CONSTITUTIONAL LAW – TRUE THREATS: ESTABLISHMENT OF A MENTAL CULPABILITY STANDARD FOR GUILT

Counterman v. Colorado, 600 U.S. 66 (2023).

ABSTRACT

In *Counterman v. Colorado*, the Supreme Court of the United States finally settled on a mental culpability standard for determining when a "true threat" is speech that is unprotected by the Constitution. From 2014 to 2016, Billy Counterman sent hundreds of messages to a local musician whom he had never met and who repeatedly blocked him. Many of his messages spoke of violence to the musician, which frightened her and eventually led to her informing the authorities. Colorado authorities charged Counterman under a state stalking statute which prohibited expressing a "true threat." Under the statute, a true threat is a statement that intimidates a specified person by thinking they will be harmed. Counterman moved to dismiss the charge on First Amendment grounds, arguing that the State must prove he had a subjectively culpable understanding that his words were threatening. The trial court rejected his argument under the statute's objective standard, determining that a reasonable person would find the statements threatening. Counterman appealed.

The United States Supreme Court agreed with Counterman. Justice Kagan, writing for the majority, examined other areas of unprotected speech, including incitement, defamation, and obscenity and determined that some form of scienter is required to seek a penalty in each of those areas. Punishing such speech without subjective mental culpability could have a chilling effect on protected expression. Thus, the Court *held* that a subjective mens rea standard should be used to determine the presence of a "true threat." Subsequently, the Court determined that the First Amendment requires no more onerous of a mens rea standard than recklessness. The Court held that recklessness provides sufficient breathing space for protected speech without overly sacrificing enforcement against true threats. However, the decision was not without discord. In a concurrence, Justice Sotomayor argued that precedent and the ideal of preventing overbearance on free speech supports an intentional mens rea. Justice Barrett dissented, rejecting both the majority's support of the recklessness standard and a subjective test in general.

North Dakota currently has an objective mental culpability standard for true threats; thus, *Counterman* alters how North Dakota practitioners will litigate future true threat cases. The U.S. Supreme Court's new subjective standard will likely make prosecuting true threats more difficult due to increased evidentiary demands. However, it will ultimately lessen the chilling effect on free speech—a tradeoff the Court deemed favorable.

I. FACTS

In *Counterman v. Colorado*, Billy Counterman ("Counterman") sent hundreds of Facebook messages to a local musician, C.W., whom he had never met, over a period of two years.[1] Some messages were seemingly harmless, yet odd considering he did not personally know C.W.[2] However, other messages gave the impression that Counterman was watching C.W.,[3] and a number of messages spoke of violence to her.[4] C.W. never responded to Counterman's messages and repeatedly blocked his accounts, spurring him to create new ones.[5]

Counterman's relentless messages frightened C.W. and made her believe he would hurt her.[6] C.W. feared she was being followed, had trouble

1. 600 U.S. 66, 70 (2023).
2. *Id.* ("'Good morning sweetheart'; 'I am going to the store would you like anything?'").
3. *Id.* ("He asked '[w]as that you in the white Jeep?'" (quoting People v. Counterman, 497 P.3d 1039, 1044 (Colo. App. 2021))), *vacated and remanded sub nom. Counterman*, 600 U.S. at 66.
4. *Id.* ("'Staying in cyber life is going to kill you.' 'You're not being good for human relations. Die.'" (citations omitted) (quoting *Counterman*, 497 P.3d at 1044))).
5. *Id.*
6. *Id.*

sleeping, reduced her social outings and musical performances, and eventually contacted the police.[7]

The State charged Counterman for repeatedly sending an individual distressing messages.[8] At trial, Counterman moved to dismiss, arguing his communications were not true threats but were First Amendment-protected free speech.[9] Following Colorado precedent, the trial used an objective, reasonable person standard to determine if the messages were true threats.[10] The trial court held that Counterman's messages to C.W. constituted actionable true threats and were not protected by the First Amendment.[11] The case was heard by a jury who found Counterman guilty.[12] Counterman appealed in Colorado, arguing that the First Amendment required the State to show that he had subjective awareness that his messages were threatening.[13] The Colorado Court of Appeals agreed with the lower court, upheld its objective standard precedent, and affirmed Counterman's conviction.[14] The Colorado Supreme Court denied Counterman's petition for certiorari.[15]

