher standard of mens rea to allow governments to respond to true threats.[67] While recognizing that recklessness imposes a higher burden on the State to prosecute a true threat, the Court stated that "reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm."[68]

In deciding on the recklessness standard in true threats cases, the Court draws a parallel to the mens rea of recklessness in its defamation decisions, as well as distinguishes true threats from incitement with its mens rea of purpose or knowledge. In its defamation decisions, the Court adopted a recklessness standard to balance the competing interests between reducing harms inflicted on victims of defamation and preventing speech from being chilled, that is, deterring "speakers from making even truthful statements."[69] The Court likened its approach to true threats to defamation, as "[t]he societal interests" in countering true threats is "at least as high" as defamation, and the societal concerns of chilling speech is lower than "truthful reputation-damaging statements about public officials and figures."[70]

In contrast, in its incitement decisions, the Court adopted a purpose or knowledge mens rea requirement.[71] The Court adopted this heightened mens rea above recklessness because "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."[72] As

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[62] *Id.* at 77–78.
[63] *Id.* at 78.
[64] *Id.*
[65] *See* Palmer, *supra* note 1, at 81.
[66] *Counterman*, 600 U.S. at 80.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 76 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).
[70] *Id.* at 80–81.
[71] *See* Hess v. Indiana, 414 U.S. 105, 109 (1973).
[72] *Counterman*, 600 U.S. at 81 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

such, the balancing of chilling speech in incitement cases weighs stronger towards protecting First Amendment speech than the risk of harm resulting from incitement. In comparing the two types of speech, the Court explains that the speech at issue in true threats cases is not "so central to the theory of the First Amendment nor so vulnerable to government prosecutions" as incitement situations are.[73]

The Court determined the mens rea of recklessness in true threats cases "strikes the right balance between the competing interests of providing breathing space for protected speech while mitigating the harms that truly threatening statements cause."[74] With its opinion, the Court attempted to gain "much of what is important on both sides of the scale" between speech protection and law enforcement.[75]

In her concurrence, Justice Sotomayor agreed with using a subjective intent requirement but believed the subjective intent should be raised to the mens rea of knowledge instead of recklessness. In part, she believed that similar chilling concerns led to adopting a knowledge requirement for obscenity and, in an era of polarizing speech, a recklessness standard would prove too broad for heated words.[76] Ultimately, she agreed with using the recklessness mens rea standard for Counterman but declined to broaden her opinion to address true threats as a general category.[77]

III. PROBLEMS WITH *COUNTERMAN*: THE CASE FOR EXCLUDING REPEATED OR SUSTAINED SPEECH FROM A SUBJECTIVE STANDARD FOR TRUE THREATS

When trying to strike the balance between speech protection and harm reduction, *Counterman* missed the mark on both fronts, as the category of true threats is overbroad. This amorphous category is problematic, as the Court set a mens rea floor that is overinclusive to *all* speech considered to be a true threat while not providing sufficient remedy to victims of stalking or harassment-like occurrences. Part A of this Section details some of the problems with *Counterman* and true threats as a category, Part B describes my approach to create more clarity within true threats cases, and Part C addresses some counterarguments that may arise when considering my approach.

A. Overbroad and Overinclusive: Problems with True Threats as a Category of Unprotected Speech

Counterman unintentionally exacerbates a significant problem in the

[73] *Id.*
[74] Palmer, *supra* note 1, at 82.
[75] *Counterman*, 600 U.S. at 81.
[76] *Id.* at 100, 104 (Sotomayor, J. concurring in part).
[77] *Id.* at 104 (Sotomayor, J. concurring in part).

true threats space: the currently defined category sweeps too much conduct into the true threats exception to First Amendment protection with the now-heightened subjective intent element. *Counterman* treated true threats as a monolith: that all true threats, regardless of the form it takes, should receive the blanket protection of the subjective standard with a mens rea of recklessness.[78] However, some of the most severe threats individuals can make towards another, including doxing, defined as someone maliciously gathering another's personal information and publicly releasing it,[79] and stalking, are very different than "unintentionally threatening speech."[80] Indeed, a single utterance is not necessary nor sufficient to be considered stalking or sustained harassment under the law: the two are entirely different kinds of conduct.[81]

The problem with the true threats category acting as a broad catchall for different types of behavior is at the forefront in *Counterman*. While *Counterman* was construed as a true threats case, the underlying facts of *Counterman* reveal it was a stalking case.[82] Stalking is felt as a threatening behavior to victims, as seen in *Counterman* with C.W. upending her life as a result of Counterman's behavior.[83] Considering the full range of Counterman's conduct, it would likely fall into the true threats definition as set out in *Black*, that is, speech in which the speaker communicates "a serious expression of an intent to commit an act of unlawful violence."[84] Indeed, some of Counterman's messages, although not all of them, demonstrate that he wished harm to fall upon C.W.[85] However, the *Counterman* Court set the mens rea standard at recklessness, which operates as the Constitutional floor for, in effect, all true threats, which inadvertently sweeps in stalking and harassment prosecutions.

