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Comments

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Abstract

Living in the Information Age means that information is literally always at our fingertips. This also means that keeping tabs on one another is as easy as a tap on a screen. The effortless ability to follow another's life on the internet has led to a sinister phenomenon: cyberstalking. Prosecuting cyberstalking cases poses complex constitutional challenges. Specifically, prosecuting these cases may clash with a perpetrator's First Amendment right to free speech. However, the First Amendment does not protect all categories of speech. One of those unprotected categories is the category of "true threats." If a perpetrator's conduct constitutes a "true threat," then there can be no First Amendment violation.

While this bedrock principle may sound clear enough, the U.S. Supreme Court never definitively ruled on which standard of proof is required to prove a true threat. Due to this ambiguity, federal courts have applied different standards of proof; some utilized the objective standard while others utilized the subjective standard.

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However, this ambiguity was resolved in 2023 when the Supreme Court affirmatively rejected the objective standard in *Counterman v. Colorado*. The Court reasoned that the objective standard created a chilling effect on the First Amendment. However, the Court failed to adequately address the ruling's impact on cyberstalking victims.

This Comment seeks to analyze the Supreme Court's reasoning in rejecting the objective standard. More specifically, this Comment addresses the Court's failure to consider the ruling's one-sided consequences, leaving victims without any of the safeguards that are afforded to their perpetrators. This Comment offers potential remedies for this unjust outcome, including holding social media companies accountable, placing pressure on legislatures to regulate true threats, and urging the Court to revisit its decision.

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INTRODUCTION

Imagine it is 2014. You are home alone. Out of boredom, you grab your iPhone and click on the Facebook app. You start scrolling through your Facebook feed, and your eyes dart to the corner of your iPhone screen; you see a Messenger notification. You click on the notification, and you see an unfamiliar name at the top of your inbox: "Billy Counterman." As you glance at the contents of the message, your stomach drops. The message reads: "Good morning sweetheart." You quickly exit the app; you begin to feel rather uneasy and unsettled. You text your mom about what just happened. She assures you there is nothing to worry about; it is likely just a harmless prank. Unfortunately, she is wrong.

Over the next two years, you receive hundreds of messages from Billy, and these messages become more and more threatening. In one of Billy's messages, he even insinuates that he knows what car you drive. You try to delete your existing Facebook accounts and create new ones, but Billy somehow always finds them. The situation causes paralyzing anxiety; you feel uncomfortable going on social media anymore, and you cannot leave the house. To get back the life you once had, you decide to take legal action. After a grueling three years, Billy is finally convicted of stalking and sentenced to jail time. You feel free again.

This story is based on real facts, and it happened to country singer Coles Whalen. Sadly, this is not the end of the story; the Supreme Court recently reversed Billy Counterman's conviction[1] on the grounds that his conviction violated the First Amendment.[2] Specifically, the Court clarified that to convict Counterman, it was not enough to prove that a reasonable person would find Counterman's messages threatening.[3] Instead, the Court concluded that to obtain a conviction, the prosecution must prove that the defendant acted with intent to threaten.[4] This decision has permanently altered the true threat legislative landscape and a victim's ability to seek justice.

This Comment addresses the inadequacies presented by the majority opinion and suggests that the dissent presents a more compelling analysis. This Comment then addresses why the reasonable person standard is appropriate in true threat cases, discusses the implications of the Court's ruling for true threat victims, and provides potential solutions for victims moving forward.

I. BACKGROUND

A. Historical Overview of True Threat Jurisprudence

1. The First Amendment and Unprotected Speech

The First Amendment, which leads the Bill of Rights of the United States Constitution, is widely accepted by Americans as the most important amendment.[5] By its plain language, the First Amendment provides, *inter alia*, that Congress may not create a law that

1. Counterman v. Colorado, 600 U.S. 66 (2023).
2. *Id.* at 82–83.
3. *Id.*
4. *Id.* at 103.
5. Linda R. Monk, *The First and Second Amendments*, PBS, https://tinyurl.com/yc5vueae (last visited Oct. 31, 2023); Jan Neuharth, *First Amendment Is an Important Reminder of the Rights We Enjoy – And Must Protect*, USA TODAY (Sept. 23, 2021, 10:00 AM), https://tinyurl.com/22cec4n2 [https://perma.cc/93Q2-G32M] (noting that 94% of Americans find the First Amendment to be "vital").

"abridg[es] the freedom of speech."[6] The First Amendment is broad in scope, as it protects not only actual speech but also expressive conduct.[7] Actual speech includes spoken or written words, while expressive conduct is behavior that conveys a particular message.[8] While the First Amendment's protection is broad, this protection has limits. Specifically, the First Amendment does not protect speech or expression that is lewd and obscene, profane, libelous, nor does it protect "insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[9] Speech categorized as a "true threat" is one category of unprotected speech.[10] While the Supreme Court began using the term "true threat" as early as 1969,[11] the Court's treatment of true threat cases has been vague and unclear, leading to courts applying split standards around the country.[12]

2. The Emergence of the True Threat Doctrine

a. The Supreme Court's First Acknowledgment of True Threats

The Supreme Court first used the term "true threat" in 1969 in *Watts v. United States*.[13] In *Watts*, the defendant, Robert Watts, attended a political rally.[14] At the rally, Watts expressed that he would not attend a scheduled physical for the possible draft.[15] Watts then stated, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J. [the current President of the United States]."[16] Watts subsequently was arrested and convicted under a federal statute that prohibited a person from "knowingly and willfully (making) any threat to take the life of or to inflict bodily harm upon the President of the United States."[17] In its analysis, the Court clarified that under the statute, the Government had the burden of proving that the defendant's statement was a true threat.[18] Accordingly, the Court overturned Watts's conviction, concluding that his statement was not

6. U.S. CONST. amend. I.
7. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
8. Texas v. Johnson, 491 U.S. 397, 404 (1989).
9. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
10. Watts v. United States, 394 U.S. 705, 708 (1969).
11. *Id.*
12. *See* Commonwealth v. Knox, 190 A.3d 1146, 1163–64 (Pa. 2018) (Wecht, J., concurring) (noting the various circuit courts that adopted an objective intent standard versus those that adopted a subjective intent standard).
13. *Watts*, 394 U.S. at 708.
14. *Id.* at 706.
15. *Id.*
16. *Id.*
17. *Id.* at 705; 18 U.S.C. § 871(a).
18. *Watts*, 394 U.S. at 707–08.

a threat.[19] Instead, the Court found that Watts's statement was merely "political hyperbole," as he simply stated his political dissatisfaction with the current president.[20] The Court arrived at this conclusion after examining the surrounding context, the "conditional nature of the statement," and the listeners' reactions.[21]

Despite making broad observations about true threats generally, the Court did not provide a specific test or definition to clarify just what constitutes a true threat. Instead, the Court engaged in a contextual analysis to conclude that the defendant's political statement was not a true threat. Furthermore, while the Court acknowledged that there was an ongoing debate on whether the "willfulness" element of the statute required proof of a specific mental state, the Court refrained from delving into this element.[22] Instead, the Court focused on the threshold inquiry of whether the Government satisfied the "threat" element, consequently opening the door for increased ambiguity moving forward.[23]

b. Officially Defining True Threats: *Virginia v. Black*

Thirty-four years after the decision in *Watts*, the Supreme Court finally provided a clear definition of a "true threat" in *Virginia v. Black*.[24] In *Black*, the defendants burned a cross at a Ku Klux Klan rally in an attendee's backyard.[25] The defendants were criminally charged under a state statute which banned cross burning with "an intent to intimidate a person or group of persons."[26] At trial, the jury was instructed that the act of burning the cross itself was "sufficient evidence" to prove the "intent to intimidate."[27] The Court found the jury instruction was a violation of the First Amendment because it broadly regulated the act of cross burning.[28] In arriving at this conclusion, the Court closely analyzed the "threat" element of the statute, and stated that true threats are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence."[29] In light of this definition, the Court clarified that an individual cannot be punished for the act of burning a cross