II. LEGAL BACKGROUND

A. HISTORY OF TRUE THREATS

Free speech is not absolute.[16] However, in light of the First Amendment's protection, any regulation of pure speech must be done with caution and precision.[17] True threats are an unprotected type of speech carved out by the U.S. Supreme Court.[18] "True threats are 'serious expression[s]'

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7. *Id.*

8. *Id.* (It is unlawful to "[r]epeatedly . . . make[] 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." (quoting COLO. REV. STAT. § 18-3-602(1)(c) (2022))).

9. *Id.* at 71.

10. *Id.* (citing People v. Cross, 127 P.3d 71, 76 (Colo. 2006) (en banc), *abrogated by Counterman*, 600 U.S. at 66).

11. *Id.* (quoting People v. Counterman, 497 P.3d 1039, 1045 (Colo. App. 2021), *vacated and remanded by Counterman*, 600 U.S. at 66).

12. *Id.*

13. *Id.*

14. *Id*. at 71-72.

15. Counterman v. People, No. 21SC650, 2022 WL 1086644, at *1 (Colo. Apr. 11, 2022).

16. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances."); Virginia v. Black, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

17. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("When such conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded." (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))).

18. *See* Watts v. United States, 394 U.S. 705, 708 (1969).

conveying that a speaker means to 'commit an act of unlawful violence.'"[19] "Instead of conveying a fact, idea, or opinion, a true threat causes fear, disruption, and a risk of violence."[20] Therefore, the Court has held that these expressions add little value to the core ideals of the First Amendment.[21]

Watts v. United States established the true threat doctrine.[22] In *Watts,* prosecutors charged a Vietnam War protester for threatening President Johnson.[23] The protestor stated that if he were drafted, the first person in the sights of his issued rifle would be the President.[24] Utilizing the phrase "true threat" for the first time, the Court held that the protestor's statement was a political hyperbole and did not fit within the term, reversing his conviction.[25] The Court found that the statement was not a true threat because the statement was said during a debate, it was conditional, and it made public onlookers laugh.[26] However, the Court did not address the speaker's mental state or mens rea, leaving the issue out altogether.[27] Following *Watts*, courts utilized the factors the U.S. Supreme Court considered to determine the presence of a true threat,[28] making their determinations very fact dependent.

Decades later *Elonis v. United States* presented another opportunity for the Court to expressly state the necessary intent for culpability of a true threat,[29] but the Court failed to do so. In *Elonis*, the defendant posted rap songs he wrote online that contained lyrics detailing violent acts he wanted to commit to his wife, FBI agents, and even a school.[30] Prosecutors charged him with violating a federal statute for transmitting threats to injure a person in interstate commerce.[31] The defendant argued that the state had to prove he intended to threaten people.[32] However, at trial, the jury was instructed to

19. *Counterman*, 600 U.S. at 74 (quoting *Black*, 538 U.S. at 359).

20. Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1230 (2006); *see also* United States v. Aman, 31 F.3d 550, 555 (7th Cir. 1994) ("The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense." (quoting United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991))).

21. Crane, *supra* note 20, at 1230-31 ("[A threat's] contribution to public debate and to the marketplace of ideas, the core values of the First Amendment, is de minimus.").

22. 394 U.S. at 705.

23. *Id*. at 706-08.

24. *Id.*

25. *Id.* at 708.

26. Crane, *supra* note 20, at 1233; *Watts,* 394 U.S. at 708.

27. *Watts*, 394 U.S. at 707-08; *see also* Crane, *supra* note 20, at 1233-34.

28. *See, e.g.*, United States v. Kosma, 951 F.2d 549, 554-54 (3d Cir. 1991).

29. 575 U.S. 723, 726 (2001).

30. *Id.* at 728-31.

31. *Id.* at 731; *see also* 18 U.S.C. § 875(c).