As Justice Sotomayor suggests in her concurrence, *Counterman* did not have to reach the question of what mens rea standard to apply to all true threats prosecutions. The stalking at issue included a variety of tactics, such as threatening statements, as well as repeated and unwanted

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[78] *See id.* at 71–73.

[79] *Resources for Individuals on the Threat of Doxing*, DEPT. OF HOMELAND SEC. (Jan. 16, 2024), https://www.dhs.gov/sites/default/files/2024-01/24_0117_ope_resources-for-individuals-on-the-threat-of-doxing-508.pdf.

[80] *Counterman*, 600 U.S. at 87–88 (Sotomayor, J., concurring in part) (providing examples of "a high school student who is still learning norms around appropriate language," a "'drunken joke' in bad taste," and "an enraged comment under a news story" as unintentionally threatening speech).

[81] Leading Cases, Counterman v. Colorado, 137 HARV. L. REV. 300, 306 (2023).

[82] *Id.* at 70–71.

[83] *Counterman*, 600 U.S. at 70.

[84] Virginia v. Black, 538 U.S. 343, 359 (2003).

[85] *See supra* note 47 (detailing some of the more threatening messages Counterman sent to C.W.).

conduct.[86] In stalking cases, speech may or may not be at issue and the content of the speech may not be relevant.[87] Additionally, while the chilling effect problem applies to when a speaker may accidentally incur liability with a single utterance, repeated conduct, such as stalking, does not raise that same concern.[88] For example, in *Counterman*, the defendant sent "hundreds of Facebook messages" to the victim, was blocked multiple times, and repeatedly set up different Facebook accounts to continue contacting her.[89] Some of the messages sent in isolation would not be necessarily considered threatening, some statements hinted at the defendant following the victim, and others expressed anger and hoped harm fell upon her.[90] Taking some of Counterman's speech and conduct in isolation, the speech may not be enough to rise to a true threat, which could be problematic in assessing whether Counterman acted with a subjective intent.[91]

This new floor of recklessness harms victims of stalking and harassment. With modern technology, perpetrators of stalking and harassment can more easily inflict harm over the internet. "[H]arassers can hide behind online anonymity while tormenting others,"[92] which can occur from "thousands of miles away" or from around the corner.[93] By pulling the conduct of stalking into the true threats exception and, *de facto*, raising the mens rea standard to recklessness, the Court risks reducing legal protections for stalking victims, as it has the potential to misguide lower courts into requiring proof of a defendant's subjective intent in stalking cases.[94] Indeed, there is prosecutorial uncertainty whether the *Counterman* decision changes the intent requirements in various statutes that criminalize threats, such as in the cyberstalking context.[95]

By sweeping stalking into the broad category of true threats and effectively raising the mens rea requirement for stalking prosecutions, the Court also unknowingly chills speech for victims, which was not explicitly

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[86] *Counterman*, 600 U.S. at 85 (Sotomayor, J. concurring in part).
[87] *Id.* at 85–86 (Sotomayor, J. concurring in part).
[88] *Id.*
[89] *Id.* at 70.
[90] *See supra* notes 45–47 and accompanying text.
[91] Counterman's conduct may not rise to the *Black* definition that a true threat is a statement that "means to communicate a serious expression of an intent to commit an act of unlawful violence." Virginia v. Black, 538 U.S. 343, 359 (2003). While some of his conduct may not have risen to this definition set forth in *Black*, other statements arguably may have. *Compare supra* notes 45–46 (statements not clearly communicating harm) *with supra* note 47 (statements arguably communicating harm).
[92] *Counterman*, 600 U.S. at 89 (Sotomayor, J. concurring in part).
[93] Benjamin Wilson, *Online Harassment*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., https://firstamendment.mtsu.edu/article/online-harassment/ (July 17, 2024).
[94] Leading Cases, *supra* note 81, at 300, 305.
[95] *See* Palmer, *supra* note 1, at 92–93.