19. *Id.* 708.
20. *Id.*
21. *Id.*
22. *Id.* at 707.
23. *Id.* at 708.
24. Virginia v. Black, 538 U.S. 343 (2003).
25. *Id.* at 349.
26. *Id.*; VA. CODE ANN. § 18.2-423, *declared unconstitutional by* Virginia v. Black, 538 U.S. 343 (2003).
27. *Black*, 538 U.S. at 349.
28. *Id.* at 367.
29. *Id.* at 359.

without inquiry into the specific facts of the case.[30] The Court reasoned that while the burning of a cross is a "symbol of hate" due to its ties to the Ku Klux Klan, the act itself is not always intended to threaten another, so the act therefore cannot be banned as a whole.[31] For example, the Court pointed out that "burning a cross at a political rally" would be protected as "core political speech."[32] The Court found that the original jury instruction was flawed as it did not consider the location of the cross burning, or whether the act was done towards an intended victim or "like-minded believers."[33]

Here, while the Court provided an official definition of a true threat, many questions still were left unanswered. For example, like it did in *Watts*, the Court seemed to endorse a contextual inquiry into the facts and reiterated that political speech is not a true threat.[34] However, the Court declined to introduce concrete factors or elements that would prove the existence of a true threat, and did not address what, if any, culpable mental state is required to obtain a true threat conviction. This led to a circuit split on what level of intent, if any, is required in true threat cases.[35]

c. Supreme Court Rejects Application of Objective Standard for Federal Criminal Liability

In 2015, in *Elonis v. United States*,[36] the Court clarified that for an individual to be convicted under a federal true threat statute, the Government must prove a culpable mental state.[37] In *Elonis*, the defendant, Anthony Elonis, began posting threatening statements on Facebook after his wife left him.[38] His posts threatened his wife, his co-workers, patrons, police officers, and even a kindergarten class.[39] His wife indicated that she felt "extremely afraid for her life" due to the contents of the posts.[40] Elonis was eventually charged and convicted under a federal statute that made it a crime to "transmit threats in interstate commerce."[41] At trial, the jury was instructed that Elonis could be found guilty if "a reasonable person would foresee that the

30. *Id.* at 365.
31. *Id.* at 356, 366.
32. *Id.* at 365–66.
33. *Id.* at 366.
34. Watts v. United States, 394 U.S. 705, 708 (1969).
35. Commonwealth v. Knox, 190 A.3d 1146, 1163–64 (Pa. 2018) (Wecht, J., concurring).
36. Elonis v. United States, 575 U.S. 723 (2015).
37. *Id.* at 740.
38. *Id.* at 726.
39. *Id.* at 731.
40. *Id.* at 728.
41. *Id.* at 726; 18 U.S.C. § 875(c).

statements would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual."[42] The Supreme Court disagreed that the statute's silence as to a culpable mental state meant that none was required.[43] The Court observed that in a criminal context, an individual must be conscious of their wrongdoing and therefore a culpable mental state is required.[44]

Here, the Court demonstrated its disapproval of the reasonable person standard in the context of federal criminal statutes. While the Court used statutory principles to conclude that a culpable mental state was required to convict Elonis under the statute, the Court never referenced the true threat doctrine. Instead, because there was a statutory basis to resolve the case, the Court avoided discussing the constitutional applicability of its ruling. Additionally, the Court failed to address which specific culpable mental state would be necessary to convict an individual under the statute.[45] The Court noted briefly that deciding the appropriate mental state would "step[] over the line that separates interpretation from amendment" and that First Amendment considerations were unnecessary.[46] The Court's refusal to discuss constitutional principles and the true threat doctrine therefore failed to resolve the split among courts.

B. Debate on the Intent Required to Prove a True Threat

1. Objective v. Subjective Standard: Courts Split on the Level of Intent Required in True Threat Cases

After *Black*, courts extensively disagreed over which standard is appropriate in true threat cases: the objective standard or the subjective standard.[47] The objective standard focuses on what a reasonable person would find threatening, while the subjective standard focuses on the perpetrator's intent.[48] Before 2023, most of the circuit courts, including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, applied the objective reasonable

42. *Elonis*, 575 U.S. at 731.

43. *Id.* at 734 ("We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'").

44. *Id.* at 734, 738.

45. *See id.* at 740 (stating that neither Elonis nor the Government have argued that recklessness is the appropriate standard so the Court "decline[d] to address it").

46. *Id.* at 740, 745.

47. Commonwealth v. Knox, 190 A.3d 1146, 1163–64 (Pa. 2018) (Wecht, J., concurring).

48. *Id.*

person standard.[49] These courts found that under the decision in *Black*, "intent" solely meant that the defendant intended to "transmit communication."[50] These courts found the objective standard to be more appropriate because certain speech is unprotected due to the injury it inflicts on another, not because of the "speaker's guilty mind."[51] Furthermore, these courts appreciated that the reasonable person standard requires a jury to engage in a meaningful fact-specific inquiry, allowing for a holistic review of the case.[52] However, the Ninth and Tenth Circuits viewed the *Black* decision differently, believing it meant that the Government must prove the defendant had the specific intent to "intimidate or terrorize."[53] The Seventh Circuit routinely applied a hybridized test, in which the statement "must objectively *be* a threat and subjectively be *intended* as such."[54]

Furthermore, while *Elonis* was decided after *Black*, the decision did not shed light on whether the prosecution must prove the defendant's mental state to survive a First Amendment challenge in true threat cases. While the Court expressed its general dissatisfaction with the objective standard in *Elonis*, the Court did not explicitly denounce the objective standard in the context of true threat cases. Instead, the Court refused to discuss any First Amendment implications. As a result, the circuit courts continued to apply disparate standards of proof in true threat cases without constitutional concern.[55]

2. The Lower Courts' Treatment of Counterman

The Colorado trial court, where Billy Counterman was convicted, was one of the courts that applied the objective standard.[56] Counterman later appealed his conviction, arguing that the prosecution violated his First Amendment rights.[57] The Colorado Court of

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49. United States v. Clemens, 738 F.3d 1 (1st Cir. 2013); United States v. Davila, 461 F.3d 298 (2d Cir. 2006); United States v. Elonis, 730 F.3d 321 (3d Cir. 2013); United States v. White, 670 F.3d 498 (4th Cir. 2012); Porter v. Ascension Par. Sch. Bd., 393 F.3d 608 (5th Cir. 2004); United States v. Jeffries, 692 F.3d 473 (6th Cir. 2012); United States v. Parr, 545 F.3d 491 (7th Cir. 2008); United States v. Nicklas, 713 F.3d 435 (8th Cir. 2013); United States v. Martinez, 736 F.3d 981 (11th Cir. 2013), *vacated*, 576 U.S. 1001 (2015).

50. *Knox*, 190 A.3d at 1163.

51. *Id.* at 1156.

52. *See Jeffries*, 692 F.3d at 480 (stating that the reasonable person standard "forces jurors to examine the circumstances in which a statement is made").

53. *Compare id.*, *with* United States v. Cassel, 408 F.3d 622, 629 (9th Cir. 2005), *and* United States v. Magleby, 420 F.3d 1136, 1141 (10th Cir. 2005).

54. *Parr*, 545 F.3d at 500.

55. John Sivils, Case Note, *Online Threats: The Dire Need for a Reboot in True-Threats Jurisprudence*, 72 SMU L. REV. F. 51, 53 (2019).

