TRUE THREAT RECKLESSNESS

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I. INTRODUCTION

The United States Supreme Court has discussed true threats in several cases but has provided too little guidance about which acts constitute threats that are not protected by the First Amendment. One case stands in contrast to the others—*Virginia v. Black*,[1] where the Court offered a definition of "true threats." However, the Court's application of the definition in that very case caused separate conceptual difficulties. Since the *Black* opinion was issued, the Court has undermined or modified the definition of "true threat" in ways that are confusing and self-contradictory.

A majority of the justices on the current Supreme Court reject that a statement counts as a true threat merely because a reasonable person might construe that statement as threatening. However, the Court has had great difficulty articulating what counts as a threat, and the Court's conflation of differing standards not only makes true threat jurisprudence murky, but muddies the waters as a general matter with respect to which statements are afforded constitutional protection.

Part II of this article discusses the development of true threat jurisprudence, noting some of the Court's difficulties in defining what counts as a true threat. Part III discusses how the Court's jurisprudence has been changing recently. The Court is clearly trying to limit what counts as a true threat but has offered a test that is confusing and poorly thought out. That is regrettable for a number of reasons.

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1. 538 U.S. 343 (2003).

Precisely because such threats are not protected by the First Amendment, both private individuals and society as a whole need a definition of "true threat" that is clear and easily applied. This article concludes that the current standard not only does not give adequate notice about what counts as a true threat, but also will likely result in greater uncertainty about which expressive activity is protected under the First Amendment as a general matter.[2] Claims to the contrary notwithstanding, the Court's recent attempt to prevent the chilling of speech illustrates that the Court does not appreciate some of the very difficult issues facing the country and is unlikely to provide much insight into what the Constitution protects during these incendiary times.

II. THE DEVELOPMENT OF TRUE THREAT JURISPRUDENCE

True threat jurisprudence has developed rather unevenly, perhaps in part because the Court reversed the convictions in the first two cases in which true threats were at issue and was focused on explaining why the convictions could not stand. That left the Court either discussing why a particular statement did not count as a true threat or focusing on procedural irregularities rather than on the content of the statement at issue. While those analyses sufficed to explain the reversals, the Court failed to provide guidance about which hypothetical changes to the facts would have made the statements at issue threats. In *Virginia v. Black*,[3] the Court tried to clarify what constitutes a true threat,[4] but the Court's application of the announced standard raised more questions than it answered, especially in light of other recognized exceptions to the First Amendment.

A. THE COURT'S EARLIER DISCUSSIONS OF TRUE THREATS

The Court first discussed the exclusion of true threats from First Amendment protection in *Watts v. United States*.[5] The decision was

2. *See* Charlotte Taylor, *Free Expression and Expressness*, 33 N.Y.U. REV. L. & SOC. CHANGE 375, 419–20 (2009) (discussing "the First Amendment's preference for administrative clarity and notice as well as for the protection of core political speech").

3. 538 U.S. 343 (2003).

4. *See* Va. v. Black, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

5. 394 U.S. 705 (1969). *See also* Kyle A. Mabe, *Long Live the King:* United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 GOLDEN GATE U. L. REV. 51, 54 (2013) ("The true–threats doctrine began in *Watts v. United States*, in which the Court considered threatening statements aimed at then-President Lyndon B. Johnson."); Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1229 (2006) (discussing the Court's "first true threats case, Watts v. United States"); Alison J. Best, Elonis v. United States: *The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 MD.

not particularly helpful in clarifying what counts as a true threat,[6] although it did identify one kind of statement that would not constitute a threat.[7]

At issue was the conviction of an eighteen-year-old for having allegedly threatened the President of the United States.[8] Watts's comments at an anti-war rally provided the basis for his conviction.[9] He said:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my [B]lack brothers.[10]

Watts's counsel offered three reasons that Watts should be acquitted of threatening the President: (1) the statement was made during a political debate,[11] (2) the threat was conditioned on something—induction into the Army—that would not occur because Watts had said that he was not going to show up,[12] and (3) his comments about getting L.B.J. in his sights were clearly meant as a joke, and everyone had laughed after the comments were made.[13] Basically, counsel argued

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L. REV. 1127, 1137 (2016) ("The United States Supreme Court first used the term 'true threats' in *Watts v. United States*.").

6. Robyn P. Mohr, *True Threats and the First Amendment: Why It Matters "What's on Your Mind?,"* 31 COMMC'N. LAW. 4, 5 (Spring 2015) ("Though the Supreme Court ultimately decided that Watts's statement did not rise to the level of a 'true threat' envisioned by the statute, it did not do much to clarify the law's intent requirement."); Adrienne Scheffey, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After* Virginia v. Black, 69 U. MIAMI L. REV. 861, 872 (2015) ("After *Watts*, very little guidance could be derived from Supreme Court precedent to clarify the standard for true threats."); Mabe, *supra* note 5, at 65 ("Unfortunately, however, the *Watts* court provided the lower courts with sparse guidance on the parameters of this new doctrine.").

7. Watts v. United States, 394 U.S. 705, 708 (1969) ("[T]he statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term.").

8. *Watts*, 394 U.S. at 705–06.

9. *Id*. at 705–06 ("The incident which led to petitioner's arrest occurred on August 27, 1966, during a public rally on the Washington Monument grounds."); Dana S. Gershon, *Stalking Statutes: A New Vehicle to Curb the New Violence of the Radical Anti-Abortion Movement*, 26 COLUM. HUM. RTS. L. REV. 215, 234 (1994) ("The *Watts* Court analyzed Watts's statement in the 'context' of the anti-war rally at which it was made."); Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 668 (2017) ("The case arose from a speech that Watts made at an anti-Vietnam War rally.").

10. *Watts*, 394 U.S. at 706.

11. *Id*. at 707.

12. *Id*.

13. *Id*.

that these comments could not reasonably[14] be perceived as a threat,[15] and the Court agreed that "the kind of political hyperbole indulged in by petitioner"[16] did not qualify as a true threat.[17]

The *Watts* Court noted the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[18] The Court further explained that the "language of the political arena . . . is often vituperative, abusive, and inexact."[19] Here, the Court cautioned that courts must be careful not to classify political speech as unprotected true threats.

The Court treated the speech as political commentary and so felt no need to delve into what would have constituted a true threat. While noting that there was some debate whether an individual must intend to carry out a threat in order for her statement to qualify as a willful threat,[20] the Court neither decided nor even further addressed that issue, because the speech at hand was not reasonably construed as a threat.[21]

In *Rogers v. United States*,[22] the Court had another opportunity to consider an alleged threat against the President. This time, the challenge to the conviction[23] was based on some unusual circumstances: the jury had been unable to agree about the appropriate resolution of the case for about two hours and then had sent a note to the judge

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14. *Cf.* Mark Strasser, *Incitement, Threats, and Constitutional Guarantees: First Amendment Protections Pre-and Post-Elonis*, 14 U.N.H. L. REV. 163, 177 (2016) (discussing "whether a statement can plausibly be construed as a threat as opposed to a joke or political hyperbole").

15. These factors were proposed by Watts's counsel. The Court itself did not adopt a three-part test. Not all commentators appreciate that the Court itself did not officially adopt these factors as a test. *See* Crane, *supra* note 5, at 1233 ("The Court relied on three factors, which this Note will call the 'Watts factors,' in holding that Watts's statement was not a true threat: the statement (1) was made during a political debate, (2) was expressly conditional in nature, and (3) caused the listeners to laugh.").

16. *Watts*, 394 U.S. at 708.

17. It was unclear whether the Court interpreted the comments as a joke or as political hyperbole. *See* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1338 n.4 (2006) ("Under the circumstances, the Supreme Court interpreted the words as a joke–not a 'true threat' to President Lyndon Johnson, but rather political hyperbole.").

18. *Watts*, 394 U.S. at 708 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

19. *Id.* at 708 (citing Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58 (1966)).

20. *Id*. at 707.

21. *Id*. at 708.

22. 422 U.S. 35 (1975).

23. Rogers v. United States, 422 U.S. 35, 36 (1975) ("Petitioner was convicted by a jury on five counts of an indictment charging him with knowingly and willfully making oral threats 'to take the life of or to inflict bodily harm upon the President of the United States,' in violation of 18 U.S.C. § 871(a). The Court of Appeals affirmed.").

asking whether he would "accept the Verdict—'Guilty as charged with extreme mercy of the Court.'"[24] The judge answered in the affirmative without notifying the defendant or his counsel.[25] The United States Supreme Court reversed because "the trial judge's response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise.[26]

The case involved George Rogers, who had walked into a Holiday Inn in Shreveport, Louisiana,[27] and had started making threatening comments, including that "he was going to go to Washington to 'whip Nixon's ass,' or to 'kill him in order to save the United States.'"[28] In addition, Rogers had announced that "he was Jesus Christ and that he was opposed to President Nixon's visiting China."[29] In passing, when discussing his plan to go to Washington, Rogers had mentioned that he was planning to walk because he did not like cars,[30] even though the distance between the two cities is over one thousand miles.[31] Justice Marshall expressly noted that Rogers had "a 10-year history of alcoholism,"[32] perhaps as a way of suggesting that Rogers was suffering from a mental impairment.[33]

There was no need for the *Rogers* Court to offer a careful elucidation of what true threats involve, because the Court based its reversal of the conviction on a different ground—"potential prejudice."[34] Nonetheless, Justice Marshall in his concurrence discussed the jury instruction, which reflected the "objective construction"[35] of the statute criminalizing threats against the President.