considered in *Counterman*.[96] The victim's speech in *Counterman* was chilled, as she canceled shows and refused to schedule new ones due to the fear that the defendant instilled in her.[97] More broadly, the implicit goal of online abuse is to "silence victims," "punish them for speaking out," and to "drive them from public life."[98] Importantly, victims' chilled speech due to online abuse, including but not limited to true threats, "disproportionately impacts women and marginalized communities."[99] This problematic targeting "endangers deliberative democracy, which depends upon contributions from diverse voices and perspectives," especially those who have been "historically excluded from the marketplace of ideas."[100] As such, by silencing victims of online abuse from the national discourse, the Court cuts against the country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen [sic]."[101]

Additionally, regardless of what subjective mens rea standard stalking and harassment receive, stalkers will not be uniquely deterred, nor will their speech be uniquely chilled.[102] In the government's eyes, as the repeated harmful conduct continues (i.e. stalking and harassment), the government's interest in chilling that speech and deterring people from engaging in repeated interactions increases, as the victims of stalking and harassment will suffer additional harm. In a potential defendant's eyes, the likelihood of accidental violation or mistake of law is diminished, as the conduct is not a one-time error: it is instead a pattern of repeated behavior that continues to inflict harm onto another.

Due to the harms to victims in harassment and stalking contexts, "true threats" as a broad category should not receive the one-size-fits-all treatment that it received in *Counterman*. As such, the mens rea requirement as applied to *all* true threats is unworkable, as it inevitably sweeps stalking prosecutions into the recklessness mens rea standard as the Constitutional floor. Sustained conduct, such as stalking and sustained harassment, should not receive the benefit of subjective intent, as the chilling problems it creates for victims plays "no essential part of any exposition of ideas," and has "such slight social value" such that "any benefit . . . is clearly outweighed by the social interest in order and morality," namely, victim safety and security.[103]

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[96] Leading Cases, *supra* note 81, at 305.
[97] *Counterman*, 600 U.S. at 70; *see also* Leading Cases, *supra* note 81, at 309.
[98] Danielle Keats Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. 2317, 2319 (2019).
[99] *Id.* at 2319–20.
[100] *Id.*
[101] Watts v. United States, 394 U.S. 705, 706 (1969) (per curiam).
[102] *See* Leading Cases, *supra* note 81, at 305.
[103] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

B. The Benefits of Bifurcation: Treating True Threats Differently Based on Frequency of Conduct

In stalking and harassment-type cases, the Court should not have announced a subjective test and instead adopted an objective test, akin to Justice Barrett's approach in *Counterman*. With an objective test for repeated or sustained conduct, the Court could more properly look at the "entire factual context" in which the sustained speech occurs,[104] taking into account factors such as tone, audience, communication medium, and context of where the speech occurs within the exchange.[105] With the objective standard, my approach would allow courts to instead ask whether a reasonable person experiencing the repeated or sustained speech would consider the speech an intrusion or interference with daily life, rather than focusing on the particularized mind state a defendant may have.

While Justice Barrett argues that her objective test, without any modifications and as applied to all true threats, would "weed out protected speech from true threats"[106] by removing repeated or sustained speech from the true threats standard, the concern of the majority opinion in striking the right balance between chilling speech and the value of prosecution would be more easily alleviated by making the modifications this Note puts forth. Removing the subjective mens rea requirement in stalking and harassment-type cases is appropriate, as the concerns of social harm outweigh the potential of chilling speech. This approach betters societal outcomes, as it protects victims of stalking and harassment by enabling the government to more effectively hold perpetrators criminally liable, as compared to the recklessness standard.

Additionally, repeated speech or conduct towards another greatly influences an objective analysis, as the greater the numerosity of contact, regardless of each statement's content, the more likely it could be seen as threatening to a recipient. With repeated or sustained speech, courts would have a larger range of considerations to evaluate to determine whether someone should be criminally liable for their speech. Under an objective standard's analysis, the more speech a person makes towards another, the more context a court would have to evaluate what a reasonable listener's reaction may be. For example, in a harassment case, repeated communication by a defendant gives the trial court more evidence to consider the context of the conduct and whether the pattern of speech would cause a reasonable person to consider the speech threatening. In contrast, in a case where a defendant makes a threatening remark on a single occasion, trial courts have less evidence to consider whether a

[104] State v. Taveras, 271 A.3d 123, 129 (Conn. 2022).
[105] Counterman v. Colorado, 600 U.S. 66, 114 (2023) (Barrett, J. dissenting).
[106] *Id.*

reasonable person would feel threatened.