56. *See* People v. Counterman, 497 P.3d 1039, 1044 (Colo. App. 2021).

57. *Id.*

Appeals (the "Appellate Court") affirmed his conviction.[58] Relying on the Colorado Supreme Court's precedent, the Appellate Court reiterated that a true threat is "a 'statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence.'"[59] The Appellate Court confirmed that a true threat is analyzed objectively, and absent additional guidance from the U.S. Supreme Court, the Constitution does not require proof of the perpetrator's subjective intent.[60] However, this all changed on June 27, 2023, with the Supreme Court's groundbreaking ruling in *Counterman v. Colorado*.

C. Supreme Court Finally Breaks Its Silence in Counterman v. Colorado

1. Factual Background

Between 2014 and 2016, country singer Coles Whalen was inundated with hundreds of unsolicited Facebook messages from Billy Counterman, a complete stranger.[61] In those messages, among other things, Counterman indicated he knew of Whalen's whereabouts and sent her multiple death threats.[62] Although Whalen tried to block Counterman, Counterman made new Facebook accounts, making the threats inescapable.[63] As a result, Whalen avoided leaving her house, could not sleep, and developed severe anxiety that impacted her daily life.[64]

When Whalen gathered the courage to report Counterman to law enforcement, Colorado prosecutors charged Counterman under a state statute making it unlawful to repeatedly communicate with another in a way "that would cause a reasonable person to suffer serious emotional distress."[65] Counterman moved to dismiss the case, arguing it violated his First Amendment rights because his messages did not constitute "true threats."[66] The trial court was not convinced by Counterman's argument and concluded that his statements were severe enough to constitute a true threat.[67] A jury convicted Counterman, and he was sentenced to four and a half years

58. *Id.* at 1043.
59. *Id.* at 1046.
60. *Id.*
61. Counterman v. Colorado, 600 U.S. 66, 70 (2023).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*; COLO. REV. STAT. ANN. § 18-3-602 (2024).
66. *Counterman*, 600 U.S. at 71.
67. *Id.*

in prison.[68] Counterman subsequently appealed his conviction on the same First Amendment grounds.[69] His case made it to the U.S. Supreme Court, where the Court answered (1) whether in true threat cases, the First Amendment requires proof of a defendant's culpable mental state, and (2) if so, which culpable mental state is required to survive a First Amendment challenge.[70]

2. Majority Opinion: The Court's Two-Part Inquiry

a. Majority Clarifies that a Subjective Mental State Is Required in True Threat Cases

In the majority opinion delivered by Justice KAGAN, the Court first addressed whether the First Amendment requires proof of a defendant's culpable mental state in true threat cases.[71] In beginning its analysis, the Court clarified that true threats are unprotected by the First Amendment. The Court explained that the "true" nature of a threat distinguishes it from other threats that are protected by the First Amendment.[72] In determining whether threats are "true," the Court made clear that the relevant inquiry is not into what the speaker's mental state was at the time of the threat, but rather whether the statements conveyed serious violence to another.[73] Nevertheless, the Court found that the First Amendment still requires proof of the speaker's mental state.[74] The Court reasoned that other forms of unprotected speech, including defamation, obscenity, and incitement, require proof of a culpable mental state and therefore it did not see why it would treat true threats differently.[75]

The Court concluded that requiring proof of a speaker's mental state is necessary to avoid subjecting speakers to self-censorship and to protect an "ordinary citizen's predictable tendency to steer wide of the unlawful zone."[76] The Court acknowledged that requiring proof of a defendant's mental state creates a risk that some truly threatening speech will be protected because the Government will not be able to prove what the defendant was thinking.[77] However, the Court

68. Amy Howe, *Justices Throw Out Colorado Man's Stalking Conviction in First Amendment Dispute*, SCOTUSBLOG (June 27, 2023, 1:44 PM), https://tinyurl.com/v29z98pe [https://perma.cc/B3WJ-NB5M].

69. *Counterman*, 600 U.S. at 71.

70. *Id.* at 72.

71. *Id.*

72. *Id.* at 74.

73. *Id.* ("The existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end.").

74. *Id.* at 75.

75. *Id.*

76. *Counterman*, 600 U.S. at 75, 77–78.

77. *Id.* at 75.

argued that such a ruling also reduces the risk of creating a "chilling effect" on otherwise protected speech due to a speaker's fear of prosecution and provides adequate breathing room for free speech.[78]

b. Majority Clarifies Recklessness Is Appropriate Culpable Mental State

After establishing that the First Amendment requires proof of a defendant's culpable mental state in true threat cases, the Court then addressed which mental state a defendant must have had at the time of the threats.[79] The Court ultimately concluded that the most appropriate mental state is recklessness, which requires proof that a speaker "consciously disregard[ed] a substantial risk that his [or her] communications would be viewed as threatening violence."[80] The Court reasoned that, because defamation cases require proof of a reckless mental state, there is no reason why true threat cases should be treated any differently.[81] Because recklessness has the lowest burden of proof of all mental states, the Court concluded that it struck a balance between both the speakers' and victims' interests.[82]

II. ANALYSIS

A. Counterman v. Colorado: *The Dissent's Pushback*

Despite the majority's holding, the dissent, written by Justice BARRETT and joined by Justice THOMAS, offered a robust analysis which effectively accounted for inadequacies in the majority's reasoning. While the majority was most concerned with avoiding a "chilling effect" on speech, the dissent was unconvinced that the Court needed to go so far as to require proof of a defendant's mental state. In its reasoning, the dissent stated that, according to the Court's own precedent, most categories of unprotected speech utilize an objective test.[83] In light of this ruling, the dissent argued that the majority now provides a "pride of place" for true threats when compared to other forms of unprotected speech,[84] which include fighting words,

78. *Id.*; David L. Hudson, Jr., *Chilling Effect Overview*, FIRE, https://tinyurl.com/3bs53t4p [https://perma.cc/9MQB-KKPR] (last visited July 28, 2024) ("The 'chilling effect' refers to a phenomenon where individuals or groups refrain from engaging in expression for fear of running afoul of a law or regulation.").

79. *Counterman*, 600 U.S. at 78.

80. *Id.* at 69.

81. *Id.* at 80.

82. *Id.* at 82.

83. *Id.* at 108–09 (BARRETT, J., dissenting) ("We have held that nearly every category of unprotected speech may be regulated using an objective test. In concluding otherwise, the court neglects certain cases and misreads others.").

84. *Id.* at 108.

obscenity, and defamatory speech.[85] While the majority's ruling was based on a comparison drawn between true threats and defamation cases, the dissent argued that the majority "cherry picked" a defamation case that was not comparable to the situation in *Counterman*.[86] The dissent argued that the majority's comparison is flawed because the defamation case dealt with public officials rather than private individuals, and in defamation law generally, a private person is subject to an objective standard of proof when seeking to recover actual damages.[87] The dissent emphasized that now, private individuals in true threat cases are granted fewer protections than private individuals seeking to protect their reputations.[88]

Furthermore, the dissent noted that requiring proof of a defendant's mental state in true threat cases is unnecessary due to multiple free speech safeguards that already exist in this line of jurisprudence. First, the dissent makes clear that true threats do not cover words or conduct that are merely offensive or unpopular.[89] Instead, the speaker must "express an intent to commit" illegal violence towards a particular person or group.[90] Second, the perpetrator's words or conduct must be threatening to a reasonable person who is aware of the context surrounding the threat.[91] Similar safeguards do not exist for victims in true threat cases. As Justice BARRETT noted, if the speaker leaves behind no evidence to prove their mindset, the victim is left with no protections at all.[92]

