First Amendment — Free Speech — True Threats — Chilling Effect — Counterman v. Colorado

The chilling effect doctrine is "a major substantive component of first amendment adjudication,"[1] but courts' understanding of chilling effects is limited and narrow. In theory, a chilling effect occurs when prohibitions on activities that are unprotected by the Constitution unduly deter, or "chill," constitutionally protected activity.[2] Using the chilling effect doctrine, courts can "mold[] both substantive rights and procedural remedies" to protect individuals against the chilling of their protected speech.[3] Last Term in *Counterman v. Colorado*,[4] the Supreme Court employed the chilling effect doctrine to hold that, in "true-threats" cases, "the State must prove . . . that the defendant had some understanding of his statements' threatening character," and that a mens rea standard of recklessness is sufficient in such cases.[5] The Court's holding struck a middle ground between adopting an objective standard and adopting a subjective standard with a more stringent mens rea requirement. But, despite the apparent reasonableness of the Court's holding in the true-threats context, one glaring problem mars its decision: *Counterman* was not a true-threats case at all; it was a stalking case. By treating *Counterman* as a true-threats case, the Court threatens to pull stalking into the ambit of true threats. And, in the stalking context, the Court's decision provides little protection against the chilling of valuable speech. Instead, it jeopardizes legal protections for victims of stalking, an outcome that may in effect chill victims' speech.

Over the course of two years, Billy Raymond Counterman sent hundreds of Facebook messages to Coles Whalen, a musician.[6] Whalen blocked Counterman's account and never responded to his messages, but Counterman created new accounts and used other platforms to message her.[7] The messages included many aggressive outbursts directed at Whalen, such as "[f]uck off permanently," "[s]taying in cyber life is going to kill you," "[y]ou're not being good for human relations," and "[d]ie."[8] Whalen believed Counterman was threatening her life.[9] In the shadow of Counterman's stalking, she stopped walking alone, declined

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[1] Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect*," 58 B.U. L. REV. 685, 685 (1978) (footnote omitted).

[2] *Id.* at 689–90.

[3] Walker v. City of Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting).

[4] 143 S. Ct. 2106 (2023).

[5] *Id.* at 2113.

[6] *Id.* at 2112; Brief of Coles Whalen as Amicus Curiae in Support of Respondent at 1–2, *Counterman*, 143 S. Ct. 2106 (No. 22-138).

[7] Brief of Coles Whalen as Amicus Curiae in Support of Respondent, *supra* note 6, at 10.

[8] *Counterman*, 143 S. Ct. at 2112 (quoting People v. Counterman, 497 P.3d 1039, 1044 (Colo. App. 2021)).

[9] Joint Appendix Volume II at 193–94, *Counterman*, 143 S. Ct. 2106 (No. 22-138).

social engagements, and canceled some of her performances.[10] Whalen contacted the authorities to report Counterman's stalking,[11] and Counterman was charged with one count of stalking for making credible threats, one count of stalking for causing serious emotional distress, and one count of harassment.[12]

The prosecution dismissed the credible threat charge before the trial and dismissed the harassment charge on the first day of trial, leaving only the charge for stalking causing serious emotional distress.[13] To convict Counterman, the prosecution had to prove that "Counterman knowingly '[r]epeatedly follow[ed], approache[d], contact[ed], place[d] under surveillance, or ma[de] any form of communication with [Whalen], . . . in a manner that would cause a reasonable person to suffer serious emotional distress and d[id] cause [Whalen] . . . to suffer serious emotional distress.'"[14] Counterman moved to dismiss the remaining charge on the grounds that, "if applied to Counterman, section 18-3-602(1)(c) would criminalize his protected speech" because "none of his messages to [Whalen] was a true threat — a category of speech unprotected by the First Amendment and article II, section 10" of the Colorado Constitution.[15] The trial court denied the motion to dismiss,[16] and the jury found Counterman guilty.[17]

Counterman appealed, bringing an as-applied federal and state constitutional challenge to Colorado's stalking law. He contended that section 18-3-602(1)(c) was "unconstitutional as applied to his statements because they were protected speech, not unprotected true threats."[18] The Colorado Court of Appeals disagreed, but it notably addressed Counterman's argument on the merits — it did not simply dismiss Counterman's "true-threats" argument as irrelevant to his conviction for stalking. Employing an objective test, the Colorado Court of Appeals determined that Counterman's messages were true threats, which are not protected under the First Amendment or the Colorado Constitution, and that section 18-3-602(1)(c) was therefore constitutional as applied to Counterman.[19] The Colorado Supreme Court denied

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[10] *See id.* at 182–83, 199, 201–06, 238–39.