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24. *Rogers*, 422 U.S. at 36.
25. *Id*. at 37.
26. *Id*. at 40.
27. *Id*. at 41 (Marshall, J., concurring).
28. *Id*. at 42 (Marshall, J., concurring).
29. *Id*. at 41 (Marshall, J., concurring).
30. *Id*. at 42 (Marshall, J., concurring).
31. *See Distance from Shreveport, LA to Washington, DC*, DISTANCE BETWEEN CITIES, https://www.distance-cities.com/distance-shreveport-la-to-washington-dc, (last visited July, 31 2023) ("There are 1,033.95 miles from Shreveport to Washington in northeast direction and 1,197 miles (1,926.38 kilometers) by car, following the I-81 N route.").
32. *Rogers*, 422 U.S. at 41 (Marshall, J., concurring).
33. *Cf.* Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 CARDOZO L. REV. 393, 404 (1988) ("The most severe manifestations of the withdrawal syndrome, delirium tremens, usually has its onset from seventy-two to ninety-six hours after abstinence begins. Delirium tremens is characterized by the symptoms described above, as well as psychotic manifestations including tactile, auditory, and visual hallucinations; paranoia; disorientation; panic; and confusion.").
34. *Rogers*, 422 U.S. at 41.
35. *See Rogers*, 422 U.S. at 43 (Marshall, J., concurring).

> The jury was instructed in effect that it was not required to find that the petitioner actually intended to kill or injure the President, or even that he made a statement that he thought might be taken as a serious threat. Instead, the jury was permitted to convict on a showing merely that a reasonable man in petitioner's place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act.[36] In addition, the court charged that the jury could find petitioner guilty if his statements evinced "an apparent determination to carry out the threat."[37]

Justice Marshall explained that this construction was too broad,[38] because it created a "substantial risk of conviction for a merely crude or careless expression of political enmity."[39] He was not suggesting that an individual had to intend to carry out the threat in order to have made a true threat, noting that "threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out."[40] For example, a "threat made with no present intention of carrying it out may still restrict the President's movements and require a reaction from those charged with protecting the President."[41] Because there would be costs associated with threats even where there was no intention to carry out the threat, Justice Marshall suggested that the standard to determine whether a true threat has been made involves whether "the defendant intended to make a threatening statement, and [whether] . . . the statement he made was in fact threatening in nature."[42]

When discussing a statement that is in fact threatening in nature, Justice Marshall is presumably referring to a statement that reasonable people would perceive to be threatening. Such a statement might well trigger the kind of protections of the President to which Justice Marshall alluded when discussing the costs associated with statements reasonably perceived to be threatening, even where there is no intention to carry out the threat.[43]

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36. *Cf*. Mabe, *supra* note 5, at 55 ("[C]ourts have disagreed on whether a subjective intent to threaten is required for a statement to be considered a true threat.").

37. *Rogers*, 422 U.S. at 43–44 (Marshall, J., concurring).

38. *Id*. at 44 (Marshall, J., concurring).

39. *Id*. (Marshall, J., concurring).

40. *Id*. at 46–47 (Marshall, J., dissenting). *See* Renee Griffin, *Searching for Truth in the First Amendment's True Threat Doctrine*, 120 MICH. L. REV. 721, 722 (2022) ("Apart from any physical violence that may follow, the threat itself induces fear and can inflict genuine harm on its target.").

41. *Rogers*, 422 U.S. at 47 (Marshall, J., concurring).

42. *Id*. (Marshall, J., concurring).

43. *See supra* notes 40–41 and accompanying text (discussing possible costs incurred by responding to perceived threats).

Yet, when discussing what qualified as a true threat, Justice Marshall did not focus solely on the costs that would be incurred when responding to statements that might reasonably be interpreted as threatening; he focused in addition on whether the speaker intended to make the threatening statement. This latter criterion needs to be spelled out further. It might require, for example, that the speaker know what the words mean.

Suppose that a speaker intentionally uses words that he does not understand and so does not appreciate how others might interpret them. While the words were spoken purposely (not by accident), it would be false to claim that the speaker knowingly made a threatening statement.[44] Or, suppose that an individual is reciting some words from a script while trying out for a part. The individual understands what she is saying and might even realize that in other circumstances such a statement might constitute a threat, although the words in this instance would not constitute a threat.

Justice Marshall contrasted his understanding of what would count as a true threat with the objective construction approach.

> Under the objective construction . . . , the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.[45]

Yet, it is not so clear that even under the objective construction a defendant is subject to punishment for any statement reasonably thought threatening. Consider the example above involving the person who does not understand the meaning of the words he says. That person would presumably not be subject to a true threat prosecution for saying threatening words even if a reasonable person might construe those words as posing a threat.[46]

One way to parse "intend to make a threatening statement" is to say (1) the individual must knowingly make a statement, (2) the meaning

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44. Counterman v. Colo., 600 U.S. 66, 72 n.2 (2023) (quoting Elonis v. United States, 575 U.S. 723, 738 (2015)). Stating:

> [I]f a defendant delivers a sealed envelope without knowing that a threatening letter is inside, he cannot be liable for the communication. So too (though this common example seems fairly preposterous) if a 'foreigner, ignorant of the English language, who would not know the meaning of the words,' somehow manages to convey an English-language threat.

Id.

45. *Rogers*, 422 U.S. at 47 (Marshall, J., concurring). *See also* Mabe, *supra* note 5, at 95 ("Under the objective standard, the delusional ramblings of mentally unstable individuals are not safe from prosecution if a reasonable person could be inclined to believe the statements were threatening.").

46. *Counterman*, 600 U.S. at 106 (Barrett, J., dissenting) ("As everyone agrees, the statute requires that the speaker understand the meaning of his words.").

of which is understood by the speaker, and (3) others could reasonably construe the statement as a threat. But if that is what is meant, then Justice Marshall's requirement that "the defendant intend[] to make a threatening statement"[47] only seems to exclude statements reasonably perceived to be threatening that are made inadvertently or without understanding.

While such a limitation somewhat narrows the true threat category in that it does not include any and all statements that might reasonably be construed as threatening, such a limitation does not exclude from prosecution those political statements made purposely that are reasonably perceived as threatening.[48] Without further explanation of which purposely made statements reasonably perceived to be threatening would nonetheless not constitute true threats, Justice Marshall does not offer much helpful guidance with respect to how the allegedly overbroad category should be narrowed.

Virginia v. Black[49] continued the Court's confusing analysis of true threats.[50] At issue was the application of Virginia law to two different cross burnings.[51] One cross burning was by Richard Elliott and Jonathan O'Mara, who attempted to burn a cross in the yard of James Jubilee.[52] Jubilee had complained about shots being fired in the backyard of the Elliott home,[53] and Elliott and O'Mara had attempted to burn

47. *Rogers*, 422 U.S. at 47 (Marshall, J., concurring).

48. Justice Marshall seemed worried about chilling political speech. *See id*. at 44 (Marshall, J., concurring) ("[T]here is a substantial risk of conviction for a merely crude or careless expression of political enmity.").

49. 538 U.S. 343 (2003).

50. Crane, *supra* note 5, at 1226 ("Some Supreme Court decisions clarify a murky area of the law. Others further muddy an area in need of clarification. Unfortunately, the Court's decision in *Virginia v. Black* has proven to be another instance of the latter."). Connor M. Flairty, *Knowledge Is Power: A "Knowing" Mens Rea for the "True Threat" Doctrine Best Balances Protecting Legitimate Political Discourse and Prohibiting "True Threats,"* 61 WASHBURN L.J. 221, 237 (2021) ("*Virginia v. Black* has confused and frustrated lower courts.").

51. *See* VA. CODE ANN. § 18.2-423 (West) ("It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."). *But see* Elliott v. Commonwealth, 593 S.E.2d 263, 270 (Va. 2004). Stating:

> [W]e hold that the prima facie evidence provision of Code § 18.2-423 is unconstitutionally overbroad under the First Amendment and Article I, § 12 of the Constitution of Virginia. We hold that the statute is severable and that the core provisions of the statute that remain do not violate the First Amendment or Article I, § 12 of the Constitution of Virginia.

Id.

52. *Black*, 538 U.S. at 350 ("On May 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee.").

53. *Id*. at 350 ("Before the cross burning, Jubilee spoke to Elliott's mother to inquire about shots being fired from behind the Elliott home.").

the cross as a way of getting back at Jubilee for complaining to Elliott's mother.[54] Neither Elliott nor O'Mara was a member of the Ku Klux Klan.[55]

The other cross burning occurred at a Ku Klux Klan rally led by Barry Black.[56] This cross burning, which took place with permission from the landowner,[57] was near a state highway[58] and several motorists passed by while the cross burning took place.[59] The jury had been told that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm"[60] and also that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."[61]

Black, who was convicted,[62] challenged the latter instruction—the presumption of intent provision—on First Amendment grounds.[63] That presumption was struck down as unconstitutional.[64] If an intent to intimidate could be presumed whenever a cross was burned, someone who burned a cross solely as a way of communicating with likeminded individuals might nonetheless be found guilty of making a true threat.[65]

Merely because part of the statute was unconstitutional did not mean that the statute was unconstitutional as a whole,[66] which left "open the possibility that the [presumption of intent] provision [was] severable, and if so, whether Elliott and O'Mara could be retried."[67] However, the Court said nothing comparable about whether Black could be retried after the Virginia Supreme Court's striking down that

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54. *Id*. ("Their apparent motive was to 'get back' at Jubilee for complaining about the shooting in the backyard.").

55. *Id*. ("Respondents were not affiliated with the Klan.").

56. *Id*. at 348 ("On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia.").

57. *Id*. ("Barry Black led a Ku Klux Klan rally in Carroll County, Virginia . . . which occurred on private property with the permission of the owner.").

58. *Id*. ("The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.").

59. *Id*. ("During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site.").

60. *Id*. at 349.

61. *Id*.

62. *Id*. at 309 ("The jury found Black guilty, and fined him $2,500. The Court of Appeals of Virginia affirmed Black's conviction.").

63. *Id*. at 349 ("Black objected to this last instruction on First Amendment grounds.").

64. *Id*. at 367 ("[T]he prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face.").