32. *Elonis*, 575 U.S. at 731-32.

examine the defendant's guilt under an objective reasonable person standard, which they found in the affirmative.[33] The Court of Appeals affirmed.[34]

The U.S. Supreme Court reversed and stated that an objective standard was "inconsistent with 'the conventional requirement for criminal conduct—*awareness* of some wrongdoing.'"[35] However, the Court only addressed the specific statute and did not indicate which mental state is required for speech to be within the true threats exception to the First Amendment's protection.[36] In a concurrence, Justice Alito voiced his frustration with the majority for refusing to clarify the mental state necessary in true threats.[37] He lamented that attorneys and judges would continue guessing the correct standard, causing defendants to continue to be wrongfully convicted in some jurisdictions and guilty defendants to walk free in others.[38]

The Court's next significant decision regarding true threats was *Virginia v. Black*, which provided more direction for the doctrine but still did not clarify which mens rea applied.[39] In *Black*, three individuals were convicted under a Virginia statute that stated burning a cross in public view was prima facie evidence of an actionable true threat.[40] The Court 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."[41] However, courts were split on whether *Black*'s holding only required the speaker to intend to communicate the statement or whether the speaker must also intend that the recipient perceive the statement as a threat.[42] Due to the lack of a clear mens rea standard, some circuits continued using the objective standard developed in *Watts*, while others used a subjective standard, requiring that a defendant intend for the communication to be perceived as a threat.[43]

B. VARIOUS TESTS POST-BLACK

Without a settled mens rea standard for true threats until *Counterman*, circuit courts developed their own standards which widely varied. Pre-*Black*,

33. *Id*.
34. *Id.*
35. *Id.* at 738 (quoting Staples v. United States, 511 U.S. 600, 606-07 (1994)).
36. *See id.* at 737.
37. *Id.* at 742 (Alito, J., concurring).
38. *See id.* at 742-43.
39. *See* 538 U.S. 343, 359-60 (2003).
40. *Id.* at 349.
41. *Id.* at 359.
42. *In re* J.J.M., 265 A.3d 246, 258-59 (Pa. 2021).
43. *Compare* United States v. Clemens, 738 F.3d 1, 10-11 (1st Cir. 2013) (noting the lack of clarity in *Black* and continuing to use the objective test), *with* United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005) (stating the court is bound by *Black* to use a subjective test).

a majority of the federal circuits utilized an objective test that examined whether a reasonable person would interpret the threat as a serious intent of harm; however, the circuits differed on which vantage point was relevant.[44] Some, such as the Ninth Circuit, examined "whether a reasonable person in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat."[45] Yet others, such as the Second and Eighth Circuits, examined whether a reasonable person in the shoes of the recipient of the threat would view the statement as such.[46]

Post-*Black*, the circuits applied an array of tests to determine the requisite mental culpability for a true threat, placing varying amounts of weight on *Black*—including no weight at all. Some courts required subjective intent to threaten for all true threats,[47] while others required intent for specific threats.[48] Yet others continued to use the four factors established in *Watts*, either as the bulk of their mens rea analysis[49] or in addition to other measures.[50] Many circuits did not view *Black* as requiring a subjective element and continued using an objective test.[51] The Second, Fourth, Seventh, and Tenth Circuits recently confirmed that the mens rea standard in true threats is whether a reasonable person would interpret the communication as a threat.[52] Other courts utilizing *Elonis* examined whether the defendant knew the communication would be interpreted as a threat.[53] The Fifth Circuit, quoting *Black* directly, required only a subjective finding of knowledge, intent, or willingness to *transmit* a threatening communication rather than requiring knowledge that it could be interpreted as a threat.[54] Such ambiguity existed in the true threat doctrine that some courts combined tests,

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44. Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002).

45. *Id.*; *see* Lovell *ex rel.* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996).

46. *Doe*, 306 F.3d at 622; *see* United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994), *cert. denied*, 513 U.S. 968 (1994).

47. *See, e.g.*, United States v. Oliver, 19 F.4th 512, 517 (1st Cir. 2021) (determining "whether . . . the defendant knew that his statements would be interpreted as true threats of physical harm").