B. Majority Opinion's Deficiencies Create a Chilling Effect on True Threat Victims

1. No Need to Alter the Status Quo: Objective Approach Provides Safeguards to Both Victims and Speakers

While the First Amendment is among the most important constitutional protections, the amendment has limits. The First Amendment does not give citizens a "free pass" to say whatever, whenever, and

85. *Id.* at 109–10.
86. *Id.* at 111; N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
87. *Counterman*, 600 U.S. at 112. *See generally Sullivan*, 376 U.S. at 254 (analyzing the First Amendment protections in a defamation case brought by a public official); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (determining that a private individual need only prove their claim under an objective approach to recover actual damages).
88. *Counterman*, 600 U.S. at 112.
89. *Id.* at 113.
90. *Id.*
91. *Id.* at 113–14.
92. *Id.* at 120.

however they please.[93] While the Court acknowledged that requiring proof of the defendant's mental state in true threat cases prevents "self-censorship,"[94] the Court disregarded the self-censorship the ruling inflicts on victims of true threats. The majority justified its ruling by stating that holding otherwise might cause an individual to avoid speaking in fear of legal ramifications.[95] However, the Court failed to consider that the same now can be said for those who are targets of true threats. The majority failed to provide a meaningful inquiry into the ruling's implications on victims of true threats, nor does it address what, if any, avenue victims have in light of the ruling. This outcome is detrimental given that before the ruling, victims already lacked meaningful protections. For example, of the reported stalking cases, police did not act in half of those cases, and made arrests in less than ten percent of the remaining cases.[96] Given the inadequacies of law enforcement, unpredictable statutory schemes, imprecise social media policies, and the difficult task of proving a perpetrator's mental state, true threat victims are left with little recourse.[97]

Instead of accounting for these pre-existing inadequacies, the majority provides safeguards to speakers where safeguards already exist. Specifically, when applying the reasonable person standard, Colorado courts and other courts across the nation would analyze true threats through contextual inquiries.[98] Under this standard, a jury must consider the facts and circumstances behind the threat.[99] This fact-specific inquiry helps compare a constitutionally protected threat with one that is "true" and therefore unprotected. Additionally, there is yet another safeguard provided by the objective standard; the standard still accounts for the defendant's mental state in

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93. *Limits to Free Speech*, FIRE, https://tinyurl.com/24utd5sw [https://perma.cc/CUC5-3FWJ] (last visited July 28, 2024) ("While the First Amendment protects most speech, it is not a free pass to threaten, harass, or otherwise violate the rights of others.").

94. *Counterman*, 600 U.S. at 75.

95. *Id.*

96. Mary Anne Franks, *Chief Justice John Roberts' Mockery of Stalking Victims Points to a Deeper Problem*, SLATE (Apr. 21, 2023, 12:16 PM), http://tinyurl.com/2mwasvjt [https://perma.cc/4WKT-3VFK].

97. *Why Addressing Online Harassment and Discrimination Is So Difficult*, A.B.A. (May 2017), https://tinyurl.com/3d2utffr [https://perma.cc/S6Z2-LG46].

98. *Counterman*, 600 U.S. at 71; Watts v. United States, 394 U.S. 705, 708 (1969).

99. United States v. Jeffries, 692 F.3d 473, 480 (6th Cir. 2012).

> The reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made: A juror cannot permissibly ignore contextual cues in deciding whether a "reasonable person" would perceive the charged conduct "as a serious expression of an intention to inflict bodily harm."

Id.

the analysis.[100] For example, in analyzing a threat under this standard, juries may consider the relationship between the individuals, the number of messages sent, the type of statements conveyed, and the timeline and duration of the conduct.[101] By analyzing the context of the threat, a jury can then discern what the speaker was thinking at the time of the threat. Accordingly, it becomes clearer whether there was serious harmful intent behind the threats. If the context of the threat is fully considered, then speech that is not legitimately threatening likely will remain protected.

The majority stated that rejecting the objective standard was necessary to avoid a chilling effect on speakers because the ordinary citizen "steer[s] wide" of unlawful activity.[102] However, this argument is unconvincing because "ordinary citizens" are likely not sending hundreds of threatening messages to random individuals over a span of two years. Those who agree with the Supreme Court argue that the objective standard chills speech because a speaker cannot predict how their words would be received by another person.[103] However, this assertion is unpersuasive because a speaker does not have to predict what just *any* person would find threatening. Instead, the speaker must predict what a *reasonable* person would find truly threatening. Additionally, the reasonable person standard is already utilized in cases of self-defense or defense of third parties, where determining whether an action was justified is based on what an "ordinary and

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100. *See Watts*, 394 U.S. at 708 (holding that an individual's political hyperbole was not a true threat after examining the context in which the statement occurred).

101. *Counterman*, 600 U.S. at 114 ("This inquiry captures (among other things) the speaker's tone, the audience, the medium for the communication, and the broader exchange in which the statement occurs."); People v. Counterman, 497 P.3d 1039, 1044 (Colo. App. 2021).

> Under this test, courts must consider at least five factors:
>
> (1) the statement's role in a broader exchange, if any, including surrounding events;
>
> (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features;
>
> (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly);
>
> (4) the relationship between the speaker and the recipient(s); and
>
> (5) the subjective reaction of the statement's intended or foreseeable recipient(s).

Counterman, 497 P.3d at 1046.

102. *Counterman*, 600 U.S. at 77.

103. *See ACLU Commends Supreme Court Decision to Protect Free Speech in Case Defining True Threats*, ACLU (June 27, 2023, 12:32 PM), https://tinyurl.com/mtjarc5e [https://perma.cc/B3TJ-ZWUV] ("In a world rife with misunderstandings and miscommunications, people would be chilled from speaking altogether if they could be jailed for failing to predict how their words would be received.").

reasonable individual would do under the circumstances."[104] Therefore, the argument that the reasonable person standard cannot be properly applied in high-stake cases, such as those concerning true threats, is not logically sound nor historically justified based on analogous cases, such as self-defense cases, where the stakes may be even higher. Furthermore, despite what proponents of the subjective approach argue, there is a difference between sending a few messages to another online and sending violent messages for years through multiple accounts like Counterman did. The objective approach requires emphasis on the threat's context, and absent any contextual facts, sending a few messages to another stranger would not rise to the level of a true threat.

There is no denying that the First Amendment protects speech, and that includes certain threats. But Counterman's actions exceeded the boundaries of the amendment's protections. While it may be argued that some speech will be chilled due to the fear of prosecution, this would hold true for any standard. In the legal system, there is always a risk that the fear of being prosecuted will impede an individual's exercise of freedom. However, the contextual inquiry required by the reasonable person standard would ensure that extreme threats, like those conveyed in *Counterman*, are distinguished from speech that reasonably should be protected. Furthermore, implementing the objective standard prevents the possibility of a defendant taking the stand, testifying that they personally believed their conduct was not threatening, and if found credible, being released into society without reprimand. The objective standard's strengths are twofold: it not only benefits victims who have faced truly dangerous threats, but it also provides necessary constitutional safeguards to their perpetrators.

2. Comparing Apples to Oranges: Dissimilarities Between Defamation and True Threat Cases

Furthermore, in its justifications, the majority concluded that true threats should not receive any greater protections than defamation cases.[105] This conclusion is greatly troubling given that the case on which the majority relies deals with public figures, and public figures are treated differently than private plaintiffs in defamation cases.[106] It is also worth noting that the majority is comparing criminal true threat cases and civil defamation cases which provide for entirely

104. *Self-Defense in Criminal Law Cases*, JUSTIA, https://tinyurl.com/5enpnnw9 [https://perma.cc/9QED-PK4Q] (last visited Sept. 1, 2024).