While my approach to repeated or sustained speech does not explicitly entail a subjective analysis, a court could find that a defendant engaging in repeated threatening speech evidences a stronger likelihood that a defendant has intent to engage in that speech. That is, because of the repeated nature of the threats, repeated or sustained speech would likely signal that they had intent to do so as compared to a speaker communicating an isolated or discrete threat. Instead of setting a broad standard of what that mens rea should be for all true threats, courts could use an objective analysis in true threats cases to serve as a stand in for the subjective intent standard. This stand in would allow prosecutors and judges to have more flexibility to remediate victim harm and ultimately enhance societal outcomes.

C. Addressing Concerns with Bifurcation

One potential problem with bifurcating true threats between "repeated or sustained" speech and "discrete or isolated" speech is a line drawing problem, that is, what should count as repeated or sustained speech versus discrete or isolated speech? While this is an important query, announcing a specific number of contacts or time period in which they occur would be problematic for true threats prosecutions. For example, statute or court precedent could dictate that "fifty instances of communication to another party within one month would constitute repetitive or sustained speech." While it may benefit defendants in reducing the vagueness problem of knowing what the law is, announcing a threshold would allow perpetrators to get right up to the legal limit and not cross it (e.g. engaging in forty-nine instances of communications in a month instead of fifty). Drawing this line would still harm victims and would reduce the government's ability to effectively respond. Rather, instead of drawing an arbitrary line, my approach would allow courts to determine whether a reasonable person experiencing the repeated or sustained speech would consider the speech an intrusion or interference with daily life.

While the exact contours of the standard may not be easily defined in the abstract, in actual scenarios, courts and juries will be readily able to apply the definition as they see it. We see this exact type of inquiry in the obscenity context with Justice Stewart's famous phrase of "I know it when I see it" when referring to the contours of what material should be included within an obscenity definition.[107] Similarly, in the incitement context, speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" is the relevant standard for courts and juries to evaluate whether the speech is inciting violence or

[107] Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart J., concurring).

not.[108] Ultimately, in drawing the line between what is or is not inciting "imminent" violence and whether it is "likely" to do so, courts and juries are essentially engaging in a "we know it when we see it" inquiry.[109] Because this kind of line drawing problem would not be unique to a bifurcated approach to true threats, and courts engage in these types of inquiries often in other categories of unprotected speech, courts and juries are well positioned to make judgment calls on where the line is depending on the context.

By adopting an objective test for repeated or sustained speech, state legislatures and Congress can better craft legislation to address true threats. This legislation could point to different factors that lower courts should consider in determining whether the repeated or sustained speech should be considered a threat and how to know whether the threat is repeated or sustained. As such, instead of setting the mens rea standard in Supreme Court precedent for all current and future true threats now, society can more easily respond to emerging types of repeated or sustained threats through the legislative process when utilizing an objective standard.

IV. THE CASE FOR A MENS REA OF KNOWLEDGE FOR DISCRETE OR ISOLATED SPEECH

In bifurcating true threats between repeated or sustained speech and discrete or isolated speech, given the heightened political polarization that makes threats more commonplace, I argue that discrete or isolated speech should receive a heightened mens rea standard of knowledge rather than the recklessness standard as announced by the *Counterman* court. In Part A, I describe my approach while in Part B, I respond to concerns that may arise under a heightened knowledge requirement.

A. Raising the Mens Rea to Knowledge

The knowledge mens rea standard provides that an individual must be "aware" that a specific "result is practically certain to follow."[110] In the context of threats, a mens rea of knowledge would entail that an individual knows "to a practical certainty that others will take [their] words as threats."[111] In contrast, a defendant who possesses a mens rea of recklessness acts with conscious "disregard [of] a substantial risk that the conduct will cause harm to another."[112] As such, I argue that the narrower

[108] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[109] *Id.*
[110] Counterman v. Colorado, 600 U.S. 66, 79 (2023).
[111] *Id.*
[112] Voisine v. United States, 579 U.S. 686, 691 (2016) (citing ALI, MODEL PENAL CODE § 2.02(2)(c) (1962)).

band of conduct, such as a one-off comment or expressive conduct, should receive heightened First Amendment protection as a floor to subjective intent.