65. *Id*. at 365 ("[T]he prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.").

66. *See* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2350 (2020) ("The Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute.").

67. *Black*, 538 U.S. at 367.

conviction was affirmed.[68] The Court's failure to mention the possibility of a retrial of Black might have been oversight or, instead, an implicit claim that Black's actions were protected under the First Amendment.[69]

The plurality expressly mentioned that the cross burning in Jubilee's yard was by individuals unaffiliated with the Ku Klux Klan[70] and that the other cross burning was at a Ku Klux Klan rally.[71] The plurality further noted that "while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed."[72] Presumably, the cross burning by Elliott and O'Mara was viewed as *only* intended to convey a threat.[73] But no comments were made about whether the Ku Klux Klan cross burning was understood by the Court to be only addressed to likeminded individuals and carrying no intimidating message.

If the latter cross burning might be found by a jury to carry both a message of solidarity to likeminded individuals and a message of intimidation to those in the targeted group, then Virginia would seem able to punish such communications without violating First Amendment guarantees.[74] Otherwise, individuals making threats would be immunized from prosecution as long as those individuals could credibly

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68. *Id*. ("With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia.").

69. *Counterman*, 600 U.S. at 87 (Sotomayor, J., concurring in part and concurring in the judgment) ("[T]he Court has upheld First Amendment rights in the context of . . . cross burning") (citing *Black*, 538 U.S. at 347–48); Kiran Sidhu, *The Supreme Court and the American Civil Liberties Union's Colorblind Protection of Cross Burning in First Amendment Jurispprudence Legitimates White Supremacy*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 337, 362 (2017) ("The Court, however, is resolved on ensuring that cross burning—despite its notoriety as an instrument of terror—receives the benefit of First Amendment protection because of its apparent expressive value."); Chris L. Brannon, *Constitutional Law-Hate Speech-First Amendment Permits Ban on Cross Burning When Done with the Intent to Intimidate*, 73 MISS. L.J. 323, 343 (2003) ("In *Black*, the Court also reaffirmed a recent commitment to absolute freedom of expression by extending the protections of the First Amendment to one of the most offensive symbols imaginable—the burning cross.").

70. *Black*, 538 U.S. at 350 ("Respondents were not affiliated with the Klan.").

71. *Id*. at 348–49.

72. *Id*. at 357 (emphasis in original).

73. *Id*. at 350 ("Their apparent motive was to 'get back' at Jubilee.").

74. *Id.* at 363 ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation."); s*ee also* Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 396 (2005) ("Because a burning cross can be banned as a threat when used to intimidate but is otherwise constitutionally protected (symbolic) speech, the First Amendment demands a contextual, individualized analysis before a particular cross burning is punished."); Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 954 (2004) ("[C]ross burning can have several meanings.").

claim that they in addition had been sending a message of unity of purpose to likeminded individuals.

Consider how the sending-a-message-to-like-minded-individuals-immunizes approach might have played out in a modified *Watts* scenario. In the actual case, the conviction had been reversed because he had been engaging in political speech rather than issuing a threat.[75] Suppose, however, that he had not been engaging in political speech. Suppose further that he had not been joking. Even so, the message-to-like-minded-comrades-immunizes-threats view suggests that Watts's speech would have been protected, even if he had been threatening the President, as long as at the same time he had been communicating a message of solidarity to others. Needless to say, the *Watts* opinion nowhere suggests such a view.[76]

The *Black* plurality noted, "The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech."[77] Regrettably, the plurality did not explain whether core political speech could contain a true threat and, if so, whether such speech would nonetheless be immunized.[78] The plurality's failure to clarify that point rendered the decision rather opaque.[79]

After observing that "[b]urning a cross at a political rally would almost certainly be protected expression,"[80] the *Black* plurality failed to elaborate about why that was so.[81] Instead, the *Black* plurality cited to the concurrence in *R.A.V. v. City of St. Paul*,[82] written by Justice White. In a footnote in the *R.A.V.* concurrence, Justice White said the following:

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75. *See supra* notes 16–17 and accompanying text.

76. Instead, the Court was protecting speech in the "political arena." *See Watts*, 394 U.S. at 708.

77. *Black*, 538 U.S. at 365.

78. One commentator has discussed how courts have distinguished political speech from true threats. *See generally* P. Brooks Fuller, *The Angry Pamphleteer: True Threats, Political Speech, and Applying* Watts v. United States *in the Age of Twitter*, 21 COMM. L. & POL'Y 87 (2016).

79. Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1287–88 (2005). Stating:

> The simple fact is that we have no way of knowing exactly what *Black* portends for free speech because (to put the matter unkindly) Justice O'Connor's opinion in the cross burning case borders on the incoherent. The Court sends several different messages about free speech in *Black*, many of which contradict each other.

Id.

80. *Black*, 538 U.S. at 366 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 402 n.4 (1992) (White, J., concurring in judgment)).

81. *See* Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 364 (2011).

82. 505 U.S. 377 (1992).

> Burning a cross at a political rally would almost certainly be protected expression.[83] . . . [I]n such a context, the cross burning could not be characterized as a "direct personal insult or an invitation to exchange fisticuffs,"[84] to which the fighting words doctrine . . . applies.[85]

Regrettably, the *Black* plurality did not discuss what Justice White was arguing (and not arguing), but instead implied that his comment explained why a cross burning at a political rally would be protected regardless of when and where such a demonstration occurred.

Justice White's *R.A.V.* concurrence, cited with approval by the *Black* plurality, can only be understood in light of some of the other speech exceptions that fall outside of First Amendment protections. Justice White suggested that burning a cross would not constitute incitement under *Brandenburg v. Ohio,*[86] and would not constitute fighting words[87] because cross burning is not directed to a particular person.[88] But those points about other First Amendment exceptions are less relevant to what was at issue in *Black* than the Court implied, although the reason that those comments are not applicable is more easily understood when considered in light of the opinion impelling Justice White to write his concurrence.

B. Other First Amendment Exceptions

R.A.V. v. City of St. Paul[89] involved a cross burning in the yard of a Black family.[90] The alleged perpetrator was prosecuted under the St. Paul Bias-Motivated Crime Ordinance, which read:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[91]

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83. R.A.V. v. City of St. Paul, 505 U.S. 377, 402 n.4 (1992) (White, J., concurring in the judgment) (citing Brandenburg v. Ohio, 395 U.S. 444, 445 (1969)).

84. *R.A.V.*, 505 U.S. at 402 n.4 (White, J., concurring in the judgment) (citing Texas v. Johnson, 491 U.S. 397, 409 (1989)).

85. *R.A.V.*, 505 U.S. at 402 n.4 (White, J., concurring in the judgment).

86. 395 U.S. 444, 445 (1969). *See R.A.V.*, 505 U.S. at 402 n.4 (White, J., concurring in the judgment) (citing Brandenburg, 395 U.S. at 445). For further discussion of *Brandenburg*, see *infra* notes 184–211 and accompanying text.

87. *See* Chaplinsky v. N. H., 315 U.S. 568, 571–72 (1942) (upholding fighting words exception).

88. *R.A.V.*, 505 U.S. at 402 (White, J., concurring in the judgment) (citing Texas v. Johnson, 491 U.S. 397, 409 (1989)).

89. 505 U.S. 377 (1992).

90. *Id*. at 379.

91. *Id.* at 380 (citing St. Paul, Minn., Legislative Code § 292.02 (1990)).

The Court noted that the conduct at issue violated a number of laws,[92] but nonetheless held that the St. Paul ordinance under which the defendant had been charged violated First Amendment guarantees.[93] The statute could not pass constitutional muster, notwithstanding its having been construed by the Minnesota Supreme Court as targeting fighting words, i.e., "conduct that itself inflicts injury or tends to incite immediate violence."[94] When striking down the ordinance, the Court was not rejecting that fighting words fall outside of First Amendment protection; on the contrary, in *Chaplinsky v. New Hampshire*,[95] the United States Supreme Court had previously upheld the constitutionality of a state statute targeting fighting words.

A few points might be made about whether cross burnings can fit within the fighting words exception. Someone who wakes up in the morning to find the remains of a burned cross in his yard would more likely be terrified[96] than incited to immediately engage in fisticuffs with some unknown perpetrator who might have committed the attempt hours earlier.[97] The "tends to incite immediate violence"[98] prong would be unlikely to be met in the scenario at issue if only because there likely would have been no one present at whom to direct that violence. But then the *R.A.V.* cross burning would have constituted fighting words only if it had triggered the fighting words prong involving conduct "that itself inflicts injury."[99]

There is reason to believe that cross burning does not constitute fighting words under the inflict injury prong if only because the United States Supreme Court may well have excised the "inflicts injury component from the fighting words doctrine."[100] If so, then the Minnesota Supreme Court would have been mistaken to think that the conduct at

92. *Id*. at 379–80 ("[T]his conduct could have been punished under any of a number of laws.").

93. *ld*. at 381 ("[W[e nonetheless conclude that the ordinance is facially unconstitutional").

94. *Id.* at 380 (citing *In re Welfare of R.A.V.*, 464 N.W.2d at 510).

95. 315 U.S. 568 (1942).

96. Mark P. Strasser, *Those Are Fighting Words, Aren't They? On Adding Injury to Insult*, 71 CASE W. RES. L. REV. 249, 282 (2020) ("Waking to discover a burning cross in the yard would be terrifying.").

97. *Cf. id*. ("[T]here was no hint that any member of the family was even tempted to confront these perpetrators with violence.").

98. *R.A.V.*, 505 U.S. at 380 (citing *In re Welfare of R.A.V.*, 464 N.W.2d at 510).

99. *ld*.

100. Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's* R.A.V. *Decision*, 61 TENN. L. REV. 197, 208 (1993) ("[C]ommentators have concluded that the inflict[s] injury prong of *Chaplinsky* is no longer good law."); Ashley Barton, *Oh Snap!: Whether Snapchat Images Qualify As "Fighting Words" Under* Chaplinsky v. New Hampshire *and How to Address Americans' Evolving Means of Communication*, 52 WAKE FOREST L. REV. 1287, 1305 (2017) ("The Court perhaps let the inflict[s]-injury prong fall to the wayside."); Gregory Preves, *The Death Knell for Hate-Crime Laws? The Supreme Court Protects Unpopular Speech in* R.A.V. v. City of St. Paul, 24 LOY. U. CHI. L.J. 309, 315

issue could fall within the fighting words exception in that particular case.[101]

Suppose that the inflicts injury component of the fighting words doctrine has not been excised. The Minnesota Supreme Court's construction of the statute and its application to the conduct at issue might then be upheld,[102] assuming that the kind of terror a burning cross might engender is the kind of injury that would satisfy the injury component of the fighting words exception.[103] The *R.A.V.* Court nowhere rejected the "inflicts injury" component of the fighting words exception. Instead, it merely quoted the language and noted that it had come from *Chaplinsky v. New Hampshire*.[104] But after noting that the "inflicts injury" language had come from a previous opinion, the *R.A.V.* opinion became somewhat difficult to follow.

The *R.A.V.* Court did not say that the Minnesota Supreme Court had misconstrued or misapplied the fighting words doctrine but instead criticized the St. Paul ordinance because it had only criminalized fighting words that "that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[105] The ordinance had not criminalized the use of fighting words "in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality."[106] Such a criticism might seem rather persuasive if there were a requirement that ordinances forbid all insulting speech if forbidding any at all.

Yet, there is no constitutional requirement that either all or no offensive expressions be prohibited,[107] for example, a "State might choose

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(1993) ("[T]he personal injury prong of *Chaplinsky*, which never enjoyed strong support by the Court, is now essentially dead.").

101. A different analysis might be necessary if, for example, the homeowner discovered an individual in the act of attempting to burn a cross in the homeowner's yard. Some individuals might flee while others might be tempted to respond to such a threat with violence. *See* People v. Monroe, 474 P.3d 113, 117 (Col. App. 2017), *aff'd on other grounds*, 468 P.3d 1273 (discussing common responses to perceived threats).

102. *But see R.A.V.*, 505 U.S. at 413 (White, J., concurring in the judgment) ("The Minnesota Supreme Court erred in its application of the *Chaplinsky* fighting words test and consequently interpreted the St. Paul ordinance in a fashion that rendered the ordinance facially overbroad.").

103. *Cf. id*. at 414 (White, J., concurring in the judgment) ("The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.").

104. *Id*. at 380 ("[T]he modifying phrase 'arouses anger, alarm or resentment in others' limited the reach of the ordinance to conduct that amounts to 'fighting words,' *i.e.*, 'conduct that itself inflicts injury or tends to incite immediate violence . . .,' In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn.1991) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)), and therefore the ordinance reached only expression 'that the first amendment does not protect,' 464 N.W.2d, at 511.").

105. *Id*. at 391.

106. *Id*.

107. *See id*. at 401 (citing *R.A.V.*, 505 U.S. at 384) (White, J., concurring in the judgment) ("Should the government want to criminalize certain fighting words, the Court

to prohibit only that obscenity which is the most patently offensive in its prurience."[108] But if there is no such requirement, then a state entity like St. Paul might decide to distinguish among expressions and choose to prohibit particular kinds of speech (such as cross burnings) precisely because of the extreme injury such speech might cause (absolute terror) to those at whom the speech had been directed.[109]

The *R.A.V.* Court also noted that "[a]nother valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech."[110] Then the question becomes which secondary effects qualify. For example, burning a cross in someone's yard might cause terror not only in that family but also in other minority families who also might feel targeted.[111] Thus, there is yet another reason to think that this kind of speech imposed special harms, justifying the imposition of penalties on this speech in particular.[112]

The *R.A.V.* Court reasoned that the statute "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses."[113] Yet, it is not as if the only fighting words prohibited under any Minnesota law were those that focused on the basis of race, color, creed, religion or gender. On the contrary, other fighting words were also prohibited under a different Minnesota law.[114] Indeed, the *R.A.V.*

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now requires it to criminalize all fighting words. To borrow a phrase: 'Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.'").

108. *Id*. at 388.

109. Strasser, *supra* note 96, at 282 ("[O]ne would have thought that St. Paul might have thought these fighting words especially important to proscribe, which presumably would mean that the announced exception had been met in this case.").

110. *R.A.V.*, 505 U.S. at 389.

111. *Cf. Black*, 538 U.S. at 389 (Thomas, J., dissenting) (discussing "cross burning—'a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan.'") (citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (Thomas, J., concurring)); Wisconsin v. Mitchell, 508 U.S. 476, 487–88 (1993) ("[T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm.").

112. *Cf. R.A.V.*, 505 U.S. at 407 (White, J., concurring in the judgment) ("This selective regulation reflects the city's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words.").

113. *Id*. at 381.

114. *See* MINN. STAT. ANN. § 609.72 (1) (West). Stating:

> Whoever does any of the following in a public or private place, including on a school bus, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: (1) engages in brawling or fighting; or (2) disturbs an assembly or meeting, not unlawful in its character; or (3) engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Id.

Court expressly noted that the conduct at issue violated other laws[115] so it is at best misleading to suggest that the statute prohibited otherwise permissible speech on the basis of the subjects it addressed.[116]

The speech was otherwise permissible only in the sense that this ordinance picked out certain speech for additional punishment and speech not falling into the specified category was permissible as far as this particular ordinance was concerned. But the same point could be made of any limitation in any statute or ordinance, i.e., that whatever did not fall within the specified prohibited category would be permissible as far as that particular statute or ordinance was concerned, even though there might have been other statutes or ordinances prohibiting the "permissible" activity.

The *R.A.V.* Court could have offered a variety of analyses that might have justified striking the conviction in this case. For example, the Court might have argued that fighting words must be those that have a tendency to incite immediate violence and that the cross-burning in this case did not meet that standard.[117] Or, the Court might have explained that although the inflicts injury prong may sometimes be the basis for classifying expression as fighting words, the kind of injury in this case did not meet that test (for whatever reason). Instead, the Court offered an analysis that seemed to fail in light of the very exceptions included within that analysis.[118]

The Court's rationale was not a model of clarity,[119] and Justice White in his concurrence was trying to explain how and why the Court could have reached the same result[120] without "cast[ing] aside long-established First Amendment doctrine."[121] When offering his explanation, Justice White was attempting to accomplish two different goals. He was offering an explanation of why the statute at issue was

115. *R.A.V.*, 505 U.S. at 379–80 ("[T]his conduct could have been punished under any of a number of laws.").

116. Strasser, *supra* note 96, at 281 ("[I]t is at best misleading to suggest that these other expressions were 'otherwise permitted,' because there was another Minnesota statute prohibiting speech that constituted fighting words.").

117. *See supra* notes 96–99 and accompanying text (discussing why the immediate violence prong might be thought not to have been triggered in this case).

118. *See supra* notes 106–13 and accompanying text.

119. W. Wat Hopkins, *Cross Burning Revisited: What the Supreme Court Should Have Done in Virginia v. Black and Why It Didn't*, 26 HASTINGS COMM. & ENT. L.J. 269, 270 (2004) ("The Court's holding in *R.A.V. v. St Paul* has been demonstrated by both the literature and the case law to be anything but clear-cut.").

120. *See R.A.V.*, 505 U.S. at 397 (White, J., concurring in the judgment) ("This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment.").

121. *Id*. at 398.

overbroad,[122] and he was attempting to distinguish the speech in this case from other kinds of speech that had protection under the First Amendment. Justice White made clear that this "expression[] of violence, . . . [this] message of intimidation and racial hatred conveyed by burning a cross on someone's lawn"[123] did not have "sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment."[124]

Justice White contrasted burning a cross in someone's yard with burning a cross at a political rally, suggesting that the latter would not be thought directed at a particular person and hence would not constitute fighting words.[125] He reasoned in addition that burning a cross at a political rally would not constitute incitement, because doing so had not constituted incitement in *Brandenburg v. Ohio*.[126]

In his *R.A.V.* concurrence, Justice White did not discuss whether a cross burning could constitute a true threat,[127] although he did suggest that burning a cross in someone's yard constituted fighting words.[128] and that the conviction was struck down because the St. Paul ordinance was overbroad[129] rather than because the cross burning itself constituted protected expression. Further, Justice White criticized the *R.A.V.* opinion because it wrongly implied that the cross burning was itself protected political speech.[130]

Justice White's comments about the cross burning at a political rally have to be understood in the context in which they were made. He was contrasting what had happened in St. Paul where a cross burning occurred in an unwilling victim's yard and so clearly targeted that

122. *Id*. at 397 (White, J., concurring in the judgment) ("[T]the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment.").

123. *Id*. at 402 (White, J., concurring in the judgment).

124. *Id*. (White, J., concurring in the judgment).

125. *Id*. (White, J., concurring in the judgment).

126. *See id.* at 402 n.4 (White, J., concurring in the judgment) (citing Brandenburg v. Ohio, 395 U.S. 444, 445 (1969)). For further discussion of *Brandenburg*, *see infra* notes 186–218 and accompanying text.

127. Justice White did discuss threats against the President. *See id*. at 407–08 (White. J., concurring in the judgment). However, his focus was on why the majority's rationale would seem to make a statute criminalizing such threats unconstitutional, *see id*., rather than on the conditions under which a cross burning might constitute a true threat.

128. *See id.* at 402 (White, J., concurring in the judgment) ("[B]y characterizing fighting words as a form of 'debate,' the majority legitimates hate speech as a form of public discussion.") (internal citation omitted).

129. *Id*. at 397 (White, J., concurring in the judgment) ("[T]he St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment.").