[11] *Id.* at 184, 197.

[12] *Counterman*, 497 P.3d at 1043. The charges fall under Colorado Revised Statutes section 18-3-602(1)(b), section 18-3-602(1)(c), and section 18-9-111(1)(e), respectively. *Id.*

[13] *Id.*

[14] *Id.* at 1043–44 (alterations other than last and third to last in original) (quoting COLO. REV. STAT. § 18-3-602(1)(c) (2023)).

[15] *Id.* at 1044.

[16] *Id.* at 1045.

[17] *Id.* at 1044.

[18] *Id.* Counterman additionally argued that, "even if his statements were true threats, the court erred by failing to sua sponte instruct the jury on true threats." *Id.*

[19] *Id.* at 1050. The Colorado Court of Appeals also held against Counterman on his claims regarding the jury instructions. *Id.*

certiorari,[20] but the United States Supreme Court took up Counterman's case.[21]

The Supreme Court vacated and remanded.[22] Writing for the Court,[23] Justice Kagan concluded that, in true-threats cases, the First Amendment "requires proof that the defendant had some subjective understanding of the threatening nature of his statements . . . but that a mental state of recklessness is sufficient."[24] The Court reiterated the explanation it articulated in *Elonis v. United States*[25] that speech is determined to be a true threat using an objective test.[26] In other words, "[t]he 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."[27] If a statement is determined to be a true threat under this objective standard, then it is not protected by the First Amendment.[28] Nonetheless, in order to avoid a chilling effect on protected speech, the Court concluded that the First Amendment "demand[s] a subjective mental-state requirement" for prohibitions on true threats.[29] The majority recognized that adding a subjective intent requirement would protect "otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought."[30] But this concern was outweighed by the need to provide "'breathing room' for more valuable speech,"[31] which could be chilled due to "[t]he speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; [or] his fear, in any event, of incurring legal costs."[32] The majority cited a number of prior chilling effect cases to justify adopting a subjective intent requirement.[33]

Having determined that the First Amendment requires that speakers have some subjective intent in true-threats cases in order to avoid chilling protected speech, the majority then turned to determining the specific mens rea required. As the majority summarized, there were three mens rea standards that the Court could have chosen: purpose,

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[20] Counterman v. People, No. 21SC650, 2022 WL 1086644, at *1 (Colo. Apr. 11, 2022) (mem).

[21] Counterman v. Colorado, 143 S. Ct. 644 (2023) (mem.).

[22] *Counterman*, 143 S. Ct. at 2119.

[23] Justice Kagan was joined by Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson.

[24] *Counterman*, 143 S. Ct. at 2111. The majority made little note of the fact that Counterman was convicted for stalking, not for making threats, dismissing this concern summarily in a footnote. *See id.* at 2112 n.1.

[25] 575 U.S. 723 (2015).

[26] *Counterman*, 143 S. Ct. at 2114 (quoting *Elonis*, 575 U.S. at 733).

[27] *Id.* (quoting *Elonis*, 575 U.S. at 733).

[28] *See id.* (noting that true threats have been "long . . . unprotected").

[29] *Id.*

[30] *Id.* at 2115.

[31] *Id.* (quoting United States v. Alvarez, 567 U.S. 709, 733 (2012) (Breyer, J., concurring in the judgment)).

[32] *Id.* at 2116.

[33] *See id.* at 2115–16 (citing, inter alia, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).

knowledge, and recklessness.[34] Purpose is the "most culpable level in the standard mental-state hierarchy,"[35] requiring that the speaker "'consciously desire[d]' a result."[36] Knowledge, the intermediate standard, requires that the speaker was "aware that [a] result [wa]s practically certain to follow."[37] Recklessness is the least demanding standard, requiring only that the speaker "consciously disregard[ed] a substantial [and unjustifiable] risk that the conduct will cause harm to another."[38]

The majority determined that recklessness "offers the right path forward" in true-threats cases.[39] The Court chose the recklessness standard after weighing the need to avoid the chilling of protected speech against the value of "protecting against the profound harms, to both individuals and society, that attend true threats of violence."[40] Although the Court's adoption of a subjective intent requirement afforded additional protection to speakers in true-threats cases, its adoption of a recklessness mens rea standard — as opposed to purpose or knowledge — limited this protection.[41] The majority recognized this middle path as "neither the most speech-protective nor the most sensitive to the dangers of true threats" and defended it as protecting "much of what is important on both sides of the scale."[42] The majority also defended the recklessness standard as firmly grounded in First Amendment precedent.[43]

Justice Sotomayor concurred in part and in the judgment.[44] She agreed with the majority that "some subjective *mens rea* is required in true-threats cases" and with the majority's conclusion that "in this particular case . . . a *mens rea* of recklessness is amply sufficient."[45] But she did not agree with the Court's decision to "reach the distinct and more complex question of whether a *mens rea* of recklessness is sufficient for true-threats prosecutions *generally*."[46] In the only opinion that recognized that Counterman was prosecuted for stalking, not for making

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[34] *Id.* at 2117.