48. *See, e.g.*, Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 746 (9th Cir. 2021) (requiring a defendant's subjective intent to threaten under some criminal statutes, but only an objective intent to threaten under other criminal statutes).

49. *See* United States v. Lincoln, 403 F.3d 703, 706-07 (9th Cir. 2005).

50. *See* United States v. Killingsworth, No. 21-3028, 2022 WL 294083 (6th Cir. Feb. 1, 2022) (examining whether a true threat was expressed based on tests of objective intent, subjective intent, and the *Watts* factors).

51. *See, e.g.*, United States v. Davila, 461 F.3d 298, 305 (2d Cir. 2006).

52. *Id.*; United States v. Vandevere, 849 F. App'x 69, 71 (4th Cir. 2021) (per curiam); United States v. Dutcher, 851 F.3d 757, 761 (7th Cir. 2017); United States v. Twitty, 859 F. App'x 310, 316 (10th Cir. 2021).

53. United States v. Oliver, 19 F.4th 512, 518 (1st Cir. 2021); United States v. Fratus, No. 22-1185, 2023 WL 2710270, at *4 (3d Cir. Mar. 30, 2023).

54. Monroe v. Hous. Indep. Sch. Dist., 794 F. App'x 381, 385 (5th Cir. 2019) (per curiam).

requiring both subjective intent to threaten and an objective finding that the defendant's statement was threatening.[55]

This confusion and lack of consistency amongst courts proved Justice Alito's fear, articulated in his dissent in *Elonis*.[56] What was considered a true threat in one jurisdiction was widely different than the next, potentially leading to vastly different outcomes for defendants and frustration in prosecuting true threat crimes.[57]

III. ANALYSIS

A. MAJORITY OPINION

In *Counterman v. Colorado*, the U.S. Supreme Court held first, that a true threat requires proof of a defendant's subjective mindset to threaten, and second, recklessness is the proper mens rea standard.[58] Under this test, the Court held that Counterman's First Amendment rights were violated because the district court determined he made true threats against C.W. without demonstrating that Counterman was aware his communications could be understood as threats.[59] Thus, the Court vacated the Colorado Court of Appeals judgment and remanded the case for further proceedings.[60]

1. The First Amendment Requires Defendants' Subjective Understanding That Their Communication Can Be Perceived as a Threat

In its analysis, the Court first considered both parties' arguments regarding whether the State must prove the defendant was aware of the threatening nature of his communications.[61] The State argued that there is no scienter requirement in true threats, while Counterman argued that there is, based on the chilling effect on speech that occurs without it.[62] The majority agreed with Counterman.[63]

The Court stated that while the First Amendment guarantees Americans the right to speak freely, this right is not without limits.[64] Some traditional

55. United States v. Dierks, 978 F.3d 585, 591-92 (8th Cir. 2020).
56. *See* Elonis v. United States, 575 U.S. 723, 742-43 (2001) (Alito, J., concurring).
57. *Id.*
58. Counterman v. Colorado, 600 U.S. 66, 69 (2023).
59. *Id.* at 82.
60. *Id*. at 83.
61. *Id.* at 71-73.
62. *Id.* at 72-73.
63. *Id.* at 73.
64. *Id.* ("'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))); *see also* U.S CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

categories of speech are not protected by the First Amendment, including incitement, defamation, and obscenity—as well as true threats of violence.[65] However, the Court held that the First Amendment may still demand a subjective mens rea to prosecute true threats, thus protecting threats made where such a mindset cannot be proven.[66]

The Court was concerned about the risk of a chilling effect on speech if a subjective mental state for a true threat was not required.[67] Limiting speech, even for good reason, such as preventing fear of violence and chaos, has the potential to "chill," or deter, all kinds of communication—including protected speech.[68] The Court found that if threats are examined objectively, considering whether a reasonable person would view the statements as threats, speakers may be unsure how a "reasonable person" would interpret their speech.[69] Thus, this could encourage self-censorship to avoid violating the law.[70] The Court noted that this self-censorship would have the undesired effect of a "cautious and restrictive" exercise of the First Amendment right to free speech.[71] However, minimizing such censorship by requiring the state to prove the defendant's subjective intent comes at a cost, as some truly threatening speech will be protected because of the difficulty of proving a defendant's thoughts and mindset.[72]