130. *Id*. at 402 (White, J., concurring in the judgment) ("[B]y characterizing fighting words as a form of 'debate,' the majority legitimates hate speech as a form of public discussion.") (internal citation omitted).

family, with a cross burning at a rally where no particular person was being targeted.[131]

At least a few points might be made about the use of Justice White's *R.A.V.* concurrence to establish that a cross burning at a rally cannot constitute a true threat. First, as a general matter, merely because an expressive activity does not fall under a particular First Amendment exception does not establish that the activity is constitutionally protected—the expressive activity might fall under a different exception. For example, a particular expression might not constitute obscenity[132] but might nonetheless fall into the fighting words exception.[133] This is so because the criteria for obscenity differ from the criteria for fighting words. So, too, the criteria for incitement and fighting words differ from each other and from the criteria for true threats, so an expression not qualifying as incitement or fighting words might nonetheless constitute a true threat. The *Black* Court's suggestion that a cross burning at a rally was almost certainly constitutionally protected[134]—because it did not constitute fighting words or incitement—was surprising because there are other First Amendment exceptions, including true threats, under which the cross burning might have fallen.[135]

An additional point might be made about Justice White's announcement that a burning cross at a rally does not constitute fighting words. He presumably had in mind the cross burning at issue in *Brandenburg*, where the only individuals present were the Klan members themselves and the newsmen invited to the event.[136] Perhaps[137] in that case the burning would not constitute fighting words because the invited newsmen would allegedly feel that it was not directed at

131. *Cf.* Cohen v. Cal., 403 U.S. 15, 20 (1971) ("No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.").

132. Miller v. Cal., 413 U.S. 15, 24 (1973) ("The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, [408 U.S. 229, 230 (1972)], quoting Roth v. United States, [354 U.S. 476, 489 (1957)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

133. *Chaplinsky*, 315 U.S. at 572 (discussing "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

134. *Black*, 538 U.S. at 366 (citing *R.A.V.*, 505 U.S. at 402, n. 4 (White, J., concurring in judgment)).

135. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (collecting cases demonstrating unprotected speech).

136. *Brandenburg*, 395 U.S. at 445–46 ("No one was present other than the participants and the newsmen who made the film.").

137. *But see infra* note 139 and accompanying text.

them[138] and the other individuals present were Klan members.[139] But a separate question is whether anything expressed at a political rally is protected regardless of content and regardless of where and when the rally takes place.

When suggesting that a cross burning at a rally would almost certainly be protected, the *Black* plurality did not explain whether the speech would be protected precisely because it was at a political rally.[140] Nor was there any explanation about why the plurality was almost (rather than quite) certain that such expression was protected. For example, the plurality might have had in mind a cross burning that was only viewed by those sympathetic to the message[141]—the plurality might have believed that in such a case the cross burning would carry no intimidating message. But an example in which the cross burning is viewed as political speech rather than intimidation does not help determine the appropriate analysis when the cross burning qualifies as both political speech and intimidation.

The *Black* plurality implied that the two cross burnings at issue before it were easily distinguishable. One occurred in an open field with the permission of the property owner[142] while the other occurred in the yard of an unwilling target.[143] The plurality implied that the cross burning in the open field was directed only at like-minded individuals, whereas the cross burning in the yard was directed at an unwilling victim.[144] But by only focussing on cross burnings that carry no

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138. How the newsmen felt might depend upon whether they were members of the targeted groups—Blacks or Jews. *See Brandenburg*, 395 U.S. at 446.

139. *See supra* note 137.

140. *Black*, 538 U.S. at 366; *but cf. Rogers*, 422 U.S. at 44, (Marshall, J., concurring) ("Although the petitioner in the present case was not at a political rally or engaged in formal political discussion, the same concern counsels against permitting the statute such a broad construction that there is a substantial risk of conviction for a merely crude or careless expression of political enmity.").

141. *Cf. Brandenburg*, 395 U.S. at 445–46 ("They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film."). *Brandenburg* involved incitement rather than true threats and there was no discussion of whether the news people themselves felt threatened. Instead, the Court focused on the difference between advocacy and incitement to imminent lawless action. *See id*. at 448–49.

142. *Black*, 538 U.S. at 348.

143. *Id.* at 350. Stating:

> [A]s Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was 'very nervous' because he 'didn't know what would be the next phase,' and because 'a cross burned in your yard . . . tells you that it's just the first round.'

Id.

144. *See id.* at 366 ("It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers.").

intimidating message versus cross burnings that only carry an intimidating message,[145] the plurality failed to consider much less discuss explain whether the Constitution protects statements that are intended to convey nonintimidating messages to like-minded individuals and intimidating messages to individuals who are not like-minded.

Suppose, for example, that there had been a cross burning with permission on the land of Jubilee's neighbor. Twenty-five to thirty like-minded people might have been attending the rally.[146] Jubilee and his family could not have failed to notice the cross burning on the neighbor's property. In this kind of case, both audiences (the attendees on the one hand and the Jubilees on the other) would receive distinct messages. The question at hand would be whether this cross burning would be protected because communicating a welcome message to those attending or unprotected because communicating a threat to the Jubilees.

Ku Klux Klan rallies send multiple messages to various groups.[147] While those attending such a meeting might not find the message intimidating at all, others who see a burning cross may feel quite intimidated.[148] Those who witness a cross burning while driving by[149] might have very different reactions depending upon their particular sympathies.[150]

The *Black* plurality distinguished between cross burnings that are only intimidating and cross burnings that only communicate a message of solidarity.[151] But as the hypothetical involving a cross burning on Jubilee's neighbor's lawn illustrates, some messages are clearly intimidating to those who are targeted while at the same time communicating a message of solidarity to others. In addition, some

145. *Id*. at 347.

146. *See id*. at 348 ("Twenty-five to thirty people attended this gathering.").

147. The point here is not merely that during a political rally there might be speech at one point in time that is constitutionally protected and speech at a different point in time that is a threat and hence unprotected. *See Elonis*, 575 U.S. at 746 (Alito J., concurring in part and dissenting in part) ("It is true that a communication containing a threat may include other statements that have value and are entitled to protection."). Rather, the point here is that one statement might have multiple meanings, where one meaning is constitutionally protected but a different meaning is not.

148. *Black*, 538 U.S. at 349 ("Sechrist testified that this language made her 'very . . . scared.'").

149. *See id*. at 348 ("During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a 'few' of which stopped to ask the sheriff what was happening on the property."). *See also* Roger C. Hartley, *Cross Burning-Hate Speech As Free Speech: A Comment on Virginia v. Black*, 54 CATH U. L. REV. 1, 40 (2004) (noting that Black motorists who saw the burning cross left the area at an increased rate of speed).

150. *See* Hartley, *supra* note 149, at 39 (noting the argument by the state of Virginia that a more secluded area for the cross burning was available so the choice of this spot provided some evidence of an intention or willingness to communicate with passing motorists in addition to those attending the rally).

151. *See supra* note 147 and accompanying text.

individuals who are not being targeted might nonetheless be fearful or intimidated because of what would happen to others rather than to themselves.[152] The *Black* plurality suggested that the Ku Klux Klan cross burning was protected even though an observer in fact was frightened,[153] which makes the plurality's analysis even more surprising because the message was not only being communicated to like-minded individuals.

There was no suggestion in the *Black* opinion that the frightened observer was overly sensitive.[154] Further, the state of Virginia had understood that sometimes when individuals are fearful of bodily harm, that fear arises "from some mere temperamental timidity of the victim"[155] rather than "from the willful conduct of the accused."[156] In those kinds of cases, the accused's conduct would not constitute a true threat under Virginia law.[157]

It would be surprising if a statement could only count as a true threat if someone in fact had the requisite negative reaction. In *Watts*, there was no discussion of the President (or anyone else) in fact feeling frightened,[158] and if that had been a necessary element of the offense one might have expected that to be mentioned somewhere in the circuit court opinion upholding the conviction.[159] *Watts* did not even include a requirement that the President have heard the threat,[160] much less that he be frightened by it.[161]

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152. *Black*, 538 U.S. at 348 ("Rebecca Sechrist, who was related to the owner of the property where the rally took place, 'sat and watched to see wha[t] [was] going on' from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself."). The opinion did not discuss whether Sechrist had reason to fear for her own safety, although the opinion makes quite clear that she reacted very negatively to what she witnessed. *See id.* at 349 ("Sechrist stated that the cross burning made her feel 'awful' and 'terrible.'").

153. *See id*. at 349.

154. The Court noted without comment that Sechrist had testified that she was very scared. *See id*.

155. *Id*.

156. *Id*.

157. *See id*.

158. See generally, Watts v. United States, 394 U.S. 705 (1969).

159. *See* Watts v. United States, 402 F.2d 676 (D.C. Cir. 1968), *rev'd*, 394 U.S. 705 (1969).

160. *Counterman*, 600 U.S. at 85 (2023) (Sotomayor, J., concurring in part and concurring in the judgment) ("True-threats doctrine covers content-based prosecutions for single utterances of 'pure speech,' which need not even be communicated to the subject of the threat.") (citing *Watts*, 394 U.S. at 707).

161. *But cf*. United States v. Patillo, 431 F.2d 293, 297–98 (4th Cir. 1970), *adhered to*, 438 F.2d 13 (4th Cir. 1971) ("We hold that where, as in Patillo's case, a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President.").

Some statements are ambiguous[162] and might reasonably be interpreted by some (in an allegedly targeted group) as threatening and by others (in that same group) as non-threatening. Some commentators suggest that a statement reasonably interpreted as non-threatening by some group members is protected even if that statement might also be reasonably interpreted as threatening by other group members.[163] Yet, such a policy would undermine the goals behind prohibiting such threats. The *Black* plurality explained that "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[164]

True threats are not protected by the First Amendment,[165] so it is important to know which expressions might be so classified. The *Black* plurality offered a definition of "true threats": "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[166] That definition itself requires explication. A speaker who purposely communicates an intent to commit a violent act does not in addition have to intend to carry out the threat.[167] It is enough that the speaker intends to make "the victim in fear of bodily harm or death,"[168] even if the speaker has no intention of engaging in physical violence.