105. *Counterman*, 600 U.S. at 80.

106. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

different circumstances and policy considerations.[107] Moreover, the majority fails to consider the disparate effects threatening language has on a victim compared to defamatory language. While it should not be discounted that speech which damages another's reputation can be detrimental to one's life, true threat cases put individuals at risk of becoming victims of violent crimes.[108] The majority acknowledged that the ruling will now make prosecution of "often dangerous" communications even more difficult but fails to delve further into the issue or acknowledge its far-reaching impact on victims.[109] Rather than striking a balance between First Amendment protections and victims' rights, the scale seems to be tipped all the way in favor of speakers' rights.

The unfairness of the ruling becomes even more evident after review of the justices' commentary during the *Counterman* oral arguments. Specifically, Justice GORSUCH expressed concern for the fact that we live in a world where people are "increasingly sensitive" and questioned "[w]hat do we do in a world in which reasonable people may deem things harmful, hurtful, threatening? . . . [W]e're going to hold people liable willy-nilly for that?"[110] The Court has spoken loud and clear on its position: "Stalking is not the problem; sensitivity is."[111] The justices certainly did not approach Whalen's case with any sensitivity. Instead, the justices engaged in blatant victim blaming while the chambers echoed with their jokes and laughter throughout the arguments.[112] Given the disrespectful dialogue elicited during the arguments, the majority's justifications for rejecting the objective standard become even more questionable.

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107. *Counterman*, 600 U.S. at 75.

108. *See* L.J. Warren et al., *Threats to Kill: A Follow-up Study*, 38 PSYCH. MED. 599, 599 (2007), https://tinyurl.com/mpr2vh5f [perma.cc/PTB5-YZGL] (stating that, "[w]ithin 10 years, 44% of threateners were convicted of further violent offending, including 19 (3%) homicides").

109. *Counterman*, 600 U.S. at 78.

110. Franks, *supra* note 96; Oral Argument at 57:20, Counterman v. Colorado, 600 U.S. 66 (2023) (No. 22-138), https://tinyurl.com/bdzb7fns [https://perma.cc/46H6-KM79].

> During oral argument, Chief Justice John Roberts quoted a handful of the thousands of unsolicited messages Counterman sent to C.W. "Staying in cyber life is going to kill you," Roberts read aloud. After a pause, he joked, "I can't promise I haven't said that," prompting laughter from other justices and the audience.

Franks, supra note 96.

111. *Id.*

112. *Id.*

C. Implications

1. Barriers to Litigation: Issues with Proving Intent on the Internet

While the Supreme Court believes that requiring proof of a defendant's mental state strikes "a proper balance" between protecting free speech and victims' rights,[113] this assertion is unconvincing. To address why the Court's assertion is so unpersuasive, it is worth explaining what a victim must prove under the new standard. The Court established that the Government must prove the defendant acted at least recklessly in true threat cases.[114] To prove that the defendant acted recklessly, the Government must prove two things. First, the Government must prove that the defendant *consciously* disregarded a substantial risk of harm.[115] This means that the defendant must be aware of the risk.[116] Second, the defendant must take an "unjustifiable risk," meaning one that no reasonable person would take.[117] Requiring proof that the defendant was aware of the risk that their conduct would be threatening is a difficult task, especially over the internet. This is particularly concerning given that two-thirds of people who reported being stalked stated their perpetrator did so using technology.[118]

a. Online Platforms Shield Identities and Promote Anonymity

Proving a perpetrator's mindset is increasingly difficult on the internet given that it may not be possible to discern the perpetrator's identity. A perpetrator can shield their identity on the internet in multiple ways. The individual can create fake accounts, use anonymous avatars, and mask IP addresses.[119] The ability to conceal one's

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113. *Counterman*, 600 U.S. at 104.

114. *Id.* at 79.

115. *Id.* at 69.

116. *4.2 Criminal Intent*, UNIV. MINN. LIBR., http://tinyurl.com/38bvbve2 [https://perma.cc/BQQ4-GUPP] (last visited Jan. 14, 2024).

117. *Counterman*, 600 U.S. at 78; *4.2 Criminal Intent*, *supra* note 116.

118. U.S. DEP'T OF JUST., STALKING VICTIMIZATION, 2019 (2022), http://tinyurl.com/mr3rypx5 [https://perma.cc/DQD7-2FKR].

119. Mike Burmester et al., *Tracking Cyberstalkers: A Cryptographic Approach*, 35 ACM SIGCAS COMPUT. & SOC'Y MAG. 1, 2 (2005), http://tinyurl.com/mvux3a4j [https://perma.cc/AJS9-C56W].

> The online environment makes it relatively easy to maintain anonymity through chatroom "avatars", anonymous email accounts, multiple ISPs, and email relay techniques. This anonymity, coupled with the wealth of data available and the ubiquity of the Internet, has frustrated law enforcement, and jurisdictional and statutory limitations often have tied the hands of investigators.

Id.

identity and location in this manner gives the perpetrator the opportunity to disappear without a trace.[120]

Additionally, even if the individual identifies themselves properly in an account, or the individual's identity is uncovered, evidence of the perpetrator's guilt is difficult to gather given the online format of the criminal activity.[121] For example, because a prosecutor cannot enter the mind of a criminal defendant, a prosecutor may have to prove the intent element by demonstrating the defendant had "consciousness of guilt."[122] Accordingly, concealing one's identity, continuing behaviors despite being clearly told to stop, or finding new ways to contact the victim after being blocked can show consciousness of guilt.[123] With that being said, this evidence must be readily available, and digital evidence can be difficult to recover.[124]

b. Evidentiary Barriers

Proving an individual's mindset may be difficult under any circumstances given that a prosecutor cannot enter the mind of another and prove exactly what an individual was thinking before or during a crime. Consequently, a prosecutor usually attempts to prove an individual's mindset through circumstantial evidence rather than

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120. *Why Addressing Online Harassment and Discrimination Is So Difficult*, *supra* note 97 ("'It becomes very difficult to find anyone to hold accountable and anyone to actually exert or have the incentive to exert restraint or punishment' . . . those committing the abuses can cover their tracks online and frequently just disappear, leaving victims in 'no man's land.'"); *see also* U.S. DEP'T OF JUST., REPORT TO CONGRESS ON STALKING & DOMESTIC VIOLENCE 6–7 (2001), http://tinyurl.com/2ks6dhum [https://perma.cc/FZ6X-HEJY] (stating more ways perpetrators can make their online criminal activity nontraceable).

121. U.S. DEP'T OF JUST., *supra* note 118, at 3.

122. *Consciousness of Guilt*, STEPHEN G. RODRIGUEZ & PARTNERS, http://tinyurl.com/mwabsvh2 [https://perma.cc/Y3J6-TQM9] (last visited Jan. 14, 2024) ("[Consciousness of Guilt] refers to a powerful and highly incriminating inference that a judge or jury may draw from the statements or conduct of a defendant (accused) after a crime has been committed suggested that the defendant knows he or she is guilty of the charged crime."); *see also Understanding the* Counterman v. Colorado *Supreme Court Decision*, THE STALKING PREVENTION, AWARENESS, & RES. CTR. (SPARC) (2023), https://tinyurl.com/3atmnwt3 [https://perma.cc/67QL-6KH9] [hereinafter *Understanding Counterman*].

> For example, prosecutors often show intent and/or recklessness through showing 'consciousness of guilt' like the defendant's efforts to conceal their identity, continuing their behavior after being told to stop, or finding ways to overcome a victim's efforts to block or end the communication. In Counterman, the prosecutors did not try to prove offender intent because it was not required that they do so under their statute at the time.

Understanding Counterman, *supra* note 122.