First Amendment protections should be of particular importance when the speech at issue is "disturbing, frightening, or painful," as the "undesirability of such speech will place a heavy thumb in favor of silencing it."[113] With threats being at issue, society's immediate reaction is to silence and prosecute speakers to protect recipients of threats. While facially rational, this reaction cuts against the First Amendment's intent to protect speakers from prosecution.

With a mens rea standard below knowledge, i.e. recklessness, prosecutorial discretion targeting discrete and isolated speech could risk over criminalizing speech. Unfortunately, the burden of criminalized speech is likely to fall harder on some groups than others. For example, juries, using their own background knowledge, will have to ascertain when statements cross the line based on "amorphous norms around language," which vary between different communities.[114] For example, "religious and cultural minorities" could use "language that is more susceptible to being misinterpreted" by these juries, and "racial and cultural stereotypes" could sway juries in determining "whether speech is perceived as dangerous."[115] While, in theory, juries should be able to cut through the stereotypes, juries are not usually representative of their communities,[116] making it more difficult for smaller ethnic and cultural groups to have a fair and impartial trial.

These concerns may not be unique to prosecutions under the recklessness mens rea standard. However, raising the mens rea from recklessness to knowledge imposes a greater evidentiary burden that prosecutors must satisfy in proving to a jury that a defendant is guilty beyond a reasonable doubt. This heightened bar would prohibit some bias from spilling over into true threat prosecutions, as prosecutors would have to prove that a defendant was practically certain harm would result from their speech as compared to just consciously disregarding a substantial risk that their speech would be considered threatening.[117]

Additionally, requiring a specific intent and setting that mens rea

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[113] *Counterman*, 600 U.S. at 87 (Sotomayor, J. concurring in part) (discussing areas of speech that have received First Amendment protections, including "gruesome animal cruelty videos; cross burning; hateful rhetoric in protests of the funerals of fallen soldiers; and computer-generated images of child pornography" (internal citations omitted)).
[114] *Id.* at 88–89 (Sotomayor, J. concurring in part).
[115] *Id.*
[116] Patrick Bayer, Randi Hjalmarsson & Shamena Anwar, *Unequal Jury Representation and its Consequences*, CTR. FOR ECON. POL'Y RSCH. (April 23, 2021), https://cepr.org/voxeu/columns/unequal-jury-representation-and-its-consequences.
[117] *Counterman*, 600 U.S. at 80.

standard to knowledge comports with prior Supreme Court precedent in what constitutes a true threat. Some statutes condemning conduct require subjective intent to not be labeled as overbroad or viewpoint discriminatory. For example, in cases addressing cross burning, the Court has acknowledged that even though the act is meant as a "symbol of hate," there are times when the message carries "no intimidating message," and there are other times where it is the "only message conveyed."[118] Regardless, in both *R.A.V.* and *Black*, the Court invalidated the statute that penalized cross burning, as the statute did not discriminate between cross burning as a symbol of political protest as compared to a threat to a specific individual or group of individuals.[119] Under a recklessness mens rea requirement, any cross burner exhibits a conscious "disregard [of] a substantial risk that the conduct will cause harm to another,"[120] as it is undeniable that cross burning is a symbol of hate and carries a substantial risk of being viewed as a threat.[121] However, a mens rea of knowledge would square the concerns that the *Black* and *R.A.V.* Courts intended to address: that cross burning, while it is undeniably a symbol of hate, is not always used as an explicit threat to an individual.[122] As such, imposing the knowledge requirement would criminalize cross burning used as an intent to intimidate, rather than used for political means. In doing so, prosecutors would not be at risk of criminalizing speech that would risk engaging in Constitutionally-prohibited content and viewpoint discrimination.[123]

B. Responding to Potential Concerns

A logical counterargument to raising the mens rea standard to knowledge is that there is a risk that some speakers may be able to evade prosecution under a subjective standard, especially under the mens rea of knowledge instead of recklessness.[124] However, a lower mens rea of