There is nothing in the *Black* definition of true threat which says implicitly or explicitly that true threats cannot occur at political rallies. Consider the statements at issue in *Watts*. When arguing that Watts's statement should not be taken to constitute a threat against L.B.J., Watts's counsel did not rely solely on where the statement was made but also offered other reasons that the statement could not credibly be thought a threat.[169] That said, however, the *Watts* Court did not specify whether one particular factor or all of the factors together established that Watts had engaged in political hyperbole rather than

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162. Benjamin Paul Bennett, *Thick Enough to Stop A Bullet: Civil Protection Orders, Social Media, and Free Speech*, 50 COLUM. HUM. RTS. L. REV. 228, 243 (2019) ("[O]rdinary people have an unprecedented ability to reach other people with ambiguous messages.").

163. *See* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 596 (2000) ("[T]he First Amendment should still require that the speech be such that no reasonable person having all the relevant information would fail to understand that a direct and immediate threat has been communicated. All ambiguities should be resolved in favor of the speaker.").

164. *Black*, 538 U.S. at 360 (citing *R.A.V.*, 505 U.S. at 388).

165. *Id*. at 359 (citing *Watts*, 394 U.S. at 708) ("[T]he First Amendment also permits a State to ban a 'true threat.'").

166. *Id*.

167. *Id*. at 359–60 ("The speaker need not actually intend to carry out the threat.").

168. *Id*. at 360.

169. *See supra* notes 16–17 and accompanying text.

a true threat,[170] so it simply is not clear which part of Watts's counsel's argument was embraced or adopted by the Court.

In several true threat opinions, various Court members have expressed their desire to protect political speech even if "vituperative, abusive, and inexact."[171] Yet, there is a difference between abusive statements and statements that threaten physical violence,[172] and the latter are not protected.[173] Merely because a statement occurs at a political rally does not immunize the statement from punishment, as is illustrated by the Court's treatment of incitement.[174]

Consider, for example, *Debs v. United States*.[175] At issue was the conviction of Eugene Debs for having attempted "to obstruct the recruiting service of the United States."[176] The Court focused on Debs's statement to a convention crowd[177] that "you need to know that you are fit for something better than slavery and cannon fodder"[178] and his "final exhortation, 'Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves.'"[179] Reasoning that Debs's opposition to World War I "was so expressed that its natural and intended effect would be to obstruct recruiting,"[180] the Court upheld Debs's conviction,[181] even though Debs's speech likely constituted political speech rather than the type of speech subject to

170. *See Watts*, 394 U.S. at 708.

171. *Id.* (citing Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58 (1966)). *See also Counterman*, 600 U.S. at 99 (2023) (Sotomayor, J., concurring in part and concurring in the judgment) (discussing "a troubling [true threat] standard for juries in a polarized nation to apply in cases involving heated political speech"); *Black*, 538 U.S. at 365 ("The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech."); *Rogers*, 422 U.S. at 44 (Marshall, J., concurring) ("Although the petitioner in the present case was not at a political rally or engaged in formal political discussion, the same concern counsels against permitting the statute such a broad construction that there is a substantial risk of conviction for a merely crude or careless expression of political enmity.").

172. *See Elonis*, 575 U.S. at 751 (Thomas, J., dissenting) (distinguishing between abusive statements and statements that threaten physical violence).

173. Perez v. Fla., 580 U.S. 1187–88 (2017) (Sotomayor, J., concurring) ("The First Amendment's protection of speech and expression does not extend to threats of physical violence.").

174. The Court has suggested that the test for incitement is more stringent than the test for true threats. *See Counterman*, 600 U.S. at 81.

175. 249 U.S. 211 (1919).

176. Debs v. United States, 249 U.S. 211, 216 (1919).

177. Andrew Green, *Silence in the Courtroom*, 24 LAW & LITERATURE 80, 90 (2012) ("On June 16, 1918, in Canton, Ohio, Debs addressed a crowd of over a thousand people at the Ohio State Socialist convention.").

178. *Debs*, 249 U.S. at 214.

179. *Id*.

180. *Id*. at 215.

181. *Id*. at 216 ("[W]e are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained.").

punishment.[182] *Debs* might be contrasted with *Brandenburg v. Ohio*,[183] where the Court adopted a test that was highly protective of speech.[184] At issue was a conviction under the Ohio Criminal Syndicalism Act[185] for advocating "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[186] Clarence Brandenburg had invited a Cincinnati television reporter to a Ku Klux Klan rally on a farm.[187] The reporter and a cameraman had recorded the events there.[188] No one was present other than the participants and the reporter and cameraman.[189]

The films, later broadcast on local and national television,[190] showed a burning cross accompanied by some discernible derogatory comments about Blacks and Jews.[191] In addition, the appellant in Ku Klux Klan regalia had reportedly said, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues

182. *See* Lauren E. Beausoleil, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in A Social Media World*, 60 B.C. L. REV. 2101, 2116–17 (2019) (noting that the Court upheld the Debs conviction after he engaged "in political speech that criticized the war effort"); Thomas E. Crocco, *Inciting Terrorism on the Internet: An Application of* Brandenburg *to Terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451, 463 (2004) (noting that Debs was convicted "for making what would certainly be considered today nothing more than a political speech"); Paul Horwitz, *Free Speech As Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 31 (2003) (noting that "in *Debs*, . . . the Court upheld the conviction of a major public figure and perennial fringe presidential candidate for fairly commonplace Socialist political speech"). Robert Post, *Writing the Dissent in* Abrams, 51 SETON HALL L. REV. 21, 21 (2020) (discussing "*Debs v. United States*, in which Holmes upheld the conviction under the Espionage Act of 1917 of a prominent socialist leader for what amounted to a political speech opposing American participation in the war"). *Cf. Counterman*, 600 U.S. at 81 ("[I]ncitement to disorder is commonly a hair's-breadth away from political 'advocacy.'").

183. 395 U.S. 444 (1969).

184. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975) ("*Brandenburg* is the most speech-protective standard yet evolved by the Supreme Court.") Susan M. Gilles, Brandenburg v. State of Ohio*: An "Accidental," "Too Easy," and "Incomplete" Landmark Case*, 38 CAP. U. L. REV. 517, 522 (2010) ("*Brandenburg* is famous for the test it created-one remarkably protective of speech."); Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379 (2017) ("[T]he Court in *Brandenburg v. Ohio* established a strongly speech-protective orientation.").

185. *Brandenburg*, 395 U.S. at 444 ("The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute.").

186. *Id*. at 444–45.

187. *Id*. at 445.

188. *Id*.

189. *Id*. at 445–46 ("No one was present other than the participants and the newsmen who made the film.").

190. *Id*. at 445 ("Portions of the films were later broadcast on the local station and on a national network.").

191. *Id*. at 446 ("Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.").

to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[192]

A few points might be made about the *Brandenburg* holding that struck down the incitement conviction. The *Brandenburg* Court adopted a stringent test for incitement:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[193]

But that stringent test does not entail that the First Amendment precludes prosecution of any and all speech acts unless intended and likely to cause imminent lawless action. For example, one would not be immunized from prosecution for revealing state secrets at a rally merely because the revelation was not intended or likely to cause imminent lawless action.[194]

Ironically, *Watts* was handed down on April 21, 1969,[195] and *Brandenburg* was handed down on June 9, 1969,[196] less than two months later.[197] *Brandenburg* includes no reference to *Watts*,[198] presumably

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192. *Id*.

193. *Id*. at 447.

194. *Cf*. United States v. Abu-Jihaad, 630 F.3d 102, 108 (2d Cir. 2010) (upholding conviction for "having communicated national defense information, specifically, the anticipated movements of a United States Navy battlegroup being deployed to the Persian Gulf, to unauthorized persons").

195. *Watts*, 394 U.S. at 705.

196. *Brandenburg*, 395 U.S. at 444.

197. Strasser, *supra* note 81, at 343 ("Ironically, the Court had recently articulated some aspects of its threatening language jurisprudence, having decided a case dealing with an alleged threat against President Lyndon B. Johnson only a few months before *Brandenburg* was handed down."); Alex J. Berkman, *Speech As A Weapon:* Planned Parenthood v. American Coalition of Life Activists *and the Need for A Reasonable Listener Standard*, 29 TOURO L. REV 485, 494 (2013) ("In April and June of 1969, the Supreme Court decided *Watts v. United States* and *Brandenburg v. Ohio*, respectively."); *see also* Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 1004 (2008) ("Justice Fortas' draft opinion in *Brandenburg* was circulated to the other Justices on April 21, 1969, the same day the Court decided *Watts v. United States*."); Lori Weiss, *Is the True Threats Doctrine Threatening the First Amendment?* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists *Signals the Need to Remedy an Inadequate Doctrine*, 72 FORDHAM L. REV. 1283, 1311 (2004) ("The pivotal *Brandenburg* decision was handed down in the wake of *Watts v. United States*, which remains the leading case governing true threats jurisprudence.").