123. *Understanding Counterman*, *supra* note 122.

124. *See Why Addressing Online Harassment and Discrimination Is So Difficult*, *supra* note 97.

direct evidence.[125] While direct evidence directly proves a fact, circumstantial evidence requires the jury to draw inferences that the fact exists.[126] While direct and circumstantial evidence hold the same weight in court, circumstantial evidence may come off as less compelling to a jury.[127] Consequently, the lack of direct evidence available to prove intent already creates a barrier to justice in any case that requires proof of intent. Furthermore, in cyberstalking cases, the prosecution often must rely on digital evidence which is much more difficult to obtain than physical evidence.[128] For example, computers can be programmed so that all the digital information disappears if the computer is tampered with.[129] Additionally, a perpetrator can always claim to have been hacked, or that the perpetrator was not the one sending the messages.[130] Discounting these claims is difficult in online cyberstalking cases because media evidence must be authenticated with proof of authorship to make it into trial.[131] Accordingly, "tech-savvy" perpetrators may easily hide their digital tracks, and law enforcement may not be able to do anything about it.[132] This is precisely the point the dissent made when emphasizing that "[t]he Court's decision thus sweeps much further than it lets on" because

125. *Intent*, CORNELL L. SCH. LEGAL INFO. INST., http://tinyurl.com/5n7hzfy8 [https://perma.cc/BCE2-2JQH] (last visited Jan. 14, 2024).

126. *Circumstantial Evidence*, CORNELL L. SCH. LEGAL INFO. INST., http://tinyurl.com/mw2j8s29 [https://perma.cc/9642-CAHX] (last visited Feb. 2, 2024).

127. *See* Mark Samuel Weinberg et al., *Simplification of Jury Directions Project Report*, SUP. CT. VICTORIA (August 2012), http://tinyurl.com/353wayyt [https://perma.cc/C5UF-7W3E] (finding that research shows there is a risk that jurors will consider circumstantial evidence inherently weaker or less reliable than direct evidence).

128. Stalking Prevention, Awareness, & Res. Ctr., *How Do Prosecutors Decide to Drop or Press Charges in Stalking Cases?*, YOUTUBE (May 13, 2020), http://tinyurl.com/2s472pjd [https://perma.cc/6VPY-R3TF].

129. *Why Is Cyberstalking and Cyberbullying Difficult to Address?*, COMPUT. FORENSICS RES., http://tinyurl.com/222y2m8w [https://perma.cc/923C-WQT6] (last visited Jan. 14, 2024).

> [D]igital evidence is harder to protect than "real world" evidence, which can be photographed, handled, and locked in an evidence locker. In a cyberstalking case, by contrast, the perpetrator might set up their computer to automatically wipe all evidence or delete all history if anything is tampered with. Investigators who are inexperienced can contaminate evidence simply by looking at it, and proof can be difficult when there's a possibility that the suspected perpetrator has been hacked.

Id.

130. *Id.*

131. *Social Media Case Law*, BOSCO LEGAL SERVS., INC., http://tinyurl.com/4kwafs35 [https://perma.cc/M296-VAJQ] (last visited Jan. 14, 2024).

132. David M. Adamson et al., *Cyberstalking: A Growing Challenge for the U.S. Legal System*, RAND CORP. (June 29, 2023), http://tinyurl.com/rn9bb78v [https://2SFQ-KY75] ("A major challenge in prosecuting cyberstalking cases involves tying the digital evidence to the offending individual or group because tech-savvy offenders can be sophisticated at hiding digital tracks.").

a "lucky speaker may leave behind no evidence of [a] mental state for the government to use against her."[133] To take this point a step further, perpetrators do not have to rely on luck to get away with the crime, but can instead deliberately plan a way to cover their digital tracks and avoid being held accountable.

In addition to the issues related to identifying the online perpetrator and obtaining digital evidence, proving what the perpetrator intended can be another challenge. For example, in some cases, the perpetrator is "oblivious to reality," and therefore providing evidence that the individual understood the nature of their words or action may be impossible.[134] Ultimately, those individuals can be the most dangerous perpetrators because of their inability to understand the consequences of their actions. For example, this can be true of individuals suffering from "erotomania," a delusional disorder in which one person believes that another is in love with them, which leads to behaviors such as stalking.[135] By requiring proof of the defendant's mental state, the Supreme Court has ruled in favor of "delusional stalking," transforming this crime into an "an inviolable constitutional right."[136]

2. Silencing Victims

In finally breaking its silence on the standard of proof required in true threat cases, the Court has regrettably imposed a chilling effect on stalking victims' peace, freedom, and efforts to seek legal remedial action against their perpetrators. In attempting to prevent self-censorship of speakers engaging in threatening expression, the Court failed to adequately consider the grave implications the ruling has on victims who often "drop out of society and censor themselves" due to their traumatic experiences.[137] True threat victims are now not only censored in their ability to fearlessly participate in society, but also are censored in their ability to seek justice from our legal system,

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133. Counterman v. Colorado, 600 U.S. 66, 120 (BARRETT, J., dissenting).

134. Devin Dwyer, *Supreme Court Overturns Online Stalking Conviction, Citing 1st Amendment*, ABC NEWS (June 27, 2023, 2:11 PM), http://tinyurl.com/fhrst58e [https://perma.cc/FRZ9-5KYC].

135. Zawn Villines, *Why Stalkers Stalk—and What to Do If You're a Victim*, GOODTHERAPY (Apr. 5, 2013), http://tinyurl.com/24kdpad7 [https://perma.cc/PU9N-WLL7].

136. Franks, *supra* note 96.

137. Taylor Lorenz, *Supreme Court's Ruling on Online Harassment Outrages Victims, Advocates*, WASH. POST (June 29, 2023, 7:30 AM), https://tinyurl.com/24tkz7pk [https://perma.cc/C6PB-Y2E8]; *see also* Caitlin Ring Carlson et al., *Access Denied: How Online Harassment Limits Enjoyment of Offline Public Accommodations*, 57 GONZ. L. REV. 551, 579 (2022) (citing examples where victims of online threats feared for their lives and avoided leaving their homes).

which in and of itself violates the First Amendment.[138] Before the release of the *Counterman* decision, about half of stalking victims did not report their claims.[139] With the increased burden of proof true threat victims now face, many victims likely will feel demoralized and will not want to put themselves through the process of testifying in front of the individual who is the reason for their suffering. Consider Coles Whalen's situation for example. Whalen expressed that "testifying was 'one of the most terrifying things' she had ever done because she had to 'describe in detail some of [her] worst fears in front of somebody who's been terrorizing [her] for years.'"[140] Given the difficulty of testifying and the high burden they face, victims may be deterred from bringing their claims forward at all. In addition to these concerns, victims likely will be deterred from bringing private lawsuits as well. Litigation fees can be excessive, and victims may not want to bear such costs with the heightened risk of losing the case.[141]

Not only does the ruling impact victims who may no longer feel comfortable bringing lawsuits, but it also has grave implications for victims with pending or active lawsuits. Justice BARRETT noted that the objective standard is the "status quo" in most states.[142] This means that plenty of cases already have been brought under the reasonable person standard, and the ruling now has created disparate impacts on those with ongoing or pending litigation. Consequently, the ruling directly impacts a state's ability to protect victims as state courts must comply with the standard outlined in the opinion to avoid First Amendment violations.[143] Some argue that the ruling will not impact

138. Benjamin Plener Cover, *First Amendment Right to a Remedy*, 50 UC DAVIS L. REV. 1741, 1741 (2017) ("Scholars and jurists agree that the First Amendment right 'to petition the Government for a redress of grievances' includes a right of court access, but narrowly define this right as the right to file a lawsuit.").