The Court compared true threats to different categories of unprotected speech for guidance.[73] In defamation cases, the Court noted that a defendant must have acted with "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[74] This required subjective mental culpability protects people's peace of mind from "the uncertainties and expense of litigation [that] deter[s] speakers from making even truthful statements,"[75] avoiding a chilling effect on speech.[76] The Court noted that incitement and obscenity law operates similarly.[77] Under *Hess v. Indiana*, the

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65. *Counterman*, 600 U.S. at 73-74; *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (Incitement is a statement "directed [at] producing imminent lawless action," and likely to do so.); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-42 (1974) (Defamation is a false statement of fact that harms another's reputation.); Miller v. California, 413 U.S. 15, 24 (1973) (Obscenity is valueless material "appeal[ing] to the prurient interest in sex, which portray sexual conduct in a patently offensive way.").

66. *Counterman*, 600 U.S. at 74.

67. *Id.* at 75.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

72. *Id.*

73. *Id.* at 75-78.

74. *Id.* at 76 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).

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

76. *See id.*

77. *Id.*

U.S. Supreme Court held that for incitement, a defendant must have intentionally used words to create chaos to be unprotected by the First Amendment.[78] Under *Hamling v. United States*, the Court recognized that for obscenity, scienter must be shown in order to prevent self-censorship.[79] Based on the Court's precedence in other First Amendment exceptions, defamation, incitement, and obscenity, which emphasizes the importance of preventing chilling of speech, the *Counterman* Court found in favor of requiring subjective mental culpability for true threats.[80]

The Court acknowledged the cost that comes with this decision.[81] While a subjective showing requirement decreases the chill on protected speech, it places a higher evidentiary burden on the state in prosecuting speech than an objective standard, as the prosecution must now prove a defendant's mindset.[82] However, requiring the prosecution to prove a defendant's subjective mental state will prevent true threat doctrine from unduly chilling protected speech.[83]

2. *Recklessness Strikes the Best Balance Between Competing Interests of Lessening the Chill on Free Speech and Prosecuting True Threats*

Once the Court determined that a subjectively culpable mind is necessary in order for a defendant to be found guilty of making a true threat, the Court then considered the required mens rea standard.[84] The Court held that recklessness is the correct mens rea standard, which it defined as "consciously disregard[ing] a substantial [and unjustifiable] risk that the conduct will cause harm to another."[85] Recklessness does not require that the defendant is aware harm is looming but rather that the defendant is not concerned about the risks caused by their acts.[86] Thus, the standard has an element of mental culpability, requiring the defendant to make a "deliberate decision to endanger another."[87]

The Court held that recklessness, like requiring a subjective mens rea, best balances the competing values of lessening a chilling effect on speech

78. *Id.* (citing Hess v. Indiana, 414 U.S. 105, 109 (1973) (per curiam)).
79. *Id.* at 76-77 (citing Hamling v. United States, 418 U.S. 87, 122-23 (1974)).
80. *Id.* at 77-78.
81. *Id.* at 78.
82. *See id.*; United States v. Dyer, 750 F. Supp. 1278, 1290 (E.D. Va. 1990) (stating that proving an objective standard is simpler than proving subjective intent because a subjective standard requires the prosecutor to probe the defendant's mind).
83. *Counterman*, 600 U.S. at 78.
84. *Id.* at 79.
85. *Id.* (alterations in original) (quoting Voisine v. United States, 579 U.S. 686, 691 (2016)).
86. *Id.*
87. *Id.* (quoting *Voisine*, 579 U.S. at 694).