198. Some commentators have noted that *Watts* contains no reference to *Brandenburg*. *See* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 19 (1994) ("The five-member majority in *Watts* rendered its decision per curiam, before *Brandenburg* was decided; therefore, the *Brandenburg* test is not mentioned in the opinion."). Here, though, the point is that having decided *Watts* a mere six weeks earlier than *Brandenburg*, *see* Christi Cassel, *Keep Out of Myspace!: Protecting Students from Unconstitutional*

because the case involved incitement rather than a true threat.[199] Brandenburg had been convicted under the Ohio Criminal Syndicalism Act, which failed to distinguish between "mere advocacy" and "incitement to imminent lawless action."[200]

Yet, *Brandenburg* also involved a threat against the President,[201] and there is no indication in the opinion that anyone thought this was a joke or political hyperbole.[202] Perhaps the speech at issue in *Brandenburg* would not have been thought a threat because the statement would instead have been thought bravado or exaggeration.[203] Yet, the facts of *Brandenburg* do not contain the kind of reaction mentioned in *Watts* (which was laughter) to undercut the seriousness of what was said. Perhaps the Court did not address true threats because the defendant had been charged with engaging in illegal advocacy rather than with having made a threat.[204] Nonetheless, considering that a true threat conviction of Clarence Brandenburg might well have been sustained, it is at the very least ironic that *Brandenburg* is cited to support constitutional protection for cross burnings at rallies, even where threatening.[205]

Suspensions and Expulsions, 49 WM. & MARY L. REV. 643, 671 (2007), one might have expected a citation, especially because both involved threats against the President.

199. *See Brandenburg*, 395 U.S. at 447.

200. *Id*. at 449.

201. *Id*. at 446.

202. *Watts*, 394 U.S. at 708.

203. *Cf.* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 829 (1999) ("Protected public debate, then, excludes neither profanity, nor exaggeration, nor heterodoxy.").

204. *See Brandenburg*, 395 U.S. at 444–45. Stating:

> The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for 'advocating . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

(cleaned up) (quoting Ohio Rev. Code Ann. 2923.13); *see also* United States v. Nieves, 2019 WL 1315940, at *5 n.2 (S.D.N.Y. Mar. 22, 2019) ("Whether Brandenburg's speech was a 'true threat' was not at issue.").

205. *See* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 1070 (2002) ("[T]he Brandenburg test offers strong support for—if it does not demand—the adoption of Marshall's and our proposed approach that requires a subjective element (intent) in the analysis of 'true threats.'"); Randall D. Nicholson, *Sticks and Stones May Break Your Bones . . . but Words May Break the Bank: Monetary Damages for "True Threats" and the Future of Free Speech After* Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists, 33 GOLDEN GATE U. L. REV. 1, 18 (2003) (suggesting that *Brandenburg* modifies *Watts*). *See also* Gey, *supra* note 163, at 594–95 (recommending applying *Brandenburg* to true threat analysis with a special modification for privately communicated statements). Some argue that Professor Gey does not go far enough. *See* Matthew G. T. Martin, *True Threats, Militant Activists, and the First Amendment*, 82 N.C. L. REV. 280, 308 (2003) (discussing "Professor Gey's failure to adequately protect the constitutional value of threats"). Other commentators have suggested that incitement and true threats

The language used at the rally suggested threats against the President and the members of the Supreme Court,[206] as well as threats again Jews, and against Blacks.[207] The Court merely characterized the comments as "derogatory,"[208] but the comments were not only casting aspersions[209] but, in addition, advocating and threatening death and burial.[210]

Categorization is important in First Amendment analysis,[211] which make commentators' discussions of *Brandenburg* and its implications for true threat analysis somewhat surprising. For example, some suggest that the *Brandenburg* imminence requirement should also be applied in the true threat context.[212] Yet, this is simply not supportable as a matter of interpretation or good public policy. When Justice Marshall was criticizing the "objective" approach to true threats,[213] he was not insisting that an individual making a true threat must intend to carry out that threat,[214] much less that the individual intended to carry it out imminently.

The Court applied *Brandenburg* in *Hess v. Indiana*.[215] At issue was a statement made by Hess during an anti-war demonstration at Indiana University.[216] A crowd was blocking a street and the police

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should be governed by the same standard, although not endorsing the very protective standard that *Brandenburg* currently employs. *See* Marc Rohr, *"Threatening" Speech: The Thin Line Between Implicit Threats, Solicitation, and Advocacy of Crime*, 13 RUTGERS J. L. & PUB. POL'Y 150, 151 (2015).

206. *Brandenburg*, 295 U.S. at 446 ("We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.").

207. *Id.* at n.1.

208. *Id*.

209. *See id*.

210. *Id.* at n.1.

211. Robert Post, *NIFLA and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1091 (2022) ("Many of the hottest debates in First Amendment jurisprudence can best be understood as controversies about the categorization of speech acts.").

212. Gey, *supra* note 79, at 1373 ("There is no good reason why these principles should not also apply to the various categories of speech that have recently been devised by the courts and are currently being used to circumvent *Brandenburg*."); *id*. at 1349 ("If the First Amendment is to remain meaningful in emotional debates, the only manifestation of fear that should be relevant to the application of the 'true threats' analysis is the personalized and immediate fear of a person who is singled out and told in no uncertain terms that he or she is specifically targeted for attack.").

213. For a discussion of Justice Marshall's comments, see *supra* notes 37–50 and accompanying text.

214. *Rogers*, 422 U.S. at 46–47 (Marshall, J., concurring).

215. *See* Hess v. Ind., 414 U.S. 105, 108 (1973) ("This is not sufficient to permit the State to punish Hess' speech. Under our decisions, 'the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'") (citing *Brandenburg*, 395 U.S. at 447).

216. *See id*. at 106.

were trying to clear it.[217] As the police moved along the street, the protesters moved to the sidewalk.[218] The Sheriff heard Hess say something, which was later determined to be, "We'll take the fucking street later" or "We'll take the fucking street again."[219] Those hearing the words did not think that Hess was exhorting the crowd to return to the street.[220] Further, they did not believe that he was addressing anyone in particular and he was not speaking any louder than others who were speaking.[221]

The *Hess* Court rejected that Hess could be prosecuted for his statement, citing *Brandenburg* for the proposition that advocacy cannot be criminalized "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[222] The *Hess* Court was not confident that the statement should be taken as incitement or a threat, instead suggesting that it might be thought a plea for moderation[223] or, at worst, "advocacy of illegal action at some indefinite future time."[224]

Just as *Brandenburg* was thought to help the defendant in *Hess*, it was also thought to help the defendant in *NAACP v. Claiborne Hardware Company*.[225] The case arose as a result of a boycott of white businesses that had been organized by the NAACP.[226] The businesses sued for lost profits.[227] The Mississippi Supreme Court upheld the imposition of liability, reasoning that because threats had been used to incentivize picketing the white businesses, the expression at issue when engaging in the boycott was not constitutionally protected.[228] When reversing the Mississippi Supreme Court opinion, the United States

217. *Id*. ("In the course of the demonstration, approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street.").

218. *Id*. ("[T]he demonstrators in their path moved to the curbs on either side, joining a large number of spectators who had gathered.").

219. *Id*. at 107.

220. *Id*.

221. *Id*. ("[H]is tone, although loud, was no louder than that of the other people in the area.").

222. *Id*. at 108 (citing *Brandenburg*, 395 U.S. at 447).

223. *Id*. ("[T]he statement could be taken as counsel for present moderation.").

224. *Id*.

225. *See* N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 927–28 (1982) (discussing *Brandenburg*).

226. *Id*. at 888 ("The boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty.").

227. *Id*. at 889 ("On October 31, 1969, several of the merchants filed suit in state court to recover losses caused by the boycott and to enjoin future boycott activity.").

228. *Id*. at 896 ("[T]hat court affirmed petitioners' liability for damages on the ground that each of the petitioners had agreed to effectuate the boycott through force, violence, and threats.").

Supreme Court noted that "[t]he boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation . . . included elements of criminality and elements of majesty."[229]

Basically, individuals were induced to participate in the boycott in different ways. For example, those supporting the boycott "sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism."[230] These forms of persuasion are protected by the First Amendment.[231] However, individuals were also threatened with violence if they did not participate in the boycott,[232] and the First Amendment does not protect threats of violence.[233]

Liability could not be imposed if individuals participated in the boycott as a result of hearing persuasive protected speech rather than the threats of violence.[234] The Court seemed convinced that much of the boycott could not be attributed to the unprotected threats.[235] For example, the Court noted that some of the threats did not achieve their aims in that some individuals subject to retribution for failing to observe the boycott nonetheless continued to patronize the businesses at issue.[236] The Court also noted that more people participated in the boycott "after the shootings of Martin Luther King, Jr., in 1968 [and] Roosevelt Jackson in 1969,"[237] which suggested that the boycott participation was motivated by something other than the violent threats.[238]

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229. *Id*. at 888.

230. *Id*. at 909–10.

231. *Id*. at 910 ("Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.").

232. *Id*. at 902 ("[T]he chancellor found that Evers stated: 'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'").

233. *Id.* at 916 ("The First Amendment does not protect violence."). Justice Sotomayor implied that the *Claiborne Hardware* Court believed the speech protected rather than that the unprotected speech was not shown to have caused all of the economic losses brought about by the boycott. *See Counterman*, 600 U.S. at 99 (Sotomayor, J., concurring in part and concurring in the judgment) ("Under a recklessness rule, *Claiborne Hardware* would have come out the other way."). *See also* Joshua Spector, *Spreading Angst or Promoting Free Expression? Regulating Hate Speech on the Internet*, 10 MIAMI INT'L & COMP. L. REV. 155, 172 (2002) ("The U.S. Supreme Court found that Evers' words, despite being an express call for violence, were quintessentially political statements made at a public rally (rather than direct threats to certain persons).").

234. *Claiborne Hardware*, 458 U.S. at 918 ("While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity.").

235. *Id*. at 922 ("The record in this case demonstrates that all of respondents' losses were not proximately caused by violence or threats of violence.").

236. *Id*. at 904 ("None of these four victims, however, ceased trading with white merchants.").

237. *Id*. at 906.

238. *Id*. at 922–23 ("[T]he fact that the boycott 'intensified' following the shootings of Martin Luther King, Jr., and Roosevelt Jackson demonstrates that factors other than force and violence (by the petitioners) figured prominently in the boycott's success.").