[35] *Id.*

[36] *Id.* (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

[37] *Id.* (first alteration in original) (quoting *Bailey*, 444 U.S. at 404).

[38] *Id.* (second alteration in original) (quoting Voisine v. United States, 136 S. Ct. 2272, 2278 (2016)).

[39] *Id.*

[40] *Id.*

[41] *Id.* at 2118.

[42] *Id.* at 2119. The majority also responded to the dissent's allegation that the majority reached a "Goldilocks judgment," *id.* at 2140 (Barrett, J., dissenting), by quipping that "in law, as in life, there are worse things than being 'just right,'" *id.* at 2119 n.7 (majority opinion).

[43] *Id.* at 2118–19 (majority opinion). The majority distinguished precedent regarding incitement, where the Court adopted a more demanding mens rea standard than recklessness, because incitement tends to involve speech that, unlike speech in the true-threats context, is "a hair's-breadth away from political 'advocacy.'" *Id.* at 2118 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

[44] Justice Sotomayor was joined by Justice Gorsuch with respect to Parts I, II, III-A, and III-B of her opinion. *Id.* at 2119 (Sotomayor, J., concurring in part and concurring in the judgment).

[45] *Id.* at 2120.

[46] *Id.* (emphasis added).

threats, Justice Sotomayor argued that *Counterman* did "not require resort to the true-threats exemption to the First Amendment" because Counterman's conviction for "'stalking [causing] serious emotional distress' . . . raises fewer First Amendment concerns" than true-threats cases involving "pure speech."[47] She reasoned that "[s]talking can be carried out through speech but need not be"; that "[t]he content of the repeated communications can sometimes be irrelevant"; and that, while chilling effects might be a risk where only a single utterance is at issue, "that risk is far reduced with a course of repeated unwanted contact" like that at issue here.[48] Justice Sotomayor recognized that "[s]talking can be devastating and dangerous,"[49] but she argued that "a *mens rea* standard for true threats would not hinder stalking prosecutions."[50]

Justice Sotomayor then turned to the harms of adopting a recklessness standard for true threats. Though Justice Sotomayor thought the Court should not have addressed the question at all, she opined that a recklessness standard is too low for true threats generally, arguing that "requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent, history, and the commitment to even harmful speech that the First Amendment enshrines."[51] Further, under a recklessness standard, unintentionally threatening speech may be incidentally criminalized.[52] Justice Sotomayor also disagreed with the majority's broad conception of true threats, asserting that "true threats encompass a narrow band of intentional threats"[53] and arguing that "a careful examination of this Court's true-threats precedent and the history of threat crimes does not support a long-settled tradition of punishing inadvertently threatening speech."[54]

Justice Barrett dissented.[55] She asserted that the choice between an objective standard and a subjective standard for true-threats prosecutions "should be easy": the objective standard is correct.[56] She reasoned that "[t]he nature of a true threat points to an objective test for determining the scope of First Amendment protection" because "[n]either its 'social value' nor its potential for 'injury' depends on the speaker's subjective intent."[57] Per Justice Barrett, precedent favored an objective

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47 *Id.* at 2120–21 (alteration in original) (quoting People v. Counterman, 497 P.3d 1039, 1043 (Colo. App. 2021)).

48 *Id.* at 2121.

49 *Id.* at 2123 (citing Brief of First Amendment Scholars as Amici Curiae in Support of Respondent at 7–8, *Counterman*, 143 S. Ct. 2106 (No. 22-138)).

50 *Id.*

51 *Id.* at 2120.

52 *Id.* at 2122.

53 *Id.* at 2132.

54 *Id.* at 2124. Justice Sotomayor then explored the Court's prior cases in depth to show that true threats have never included unintentional threats. *See id.* at 2124–32.