and prosecuting harmful true threats.[88] The Court proceeded to examine the mens rea standards of other unprotected categories of speech and determined that selecting a mens rea standard of recklessness is justified based on the comparisons.[89] The Court pointed out that defamation has had a recklessness standard for over fifty years.[90] The Court also noted that while incitement requires specific intent, this standard should not apply to true threats because there is a distinct difference between the two categories of speech.[91] The majority argued that since acts of incitement are often one step away from political speech, it is important to require a higher standard for prosecuting incitement to avoid prosecuting free speech concerning political advocacy or criticism of the government.[92] Unlike incitement, the Court found that "speech on the other side of the true-threats boundary line . . . is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions" as to require a higher mens rea standard such as intent.[93] Therefore recklessness strikes the correct balance for true threats.[94]

After holding that a subjective mens rea standard of recklessness is required for a true threat, the Court returned to Counterman's case.[95] The Court held that the lower court was incorrect as it utilized an objective mens rea standard.[96] Thus, the Court held that Counterman's First Amendment rights were violated because the State had not shown that his statements were made with subjective recklessness.[97] The Court vacated the lower court's judgment and remanded the case for further proceedings consistent with this decision.[98]

B. CONCURRING OPINION

In a concurring opinion, Justice Sotomayor stated that recklessness is too low of a standard to prevent a chilling effect on speech.[99] The justice argued that even low-value speech is worthy of First Amendment protection and should not be promptly swept away.[100] "Most of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or

88. *Id.*
89. *Id.*
90. *Id.* at 80-81.
91. *Id.* at 81-82.
92. *Id.*
93. *Id.*
94. *Id*.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 83.
99. *Id.* at 83-84 (Sotomayor, J., concurring in part and concurring in the judgment).
100. *Id.* at 87.

artistic value' (let alone serious value), but it is still sheltered from Government regulation."[101] Justice Sotomayor feared overcriminalization of unpopular speech and pointed out that this burden would befall groups often misunderstood by the majority, including minorities and fringe organizations.[102] The justice also noted that increasingly popular online communication deprives speech of context, tone, and expression, which can lead to one misinterpreting speech as threatening.[103] Justice Sotomayor argued that "[t]hese high First Amendment stakes are further reason for caution" in creating the standard for determining true threats.[104]

Justice Sotomayor also asserted that recklessness was insufficient because, in practice, it turns greatly on an objective person standard.[105] The recklessness standard asks whether the defendant consciously disregarded a risk that the conduct would harm someone.[106] However, under this standard, Justice Sotomayor argued that juries will base their decisions on context and their personal view of what is reckless, since they are often not presented with evidence of a defendant's mindset regarding whether they disregarded a future harm, thus converting the subjective recklessness standard to an objective standard in practice.[107] Therefore, based on concerns of chilling speech and the broadness of the recklessness standard, Justice Sotomayor argued that whether a communication is a true threat should not be left to a jury under the standard of recklessness, but rather, the standard should require proof of the defendants' direct intent to threaten.[108]

Thus, Justice Sotomayor found that a standard of intent is appropriate for true threats.[109] The justice stated that requiring intent for true threats aligns with the traditional understanding of threats, as well as the standards of other categories of unprotected speech.[110] Justice Sotomayor found that language such as "knowingly," "wickedly," "maliciously," "calculatedly," and "intentionally" are customary in state laws and treatises on true threats and other First Amendment exceptions including incitement, obscenity, and defamation.[111] Such language suggests that an intentional scienter is

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101. *Id.* (quoting United States v. Stevens, 559 U.S. 460, 479 (2010)); *see also* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2048 (2021).

102. *Counterman*, 600 U.S. at 87-88 (Sotomayor, J., concurring in part and concurring in the judgment).

103. *Id.* at 89.

104. *Id.*

105. *Id.* at 96.

106. *Id.* at 79 (majority opinion)

107. *See id.* at 88-89 (Sotomayor, J., concurring in part and concurring in the judgment).

108. *Id.* at 101.

109. *Id.* at 104-05.

110. *Id.* at 95-105.