139. Nat'l Ctr. for Victims of Crimes, *The Problem of Stalking*, ASU CTR. FOR PROBLEM-ORIENTED POLICING (July 2012), http://tinyurl.com/bdhafjtm [https://perma.cc/ZD5M-7JA9].

140. Brief of Coles Whalen as Amicus Curiae in Support of Respondent at 14, Counterman v. Colorado, 600 U.S. 66 (2023) (No. 22-138).

141. Lorenz, *supra* note 137 (stating how a victim of harassment filed suit "but he lost and now owes tens of thousands of dollars in legal fees"); Cara O'Neill, *Attorney Fees: Does the Losing Side Have to Pay?*, NOLO, https://tinyurl.com/3ajp9tsd [https://perma.cc/TR3B-32F5] (last visited Nov. 30, 2023) (indicating that "attorneys' fees for a litigated case that has made its way through a trial can run $100,000 to $500,000, finding out you've lost and have to pay your opponent's costs can add more than a little insult to injury").

142. Counterman v. Colorado, 600 U.S. 66, 115 (2023).

143. *See* Robyn Painter & Kate Mayer, *Which Court Is Binding?: Mandatory v. Persuasive Cases*, GULC WRITING CTR. (2004), http://tinyurl.com/5x7t6jre [https://perma.cc/CF2M-GPBK] ("The U.S. Supreme Court, a federal court, *is* mandatory on state courts when it decides an issue of federal law, such as Constitutional interpretation.").

stalking claims because these claims "frequently include speech or communication as well as other tactics," such as following the victim or damaging property, so the Government would not have to rely only on speech or conduct to prove its case.[144] However, the evidence in Coles Whalen's case solely involved Facebook communications, and there are plenty of cases like hers which will be gutted by this ruling.[145]

Furthermore, this ruling goes beyond its implications on true threat litigation. Specifically, in most states, a victim must prove the existence of a criminal threat to get a protective order.[146] To prove a criminal threat, the victim must show proof the defendant has been criminally charged. As a result, the increased burden of proof poses an additional barrier for victims to obtain other forms of legal protection such as protective orders. Concerns regarding the opinion's implications have echoed across the country, and unsurprisingly so, given that millions of Americans are victims of some form of stalking or harassment each year.[147] Women across the country must be particularly disturbed by the decision, considering that women are most often victims of cyberstalking perpetrated by men.[148] On top of this disproportionate impact, "54% of femicide victims reported stalking to police before they were killed by their stalkers."[149] Given these disturbing statistics, it is evident that letting a cyberstalking victim's perpetrator go free leads to life-threatening consequences.

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144. *Understanding Counterman*, *supra* note 122.

145. *See* U.S. DEP'T OF JUST., *supra* note 118, at 2 (stating that 80.1% of stalking victims experienced stalking through technology).

146. Christopher T. Benitez et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. J. PSYCHIATRY & L. ONLINE 376, 376 (Sept. 2010), https://tinyurl.com/bdz4xf87 [https://perma.cc/HVA5-EWBN] ("[Protective orders] can be issued by criminal courts to persons charged with assault or other crimes, by family courts in the context of divorce proceedings, or by civil courts after a hearing in which a petitioner presents a case of violence, stalking, or harassment . . . ."); *see also* Jan Wolfe & Jess Bravin, *Supreme Court Raises Bar on Prosecuting Online Stalkers*, WALL ST. J., https://tinyurl.com/bdz3w4bn [https://perma.cc/H9CE-R52C] (June 27, 2023, 12:31 PM) (noting that the ruling makes it more difficult for threat victims to obtain restraining orders to protect themselves from their harassers).

147. *See* Lorenz, *supra* note 137 (stating that "[t]he Court just handed stalkers and harassers, including of politicians, journalists, climate scientists, doctors advocating for vaccines, you name it, a new weapon"); Katrina Baum et al., *Stalking Victimization in the United States*, U.S. DEP'T OF JUST.: BUREAU OF JUST. STATS. 1, 2 (Jan. 2009), https://tinyurl.com/bdehp9e4 [https://perma.cc/MJ6G-4Q8F] (stating that "5.9 million U.S. residents age 18 or older experienced behaviors consistent with either stalking or harassment in the 12 months preceding the SVS interview").

148. *See* U.S. DEP'T OF JUST., *supra* note 118, at 2 ("The majority of cyberstalkers are men and the majority of their victims are women, although there have been reported cases of women cyberstalking men and of same-sex cyberstalking.").

149. *Stalking and Intimate Partner Violence: Fact Sheet*, STALKING PREVENTION, AWARENESS, & RES. CTR., https://tinyurl.com/4fm7836m [https://perma.cc/73VB-PR8B] (last visited July 28, 2024).

What is particularly troubling in Whalen's case is that Whalen was not Counterman's first victim; Counterman has two prior convictions for the same behavior towards other women.[150]

Counterman's prior convictions did not deter him from engaging in the same behavior, and the Court's ruling certainly does not operate as a restraint. Rather, the Supreme Court just told Counterman that he can continue engaging in the same behavior, and nothing will be done about it. This ruling will impact more individuals than imaginable; specifically, one in three women and one in six men are stalked at some point in their lives.[151] This means that this decision is far-reaching and could impact anyone. Leaving one in three women and one in six men without an adequate legal remedy or protections is an injustice of the greatest extent.

D. Recommendations Moving Forward

1. Hold Social Media Companies Accountable

As illustrated above, a disparate number of cyberstalking and online harassment occurs on social media platforms. However, the Supreme Court has been unwilling to construe statutes to regulate social media sites. Specifically, the Court has referred to social media as "the modern public square" that contains "the most powerful mechanisms available to a private citizen to make his or her voice heard."[152] Accordingly, the Court generally has pushed social media regulation issues to Congress.[153] However, rather than waiting for the Court to reconsider its stance, social media companies could take matters into their own hands. Under the state action doctrine, the United States Constitution only regulates the conduct of government actors.[154] Therefore, because social media sites are private

150. Brief of Coles Whalen as Amicus Curiae in Support of Respondent at 14, Counterman v. Colorado, 600 U.S. 66 (2023) (No. 22-138).

151. *About Stalking*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 16, 2024), https://tinyurl.com/7n8kh82u [https://perma.cc/9U2C-DKW7].

152. Packingham v. North Carolina, 582 U.S. 98, 107 (2017); Deborah Fisher, *Social Media*, FREE SPEECH CT. MIDDLE TENN. STATE UNIV. (July 10, 2024), https://tinyurl.com/2s3bbnpy [https:/perma.cc/J7RZ-W8VV].

153. Amanda Shanor, *Punting Social Media Company Liability to Congress*, REGUL. REV. (July 10, 2023), https://tinyurl.com/43m92tcj [https://perma.cc/HM84-VMHR] ("To the surprise of some observers, the Court declined to reshape the legal risks for tech companies. Instead, the Court punted the key issues presented to Congress, leaving the law and economic incentives around harmful speech on the internet approximately where they had been.").