55 Justice Barrett was joined in full by Justice Thomas. *Id.* at 2133 (Barrett, J., dissenting).

56 *Id.*

57 *Id.* at 2134 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

test, and the majority "neglect[ed] certain cases and misread[] others" to support a subjective standard.[58] Justice Barrett also argued that there was no historical basis for a subjective intent requirement in the true-threats context.[59] Further, an objective test is sufficient because it "already guard[s] against the risk of silencing protected speech."[60] First, "only a very narrow class of statements satisfies the definition of a true threat" because "[t]o make a true threat, the speaker must express 'an intent to commit *an act of unlawful violence* . . . to a particular individual or group of individuals.'"[61] Second, "the statement must be deemed threatening by a reasonable listener who is familiar with the 'entire factual context' in which the statement occurs."[62]

Justice Thomas also penned a brief dissent critiquing the "majority's surprising and misplaced reliance on *New York Times Co. v. Sullivan*" and its progeny, which Justice Thomas referred to as "policy-driven decisions masquerading as constitutional law."[63]

By construing Counterman's stalking case as a true-threats case, and by adopting a subjective intent requirement for such cases, the Supreme Court potentially widened the scope of true threats to include stalking, endangering laws that protect stalking victims. Although the majority simply treated *Counterman* as a true-threats case, and its impact on stalking prosecutions is therefore unclear, the fact that Counterman was prosecuted for stalking means that lower courts may interpret the judgment as requiring proof of subjective intent in stalking prosecutions. If so, the Court's decision may ultimately have the unintended effect of *reducing* protected speech — namely, the speech of stalking victims. First, the Court should not have considered *Counterman* as a true-threats case. Second, while chilling effects are a valid concern in threats cases, there is likely no chilling effect on speakers in stalking cases like *Counterman*. Third, because there is likely no chilling effect to justify additional speech protection for stalkers, an objective standard would be best for stalking cases. Fourth, the Court's decision may actually have the effect of reducing protected speech because of the chilling effect stalking can have on *victims*' speech, a concern that does not fall within the Court's narrow chilling effect analysis.

At the outset, it is important to examine the issue the Court ostensibly tackled in *Counterman* — the potential chilling effect that laws prohibiting threats can have on protected speech. Although *Counterman* was a stalking case that should not have been considered using a true-threats analysis, the Court's holding will apply to true-threats cases

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[58] *Id.*

[59] *Id.* at 2139.

[60] *Id.* at 2137.

[61] *Id.* (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).

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

[63] *Id.* at 2132 (Thomas, J., dissenting) (quoting McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari)).

going forward. And lower courts will undoubtedly rely on *Counterman* as a seminal true-threats case, regardless of the underlying facts.

In the threats context, the Court had good reason to think that an objective standard risks unduly chilling protected speech. Threats can consist of a single utterance.[64] In her concurrence, Justice Sotomayor employed examples of isolated, innocent utterances to demonstrate how laws criminalizing true threats can incidentally impact protected speech: "[A] high school student who is still learning norms around appropriate language could easily go to prison for sending another student violent music lyrics"[65] or a "'drunken joke' in bad taste can lead to criminal prosecution."[66] Amici curiae in *Counterman* expressed similar concerns. The ACLU, for example, discussed an individual jailed for sending a single Facebook comment in response to "a prominent local activist's post about being choked by a sheriff's deputy."[67] The post — "Wow, brother they wanna hit our general. It's time to strike back. Let's burn this motherfucker's house down" — provides an example of a single utterance that could be "a figurative or hyperbolic expression of outrage over injustice, and therefore protected speech on a matter of public concern, or an unprotected threat to set fire to a deputy's home."[68] When a single verbal blunder or innocent misunderstanding could subject a speaker to criminal penalties, an objective standard may prove insufficient to ensure that protected speech is, well, protected. Therefore, in true-threats cases, some subjective intent requirement is warranted.

But, as a group of First Amendment scholars argued as amici, *Counterman* is a stalking case, not a threats case.[69] Counterman was convicted under Colorado's stalking statute. Stalking statutes "target a pattern of conduct of which threatening communications can be — but are not necessarily — a part; and they typically target conduct and communications aimed *at a specific individual* rather than the public at large."[70] While the true-threats doctrine applies to cases where threats, or even a single threat, are made, "[i]ssuing an isolated threat is neither necessary nor sufficient to constitute stalking."[71] Because stalking consists of repeated behavior, there is no concern that a speaker could be

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

65 *Id.* at 2122.

66 *Id.* (quoting Perez v. Florida, 137 S. Ct. 853, 853 (2017) (Sotomayor, J., concurring in the denial of certiorari)).