[118] Virginia v. Black, 538 U.S. 343, 357 (2003). *Compare Black*, 538 U.S. at 348–49 (burning a cross at a Klan rally in the middle of an open field on the side of the highway with property owner's permission) *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 379–80 (1992) (burning a cross where petitioner and others trespassed onto a Black family's property, assembled the cross, and burned it within their fenced yard).
[119] *Black*, 538 U.S. at 347–48; *R.A.V.*, 505 U.S. at 391.
[120] Voisine v. United States, 579 U.S. 686, 691 (2016) (citing ALI, MODEL PENAL CODE § 2.02(2)(c) (1962)).
[121] *See supra* note 118 and accompanying text.
[122] *Id.*
[123] *See, e.g.*, *R.A.V.*, 505 U.S. at 387–91 (discussing content and viewpoint discrimination).
[124] *See Counterman*, 600 U.S. at 120 (Barrett, J. dissenting) ("A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her.").

recklessness or using the objective standard for all true threats could sweep more speech into potential criminal liability. This could ultimately chill speech, especially as it relates to political dialogue. Speech that is typically construed as political speech, such as a comment on a YouTube video, a social media post, or an act of political protest, more clearly resembles discrete or isolated speech than stalking or harassment in that the speech is not necessarily targeted, repetitive, or sustained. In contrast, stalking and harassment-type behavior are not one-off occasions: they resemble a pattern of speech that makes the message more threatening, regardless of the words actually communicated. As such, sweeping more speech into potential criminal liability does not comport with the *Watts* principle that "debate on public issues should be uninhibited, robust, and wideopen [sic]."[125]

Within the narrower band of conduct that should receive the heightened mens rea standard, i.e. speech that is clearly threatening but falls short of sustained harassment or stalking, courts should also be wary of speech that signals third-party advocacy. The third-party advocacy problem arises when a speaker calls for violence from a third party but the speech itself is unclear whether the speaker intends to carry out the violence advocated for.[126] In some cases, third-party advocacy can lead to courts finding a true threat when the context surrounding the statement demonstrates that the speaker or those who the speaker controls actually intend to carry out the violence.[127]

The third party advocacy problem is clear in *Counterman*. The *Counterman* Court found that even the defendant's most threatening statements[128] in isolation may not have been treated as a "true threat." Courts have held in some cases that "circumstances where the threat statements are ambiguous about who will execute them" are not true threats.[129] For example, the Ninth Circuit held that repeated messages of racial slurs about then-presidential candidate Barack Obama on an online forum, coupled with the presence of guns at his household, failed to "express any intent on his part to take any action."[130] The statements that the *Bagdasarian* court considered included "[r]e: Obama fk the [racial epithet], he will have a 50 cal in the head soon" and "shoot the [racial epithet] country fkd for another 4 years+, what [racial epithet] has done ANYTHING right? ? ? ? long term? ? ? ? never in history, except

[125] Watts v. United States, 394 U.S. 705, 706 (1969) (per curiam).
[126] Palmer, *supra* note 1, at 83.
[127] *Id.*
[128] *See supra* note 47 and accompanying text.
[129] Palmer, *supra* note 1, at 83.
[130] United States v. Bagdasarian, 652 F.3d 1113, 1123 (9th Cir. 2011).

sambos."[131] In *Counterman*, the statements were different: the most egregious statements the Court included in its majority opinion included "[f]uck off permanently"; "[s]taying in cyber life is going to kill you"; and "[y]ou're not being good for human relations. Die."[132] Taken in isolation, Counterman's statements do not clearly express that Counterman himself intended to carry out the threat.

To help ameliorate the third-party advocacy problem, courts should engage with my bifurcated approach and undergo a two-step inquiry. First, courts should start with an inquiry about the context surrounding the speaker's statements to determine whether the conduct is "repeated or sustained" or whether the statement is "discrete or isolated." Once a court categorizes the speech, they should engage in the second step which applies the appropriate mens rea to the speech. If a court identifies the speech as "discrete or isolated," courts should apply a subjective inquiry with a mens rea of knowledge. That is, courts should determine whether an individual is "aware" that a specific result (i.e. fear of bodily harm) "is practically certain to follow" as a result of the threatening speech.[133] However, if a court instead finds that the speech is "repeated or sustained," the court should look to the context of the speech to find whether a reasonable person would find the speech to be threatening.

This approach may mean that Bagdasarian cannot be prosecuted while Counterman can. Even though Bagdasarian's comments were egregious, his speech would likely be considered discrete and isolated, whereas Counterman's conduct was repetitive and sustained towards C.W. The *Bagdasarian* court engaged in a subjective intent inquiry and found that he did not possess a "subjective intent to threaten a presidential candidate" beyond a reasonable doubt.[134] While the *Bagdasarian* court did not reach the question of what mens rea standard to use in subjective intent inquiries, the defendant would not have met the knowledge prong if he failed to have subjective intent at all.[135] As such, Bagdasarian would have likely escaped liability under a recklessness standard as well.