154. *First Amendment and Censorship*, AM. LIBR. ASS'N, http://tinyurl.com/2vu43wde [https://perma.cc/4JU8-TSDZ] (last visited Jan. 14, 2024).

entities, they are not regulated by the First Amendment.[155] Social media companies therefore could regulate the activity on their sites without implicating the First Amendment. To be most effective, all social media site policies should be uniform across the board. While the idea that social media companies will self-regulate to protect victims seems unlikely, it is not unheard of. For example, the former CEO of Twitter previously expressed personal shame for how poorly the site handled abuse on the platform and had promised to take a "more effective approach" moving forward.[156] Additionally, if social media companies do not choose to self-regulate through their own willpower, they could be urged to do so with the threat of governmental regulation.[157] Currently, part of the 1996 Communications Decency Act (the "Act"),[158] which provides immunity to social media companies for what is posted on their sites, is being debated in the Supreme Court and Congress to be amended or repealed.[159] If it is amended or repealed, then social media companies will likely lose this immunity. Social media companies should take this risk seriously, as Justice THOMAS has made clear that "he believes lower courts have interpreted [the Act] to give too-broad protections" to "very powerful companies."[160] The Supreme Court is not the only entity scrutinizing the Act. Specifically, Congress recently passed two bills which hold social media companies responsible for certain advertisements on their sites.[161]

Notwithstanding the threat of regulation by the Court and legislatures, social media companies may be hesitant to disregard the First Amendment's importance due to social media's status as

155. Lata Nott, *Free Speech on Social Media: The Complete Guide*, FREEDOM F. (Oct. 2, 2023), http://tinyurl.com/mrsrp855 [https://perma.cc/ME9U-PDQ2] ("Social media platforms are private companies and are not bound by the First Amendment. In fact, they have their own First Amendment rights. This means they can moderate the content people post on their websites without violating those users' First Amendment rights.").

156. Matt Kapko, *Social Media Sites Still Don't Do Enough to Combat Abuse*, CIO (July 1, 2015), http://tinyurl.com/yz7jae9e [https://perma.cc/G2K7-AWYG].

157. Michael A. Cusumano et al., *Media Companies Should Self-Regulate. Now.*, HARV. BUS. REV. (Jan. 15, 2021), http://tinyurl.com/3f4tk78t [https://perma.cc/8Q9N-G4MZ].

158. 47 U.S.C. § 230.

159. Sarah Morrison, *Section 230, The Internet Law That's Under Threat, Explained*, Vox (Feb. 23, 2023, 3:07 PM), http://tinyurl.com/3r8v67cy [https://perma.cc/A4EB-R7S8].

160. *Id.*; Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13 (2020) ("But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.").

161. Morrison, *supra* note 159.

a quasi-public entity where users strongly value their freedom of speech.[162] However, educating the public on the need for regulation for safety reasons may help soften the public's resistance to regulation. In addition to updating their policies, those who run social media sites could turn into victims' advocates, urging legislators to pass laws that provide adequate protections.

2. Legislative Action: State and Federal Initiative

As the Supreme Court previously has done, the Court could "punt" issues surrounding true threats and online stalking to legislators. As mentioned above, state-specific statutory schemes do not adequately protect victims against forms of cyberstalking.[163] This is true for various reasons. First, each state has differing definitions of cyberstalking or online harassment.[164] Therefore, a victim's situation may not fit into a statute's specific definition of these crimes.[165] Consequently, it is difficult to understand how the laws apply or whether they will apply at all.[166] Second, many laws are outdated and do not address these crimes in an online context, while other states do not have these kinds of laws at all.[167] These inadequacies could be addressed in two different ways. First, Congress could pass federal legislation that defines what a true threat is, how the existence of a true threat is determined, and ensure the legislation is drafted to account for threats on online platforms. Second, state legislators and policy analysts could be proactive and work to pass bills that align with other cyberstalking statutes across the country. The good news is that some legislators have taken initiative and already have begun this process, so hopefully others follow in their footsteps.[168]

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162. *See* Nadine Strossen, *A First Amendment Right to Social Media?*, TALKS ON LAW, http://tinyurl.com/49cjmwxp [https://perma.cc/2ZLZ-XLV4] (last visited Jan. 14, 2023) ("[D]ue to the significance of these platforms, government officials, human rights agencies, and activists will likely continue to push for equitable access to social media through new regulations, rather than relying solely on First Amendment protections.").

163. *See Why Addressing Online Harassment and Discrimination Is So Difficult*, *supra* note 97 ("[L]aws that deal with harassment or threats are jurisdiction-specific. So, each state or locality will have a different definition, and online harassment and threats may or may not fit that definition.").

164. *Id.*

165. *Id.*

166. *State Laws & Online Harassment*, PEN AM., http://tinyurl.com/ycy98ph9 [https://perma.cc/8K34-GP6U] (last visited Jan. 14, 2024).

167. *Id.* ("Many states don't have specific criminal laws that differentiate online and offline conduct. Your state may have harassment and stalking laws, but not *cyber*harassment or *cyber*stalking laws.").

168. *Why Addressing Online Harassment and Discrimination Is So Difficult*, *supra* note 97.

If legislators took their power to act as victim advocates through regulation seriously, they could effectively circumvent the need for judicial solutions.

3. Judicial Reconsiderations

Arguably, the most effective solution lies with the root of the problem: the Supreme Court itself. Specifically, the Court could reconsider its decision after reviewing the backlash and conducting more research into the decision's grave implications. While the Court is most concerned with First Amendment rights, the Court could provide a different framework for the analysis of true threats without sacrificing the First Amendment's protections. In particular, the Court could consider adopting a modified objective standard that is more predictable. For example, to determine whether a reasonable person would find certain speech or conduct threatening, the Court could develop a factor-based test, stating various factors that would be investigated to address whether a true threat exists. Some factors could include the duration of the threats, whether the threats are repeated, and whether the communications include threats to cause physical harm. The Court could make clear that no factor is outcome determinative or could state that certain factors are more heavily weighed than others. Accordingly, this modified framework would provide more streamlined and clear guidelines to put speakers on notice of which types of behaviors could create legal consequences. On the other hand, victims could approach lawsuits with more certainty, knowing specifically what factors will be weighed if a First Amendment challenge is raised. This level of predictability is beneficial to both parties and strikes a balance in protecting each parties' respective rights without requiring sacrifice.

CONCLUSION

The importance and value of the First Amendment cannot be discounted. However, speech cannot go entirely unregulated. This is why we have unprotected forms of speech, including the special category of true threats. Until 2023, the Supreme Court had left unclear how to judge whether a true threat occurred, and whether proof of the perpetrator's mental state is required to avoid a First Amendment violation. The Supreme Court misguidedly resolved the issue by stating that the First Amendment requires proof of a defendant's culpable mental state in true threat cases, and more specifically, delineated that a reckless mental state is the appropriate culpable mental state. In making this distinction, the Court emphasized the need to provide breathing room for free speech while simultaneously

failing to meaningfully address the ruling's implications for cyberstalking victims. Instead, the Court acknowledged that its ruling will now make prosecution of "often dangerous" communications even more difficult, leading to a result that is anything but balanced. The dissent's pushback effectively acknowledged the majority's missteps, noting that the Court is going against its own precedent and unnecessarily affording additional safeguards for speakers.

The Court's decision was not only imprudent as a matter of First Amendment interpretation but will certainly also have significant social consequences. On the other hand, the objective standard provides the balance necessary to protect both sides' rights. The contextual fact-specific inquiry required by the objective approach funnels out threats that are constitutionally protected while ensuring victims facing dangerous perpetrators are afforded legal remedies. However, the Court's adoption of the subjective approach brings new challenges to true threat litigation. In requiring proof of the defendant's mental state, victims must overcome arduous obstacles including internet anonymity and digital evidence barriers. Victims will be less likely to bring their cases forward knowing the difficult burden of proof they face. To combat this outcome, a variety of solutions could be implemented. Social media companies could step up and crack down on stalking behaviors on their sites. Additionally, legislatures could create statutes with broader definitions that would cover true threats. Finally, the judiciary could rethink its decision after further evaluation of its implications and develop a factor-based test to put speakers on notice of behaviors that could get them in legal trouble. This standard would promote the Supreme Court's goals of avoiding the chilling effect while also providing victims with the protections necessary to live peaceful lives.