67 Brief of Amici Curiae American Civil Liberties Union et al. in Support of Petitioner at 6–7, *Counterman*, 143 S. Ct. 2106 (No. 22-138) (citing Sam Levin, *Jailed for a Facebook Post: How US Police Target Critics with Arrest and Prosecution*, THE GUARDIAN (July 14, 2017, 1:08 PM), https://www.theguardian.com/us-news/2017/may/18/facebook-comments-arrest-prosecution [https://perma.cc/2TXH-QRTG]).

68 *Id.*

69 *See* Brief of First Amendment Scholars as Amici Curiae in Support of Respondent, *supra* note 49, at 2.

70 *Id.* at 5.

71 *Id.* at 8.

prosecuted under a stalking statute for making a single, innocent statement that is misunderstood as a threat. While the true-threats exemption to the First Amendment is designed to ensure that protected speech that might be mistaken as a threat is shielded from statutes that proscribe threats, this concern does not apply to stalking.

To demonstrate the difference between threats and stalking, consider the following two statements: (1) "I fucking dare you. Dare you to throw something at me, and I'll fucking kill you."[72] (2) "Staying in cyber life is going to kill you."[73] The first statement was made by Adele, who was on stage at a concert and laughing as she spoke. She made her statement amidst a string of incidents where artists have had objects thrown at them during performances this year.[74] Was Adele's statement a true threat? Of course not. Even under an objective standard, any reasonable listener hearing Adele's statement in context would have readily understood it to be made in jest. She would therefore be unlikely to be prosecuted for her statement under laws that proscribe threats. But, out of concern that speakers like Adele might be chilled from speaking freely by laws that broadly proscribe "threats," *Counterman* provides extra protection by requiring that speakers must have acted recklessly by "consciously disregard[ing] a substantial [and unjustifiable] risk that [the statement] will cause harm to another."[75] This extra protection may well be desirable in this context — Adele was making a public comment to her fans on a series of recent incidents involving artists. This is the type of speech protected by the First Amendment and that the chilling effect doctrine is concerned with. The examples provided by Justice Sotomayor and the ACLU as amicus, discussed above, further illustrate why some subjective intent requirement is desirable for threats.

Turn now to the second statement — "staying in cyber life is going to kill you." This facially more innocuous statement was made by Counterman in a message to Whalen. Would Counterman's statement, if made in isolation, be a true threat? Chief Justice Roberts at oral argument clearly believed that this statement was not threatening: "'Staying in cyber life is going to kill you,' Roberts read aloud. After a

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[72] Hugh McIntyre, *Adele Threatened Fans at Her Concert — And She Was Right to Do So*, FORBES (July 6, 2023, 10:00 AM), https://www.forbes.com/sites/hughmcintyre/2023/07/06/adele-threatened-fans-at-her-concert-and-she-was-right-to-do-so [https://perma.cc/U6GM-XR5S].

[73] *Counterman*, 143 S. Ct. at 2112 (quoting People v. Counterman, 497 P.3d 1039, 1044 (Colo. App. 2021)).

[74] Ash Cant, *Adele Gives Fans a Stern Warning After a String of Horror Incidents*, NEW DAILY (July 5, 2023, 11:56 PM), https://thenewdaily.com.au/entertainment/celebrity/2023/07/05/adele-fans-throwing-stage [https://perma.cc/GZ4U-MPDV]; *see also* Rob Sheffield, *Dear Idiots, Please Stop Throwing Things at the Stage*, ROLLING STONE (June 30, 2023), https://www.rollingstone.com/music/music-features/rob-sheffield-idiot-fan-crisis-1234781349 [https://perma.cc/UGN6-XHQG].

[75] *Counterman*, 143 S. Ct. at 2117 (first and third alterations in original) (quoting Voisine v. United States, 136 S. Ct. 2272, 2278 (2016)).