111. *Id.* at 94-95; *see also* Hess v. Indiana, 414 U.S. 105, 109 (1973) (incitement ruling contains language of intent); Hamling v. United States, 418 U.S. 87, 123 (1974) (obscenity ruling

traditionally required for prosecuting unprotected speech rather than a mens rea of recklessness.[112]

C. DISSENTING OPINION

Justice Barrett wrote a dissenting opinion, finding that the First Amendment is not only unsupportive of a subjective standard of recklessness for determining true threats, but of any subjective standard.[113] A significant piece of Justice Barrett's reasoning was that "[t]rue threats carry little value and impose great cost."[114] The justice stated that the speaker's subjective intent does not alter the low social value and high potential for injury accompanying true threats.[115] Justice Barrett suggested that an objective test is the logical approach to separate First Amendment-protected speech from true threats.[116]

Justice Barrett disagreed with the majority's interpretation of mental state standards for other categories of unprotected speech and criticized them for failing to acknowledge First Amendment exceptions that have an objective standard, such as fighting words and misleading commercial speech.[117] Further, Justice Barrett argued that the majority was incorrect in stating that defamation law supports a subjective standard for true threats.[118] The justice noted that defamation regarding a public person requires a showing of actual malice or a "reckless disregard of whether [the speech] was false or not"; however, a private person must only meet an objective standard to recover damages.[119] Defamation against public figures is closely related to public discourse, which the First Amendment aims to protect, thus necessitating a higher mens rea standard of subjectivity.[120] Justice Barrett argued that true threats are more similar to defamation against private individuals because true threats are often not adjacent to public debate and, therefore, do not require a higher level of protection.[121] Accordingly, the

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contains language of knowledge); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (defamation ruling contains language of high degree of awareness).

112. *Counterman*, 600 U.S. at 83-84 (Sotomayor, J., concurring in part and concurring in the judgment) ("[T]raditionally, one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." (quoting Tison v. Arizona, 481 U.S. 137, 150 (1987))).

113. *Id.* at 116-18 (Barrett, J., dissenting).

114. *Id.* at 107.

115. *Id.* at 108.

116. *Id.*

117. *Id.* at 108-110.

118. *Id.* at 111-12.

119. *Id.* at 111 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

120. *Id.* at 111-12.

121. *Id.* at 112.

objective standard used in defamation cases against private individuals should also apply to true threats.[122]

Justice Barrett concluded by arguing that Colorado's precedent supports using an objective standard to determine a guilty conscience in true threats.[123] The justice argued that Counterman's inability to identify any past prosecutions of true threats that infringed upon a defendant's First Amendment right—despite many states utilizing an objective standard in true threats cases—was telling as to the validity of the objective standard.[124]

Ultimately, Justice Barrett stated that the majority's decision was "not grounded in law, but in a Goldilocks judgment."[125]

IV. IMPACT OF THE DECISION ON NORTH DAKOTA LAW

The majority opinion in *Counterman* finally proclaimed a mental standard for true treats, establishing the boundary between an actionable true threat and speech protected by the First Amendment.[126] The term "true threat" has been referenced five times by the North Dakota Supreme Court[127] and each time it has been paired with an objective mental culpability standard, which is now in direct contradiction to the U.S. Supreme Court in *Counterman*.[128] As a result, North Dakota practitioners, judges, and lawmakers must understand and apply the subjective standard in true threat cases.

Prior to *Counterman*, North Dakota prosecutors only had to prove that a reasonable person in the victim's situation would find a statement threatening and did not have to present evidence of the defendant's mindset.[129] Exemplified in *State v. Brossart*, the North Dakota Supreme Court has applied the *Watts* factors to determine whether the objective standard is met in a true threats case.[130] The court considered evidence of the threats context and content, the listeners' reaction, and whether the statement was a political hyperbole.[131]

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122. *See id.*

123. *Id.* at 115-16.

124. *Id.*

125. *Id.* at 118.

126. *Id.* at 69 (majority opinion).

127. State v. Brossart, 2015 ND 1, ¶ 20, 858 N.W.2d 275, 284; Svedberg v. Stamness, 525 N.W.2d 678, 687 (N.D. 1994) (Levine, J. dissenting); State v. Haugen, 392 N.W.2d 799, 805 (N.D. 1986); State v. Howe, 247 N.W.2d 647, 654 (N.D. 1976); State v. Weippert, 237 N.W.2d 1, 4 (N.D. 1975).