In contrast, Counterman's statements could more easily satisfy an objective standard for consideration of a threat. Counterman's conduct ranged for two years over hundreds of Facebook messages, as well as multiple new accounts to get around the victim's actions to block him.[136] Some of the messages were relatively harmless, but some insinuated he

[131] *Id.* at 1115.
[132] Counterman v. Colorado, 600 U.S. 66, 77 (2023).
[133] *Id.* at 79.
[134] *Bagdasarian*, 652 F.3d at 1123.
[135] *See id.* at 1122–24.
[136] *Counterman*, 600 U.S. at 70.

was following her and others wished harm on her.[137] Ultimately, under an objective inquiry, based on the repetitive nature of Counterman's conduct, the nature of the messages, attempts by the victim to stop Counterman, and impact that the messages had on the victim, a court could likely find that Counterman had communicated a true threat and should be prosecuted under the objective standard.[138] Indeed, the lower courts found that Counterman had communicated a true threat using an objective standard.[139]

This outcome may still be acceptable, as then-presidential candidate Barack Obama unlikely saw Bagdasarian's posts and therefore unlikely felt subjectively threatened by them. In contrast, C.W. had to upend "her daily existence" because of Counterman's continuing threatening speech and behavior.[140] Additionally, Bagdasarian's speech, although repulsive, is more likely to constitute political speech, which is at direct odds with the First Amendment's "'profound national commitment'" to debate on public issues being "'uninhibited, robust, and wideopen [sic]," which often includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"[141]

Overall, the knowledge standard, while imperfect, eliminates some of the problems that the recklessness standard allows. The bifurcated approach between a repeated or sustained threat and a discrete or isolated threat, rather than treating all true threats as a monolith, allows this approach to garner the benefits of speech protection and avoid the risks of chilling potentially protected speech. While this approach may be potentially challenging for courts to apply, attorneys that present their client's case could help persuade courts to make a decision whether to categorize speech in one category or another and allow judges more flexibility in its consideration of each case individually.

CONCLUSION

Threatening language is common throughout our society and political discourse. While threats undoubtedly cause harm to people, courts must find a way to balance individuals' First Amendment rights to speech with society's rights to freedom from threats. However, the *Counterman* court painted with too broad a brush, sweeping in conduct into a standard of recklessness that causes more social harm than it prevents. As I argue, the proper balance should bifurcate true threats between "repeated or sustained" speech and "discrete or isolated" speech, where the former

[137] *See id.*; *supra* notes 45–47 and accompanying text (highlighting Counterman's statements).
[138] *Counterman*, 600 U.S. at 120 (Barrett, J. dissenting).
[139] *Id.* at 71.
[140] *Id.* at 79.
[141] Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

should be subject to an objective inquiry looking at the context of communication and the latter should be considered under a subjective intent standard with a heightened mens rea of knowledge rather than recklessness. This bifurcation would allow courts and prosecutors to be more flexible in the repeated or sustained speech context, which arguably causes more harm to victims, while granting more speech protection for individuals making a more isolated statement.

With this bifurcation in mind, courts should be mindful of the impact of evolving technology and the presence of online threats. Specifically, communications online may lack context clues present in traditional speech and may reach a larger audience than a speaker originally intended through reposts and shares.[142] Additionally, with the emergence of Artificial Intelligence and "bots," it may be more challenging to determine who the speaker is and whether that speaker has intent in their statements.[143]

Ultimately, in the criminal context, courts should strive to achieve a balance between protecting rights and social welfare. With the sharp difference of opinions in *Counterman*, it is clear that the Justices have identified this tension and are attempting to strike that balance. It is unclear if that balance can be met without an overhaul of the true threats category. What is clear, however, is that *Counterman* cannot be the last word on the subject.

[142] *Counterman*, 600 U.S. at 87 (Sotomayor, J. concurring in part).

[143] *See, e.g.*, Brandi Wampler, *AI among us: Social media users struggle to identify AI bots during political discourse*, NOTRE DAME NEWS (Feb. 27, 2024), https://news.nd.edu/news/ai-among-us-social-media-users-struggle-to-identify-ai-bots-during-political-discourse/.