pause, he joked, 'I can't promise *I* haven't said that.'"[76] Taken alone, making this statement would likely not have put Counterman in jeopardy of imprisonment, even under an objective standard. But Counterman did not make an isolated statement, and the context in which he made his statements moved his communications from the realm of threats to the realm of stalking. Unlike Adele in the first example, Counterman was not speaking to a crowd of adoring fans. Indeed, he was not sharing his views with the public at all. Instead, he was messaging a stranger, Whalen, to whom he had sent hundreds of unsolicited messages for years. Whalen made clear that she did not want to engage with Counterman. She blocked Counterman on social media. She never responded to his messages. She wanted his messages to end. And, after receiving his messages for years, she reasonably felt that her safety was in jeopardy — not from a single utterance, but from a pattern of behavior targeted at her specifically. A jury applying an objective standard convicted Counterman of stalking for this very activity. But, under the Supreme Court's subjective standard, it would not be enough that a reasonable person would (and did) feel threatened by Counterman's statements, even in their proper context. Instead, such behavior would be afforded the additional protection of a subjective intent requirement. By lumping Counterman's stalking behavior into the ambit of the true-threats exemption, the Court may have opened the door for stalkers to use as a defense the idea that they were merely a speaker making "untrue" threats. Indeed, on remand in *Counterman* itself, the trial court will have to apply the new subjective standard for threats cases in a case not about threats, but about stalking.

Unlike in the threats context, there is no need to provide additional protection for stalkers out of a concern that their protected speech will be chilled. Laws that prohibit stalking run little risk of interfering with protected speech because laws that "apply to one-to-one unwanted speech . . . interfere only slightly with debate and the spread of information"[77] — the type of protected speech that the chilling effect doctrine is concerned with. Further, as Justice Sotomayor correctly argued in her concurrence, a lesser mens rea is needed for stalking than for threats because the risk of chilling protected speech is not as salient for "repeated unwanted contact" as it is for isolated utterances.[78] But Justice Sotomayor was incorrect in concluding that a subjective intent requirement with a mens rea of recklessness is the appropriate standard in stalking cases.

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[76] Mary Anne Franks, *Chief Justice John Roberts' Mockery of Stalking Victims Points to a Deeper Problem*, SLATE (Apr. 21, 2023, 12:16 PM), https://slate.com/news-and-politics/2023/04/counterman-colorado-supreme-court-threats-stalking.html [https://perma.cc/7XCW-KC3D].

[77] Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking*," 107 NW. U. L. REV. 731, 742 (2013).

[78] *Counterman*, 143 S. Ct. at 2121 (Sotomayor, J., concurring in part and concurring in the judgment).

Because there is no chilling effect concern sufficient to justify additional protection for stalking, an objective standard is best for stalking cases. Indeed, the speech considerations in the stalking context may actually weigh *against* courts affording additional speech protections for speakers — in this context, stalkers. The Court's holding in *Counterman* may make it harder for states to prosecute stalkers, lessening protection for stalking victims. Without sufficient protection, the ability of *victims* to speak freely may be unduly chilled. Stalking via social media — including targeting an individual with persistent threats, as in this case — can "cause[] severe emotional distress or the fear of physical harm."[79] This abusive behavior "has a 'totalizing and devastating impact' upon victims,"[80] causing a "profound 'chilling effect'" on their speech.[81] This chilling occurred in *Counterman* itself, as Whalen "started cancelling shows and stopped scheduling new ones" and her "joy of touring the country, playing music, and selling albums gave way to the terror inflicted by Counterman."[82] Because victims' speech is chilled by the private actions of stalkers, not by state action, this chilling effect may be less salient for the Court, whose reach under the Constitution extends only to public actors.[83] But, while the courts are not in a position to consider chilling caused by private actors, legislatures, like Colorado's in this case, are well positioned to consider just such effects. The narrow nature of the chilling effect doctrine should make the Court pause before it employs the doctrine to protect speakers in situations where the potential consequences for victims are unclear to the Court or outside of its purview, as in *Counterman*.

Ultimately, the Court should never have considered *Counterman* as a true-threats case. Regardless of whether chilling effects are a concern in the true-threats context, the chilling effect doctrine is questionable, at best, in stalking cases like *Counterman*. And countervailing chilling concerns — namely the chilling effects to victims of stalking — outweigh any possible chilling effect to the speech of stalkers, which tends not to be the type of speech at issue with isolated utterances or speech to groups of people. The Court should have allowed Colorado's antistalking law and similar laws in other states to stand unabated. Its decision in *Counterman* puts protections for stalking victims at risk and may ultimately lead to *less* protected speech.

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[79] Danielle Keats Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. 2317, 2319 (2019) (citing DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 6–8 (2014)).

[80] *Id.* (quoting CITRON, *supra* note 79, at 29).

[81] *Id.*

[82] Brief of Coles Whalen as Amicus Curiae in Support of Respondent, *supra* note 6, at 3–4.

[83] *See The Civil Rights Cases*, 109 U.S. 3, 13 (1883) ("[T]he prohibitions of the [Fourteenth] [A]mendment are against state laws and acts done under state authority.").