128. *See, e.g.*, *Brossart*, 2015 ND 1, ¶ 19, 858 N.W.2d at 275; *Weippert*, 237 N.W.2d at 4; *Howe*, 247 N.W.2d at 654.

129. *See Brossart*, 2015 ND 1, ¶ 19, 858 N.W.2d at 284.

130. *Id.* ¶ 13 (citing Watts v. United States, 394 U.S. 705, 708 (1969)).

131. *See id.*

New York—which had previously also used an objective standard, like North Dakota—recently decided a post-*Counterman* true threats case, offering insight in dicta on how *Counterman* may alter true threat cases in North Dakota.[132] In *United States v. Garnes*, a New York district court examined the admissibility of evidence in whether a defendant had the requisite mens rea under *Counterman* in expressing a true threat.[133] The court stated that the defendant's proclamation of his criminal history could be interpreted by the jury as evidence of his subjective mens rea in threatening the victim.[134] The court also found that evidence showing that the defendant planned to carry out his threats was probative of his mental state and relevant to whether he made his threats recklessly.[135] Applying *Counterman* for the first time, the New York district court found that the defendant's statements concerning the threats and evidence of his intention to carry out his threats were relevant as to whether he had the requisite subjective mens rea to have expressed a true threat.[136]

The differences in evidence relevant to proving mens rea between *Brossart* and *Garnes* illustrates the practical impact that *Counterman* will likely have on prosecuting true threats in North Dakota. Proving a mens rea of recklessness under *Counterman* requires prosecutors to demonstrate the defendant's mindset by putting forth evidence of their thoughts and propensities, which may sometimes be impossible.[137] Therefore, this new standard may make successfully prosecuting true threats more difficult for North Dakota practitioners due to a more demanding evidential burden than was required under the objective mens rea standard.[138]

Although *Counterman* may create new evidentiary challenges for prosecuting true threats in North Dakota, the U.S. Supreme Court emphasized that the benefits of a greater mens rea standard outweigh such obstacles.[139] The decision in *Counterman* will likely bring more consistency

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132. United States v. Garnes, No. 1:22-cr-00487-NRM, 2023 WL 4489983, at *3 (E.D.N.Y. July 12, 2023) (mem.).

133. *Id.*

134. *Id.* at *4 (The court eventually found that this statement was too prejudicial against the defendant to be admissible.).

135. *See id.* at *9.

136. *Id.*

137. *See* Counterman v. Colorado, 600 U.S. 66, 72-73 (2023) (Requiring a subjective mental state requirement will shield some threatening communications from prosecution because the State is not always able to prove the defendant's thoughts.).

138. Justin M. Lichterman, *True Threats: Evolving Mens Rea Requirements for Violations of 18 U.S.C § 875(C)*, 22 CARDOZO L. REV. 1961, 1974, 1991 (2001) (Under an objective standard, the prosecution does not have to put forth evidence of the defendant's intent nor the present ability to execute the threats, instead looking at the surrounding circumstances and facts; whereas under a subjective, recklessness standard, prosecution must put forth evidence that the defendant consciously disregarded a substantial risk in making the statement.).

139. *See supra* notes 93-95 and accompanying text.

to true threats law across all states, give individuals clarity on the bounds of threatening language, and better protect First Amendment rights in jurisdictions formerly using an objective mens rea standard, including North Dakota.

V. CONCLUSION

In *Counterman*, the U.S. Supreme Court held that in true threat cases, a subjective mens rea standard of recklessness must be used to determine mental culpability,[140] as it provides breathing room between the competing interests of preventing chilled free speech and prosecuting dangerous threats.[141] This decision finally clarified a longstanding and widely varying circuit split.[142] While it will take adjustment and perhaps more evidentiary resources for practitioners in North Dakota to apply the requirements of the *Counterman* standard, its adoption will be beneficial as it creates a universal true threats mens rea standard and greater protection of free speech in North Dakota.

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140. *Counterman*, 600 U.S. at 69.

141. *Id.* at 82.

142. Crane, *supra* note 20 at 1233-34.

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