Claiborne Hardware did not suggest that the threats of physical harm against individuals were themselves protected by the Constitution but merely that there had to be "a careful limitation on damages liability,"[239] so that the liability was based on unprotected rather than on protected speech. But the "opinion of the Mississippi Supreme Court itself demonstrate[d] that all business losses were not proximately caused by the violence and threats of violence found to be present."[240] The Mississippi Supreme Court attributed all of the losses to isolated incidents of violence and none of the losses to political aims and goals,[241] and such an analysis simply could not stand.[242]

In *Claiborne Hardware*, *Hess*, *Brandenburg*, and many other cases, the Court has tried to protect political speech. But the Court has also recognized that threats of violence are not protected. The difficulty posed in the *Black* opinion was that the Court seemed to ignore that threats might be made at political gatherings against individuals or groups and thus the Court felt no need to discuss what to do when that occurs. But the failure to address the issue does not mean that such threats do not occur during such meetings, and the Court has simply failed to offer any analysis with respect to whether such threats are constitutionally protected.

The *Black* plurality may not have wished to broach the possibility of threats during political meetings[243] because it would then be forced to discuss the conditions under which cross burnings constitute threats. If indeed "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,"[244] then the question would be whether burning a cross at a political meeting would reasonably be construed as a threat of violence by a member of a group traditionally targeted by the Ku Klux Klan. If a reasonable person traditionally targeted by the Ku Klux Klan would feel threatened by a burning cross[245] and the Court

239. *Id*. at 918; *see also id*. at 921 ("The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the 'precision of regulation' demanded by that constitutional provision.").

240. *Id*. at 921.

241. *Id*. at 924.

242. *Id*.

243. *Cf*. Elonis v. United States, 575 U.S. at 746 (Alito J., concurring in part and dissenting in part) ("It is true that a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself.").

244. *Black*, 538 U.S. at 359.

245. *Cf. id*. at 357 ("[W]hile a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.").

nonetheless believes that a cross burning at a rally does not constitute a punishable threat, then the Court must explain why. After all, it would still cause much fear and trepidation,[246] and might well result in people taking defensive measures such as fleeing.[247]

Perhaps the Court would suggest that to qualify as a true threat, the action at issue must not simply target Blacks or Jews generally but must specify with more particularity who is targeted. The Court might say that a generalized threat is not sufficiently "direct" to constitute a threat.[248] Yet, even if a cross burning in a field far from anyone would not be thought to constitute a threat, a cross burning in a neighborhood (even if not in the victim's yard) would seem sufficiently direct to constitute a threat.

There is no requirement that a threat target one person in particular. In *Claiborne Hardware*, the Court suggested that threats of violence against Blacks who did not participate in the boycott were sufficiently targeted that such statements were not protected by the First Amendment.[249] The Court has simply refrained from making clear the constitutional protections for public threats made in the political context, leaving lower courts to work this out for themselves.[250]

III. THE EVOLVING TRUE THREAT JURISPRUDENCE

The Court has recently addressed true threats in two different cases. Rather than refine the *Black* jurisprudence to make clear which statements reasonably perceived to be threats are nonetheless

246. *Elonis*, 575 U.S. at 746 (Alito J., concurring in part and dissenting in part) ("True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation.").

247. For example, an individual might sell his home and move elsewhere after having received such a threat. *See* Julie Inness, *Going to the Bottom Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment by Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlaee Williams Crenshaw. Boulder: Westview Pre*, 9 BERKLEY WOMEN'S L. J. 162, 166 (1994) ("Some victims sell their house after they find a cross burning in their front yard.").

248. *See Counterman*, 600 U.S. at 113 (Barrett, J., dissenting) ("The statement must also threaten violence 'to a particular individual or group of individuals'—not just in general." *Id.* (citing *Black*, 538 U.S. at 359)); *cf. R.A.V.*, 505 U.S. at 402 n.4 (White, J., concurring in the judgment).

249. *See supra* notes 234–35 and accompanying text.

250. For example, *compare McCalden v. California Libr. Ass'n*, 955 F.2d 1214, 1229 (9th Cir. 1990) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing en banc) ("What the Supreme Court recognized in *Claiborne Hardware* and *Brandenburg* is that strongly held political views engage the emotions as well as the intellect, and that the participants will often make statements that—taken out of context—sound a lot like threats of violence."), *with id.* (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing en banc) ("the panel majority brushes aside *Brandenburg* and *Claiborne Hardware* as cases 'involv[ing] public speeches advocating violence, not privately communicated threats of violence as are alleged here.'").

protected, e.g., because not sufficiently direct, the Court has modified the jurisprudence in ways that are poorly defined. Perhaps because of a desire to protect political speech, members of the Court are inching their way towards an account of true threats which offers too little protection of political speech but also too much protection to speech that is paradigmatic of what should count as a true threat.

A. *ELONIS*

Elonis v. United States[251] involved an individual who was convicted of violating federal law by transmitting in interstate commerce a communication that might reasonably be construed as a threat.[252] Elonis made numerous postings on Facebook which might reasonably have been understood to contain threats against people ranging from his wife, to coworkers, to members of the public, including kindergarteners, to police, and members of the FBI.

Anthony Elonis and his wife divorced and his wife retained custody of the children.[253] After the divorce, Elonis started listening to violent music and began to write rap lyrics inspired by that music.[254] He posted some of those lyrics on Facebook, sometimes noting that the lyrics were "fictitious"[255] and that he found writing the lyrics "therapeutic."[256] However, friends and co-workers were not confident that the posts were innocuous.[257] For example, he posted a picture where he was holding a toy knife against the throat of a co-worker and in the accompanying caption wrote, "I wish."[258] The chief of security saw the posting and fired Elonis.[259] In response, Elonis posted the following on Facebook:

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251. 575 U.S. 723 (2015).

252. Elonis v. United States, 575 U.S. 723, 726 (2015) ("Federal law makes it a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another.' 18 U.S.C. § 875(c). Petitioner was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat.").

253. *Elonis*, 575 U.S. at 726 ("In May 2010, Elonis's wife of nearly seven years left him, taking with her their two young children.").

254. *Id*. ("Elonis began 'listening to more violent music' and posting self-styled 'rap' lyrics inspired by the music.").

255. *Id*. at 727.

256. *Id*.

257. *Id*. at 727 ("Elonis's co-workers and friends viewed the posts in a different light."); *cf. id*. at 746–47 (Alito, J., concurring in part and dissenting in part). Stating:

> [T]he fact that making a threat may have a therapeutic or cathartic effect for the speaker is not sufficient to justify constitutional protection. Some people may experience a therapeutic or cathartic benefit only if they know that their words will cause harm or only if they actually plan to carry out the threat, but surely the First Amendment does not protect them.

Id.

258. *Id*. at 727.

259. *Id*.

> Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so f***in' scary?[260]

Based on this posting, Elonis was later indicted for threatening park employees and patrons.[261]

There were other alarming posts as well. For example, he and his wife had watched a satirical sketch in which a comedian had explained that "it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that."[262] In his posting, Elonis modified the comedian's joke to say the following:

> Did you know that it's illegal for me to say I want to kill my wife? . . . It's one of the only sentences that I'm not allowed to say . . . Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. . . . Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. . . . But not illegal to say with a mortar launcher. Because that's its own sentence. . . . I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room. . . . Yet even more illegal to show an illustrated diagram. [diagram of the house].[263]

After seeing the above and other posts, Elonis's wife felt very afraid and obtained a three-year protective order.[264] Elonis reacted to his wife's obtaining a protective order by posting again.

> Fold up your [protection-from-abuse order] and put it in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order . . .
> And if worse comes to worse
> I've got enough explosives
> to take care of the State Police and the Sheriff's Department.[265]

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260. *Id*.
261. *Id*.
262. *Id*. at 728.
263. *Id*.
264. *Id*. at 728–29.
265. *Id*. at 729.

That posting provided the basis for another count in the indictment.[266] In another posting that was the basis for an additional indictment, Elonis said the following:

> That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a Kindergarten class
> The only question is . . . which one?"[267]

After the posting about the school, FBI agents visited Elonis to question him.[268] That visit, during which he was polite but uncooperative,[269] resulted in another posting:

> You know your s***'s ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent lady stood so close
> Took all the strength I had not to turn the b**** ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner
> [laughter]
> So the next time you knock, you best be serving a warrant
> And bring yo' SWAT and an explosives expert while you're at it
> Cause little did y'all know, I was strapped wit' a bomb
> Why do you think it took me so long to get dressed with no shoes on?
> I was jus' waitin' for y'all to handcuff me and pat me down
> Touch the detonator in my pocket and we're all goin'
> [BOOM!]
> Are all the pieces comin' together?
> S***, I'm just a crazy sociopath
> that gets off playin' you stupid f***s like a fiddle
> And if y'all didn't hear, I'm gonna be famous
> Cause I'm just an aspiring rapper who likes the attention
> who happens to be under investigation for terrorism
> cause y'all think I'm ready to turn the Valley into Fallujah
> But I ain't gonna tell you which bridge is gonna fall
> into which river or road
> And if you really believe this s***
> I'll have some bridge rubble to sell you tomorrow
> [BOOM!][BOOM!][BOOM!][270]

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266. *Id*. ("Elonis's reference to the police was the basis for Count Three of his indictment, threatening law enforcement officers.").
267. *Id*.
268. *Id*. at 730.
269. *Id*.
270. *Id*. at 730–31.

At trial, various individuals testified that the postings made them afraid.[271] Elonis argued that the government had failed to establish that he had intended to threaten anyone.[272] That argument was rejected by the trial court.[273] The jury was given the following instruction:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement 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.[274]

The jury convicted on four of the five counts.[275] When reviewing the conviction, the *Elonis* Court interpreted the statute to "require[] that a communication be transmitted and that the communication contain a threat."[276] The Court explained that the statute "does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat."[277] However, "[t]he fact that the statute does not specify any required mental state, however, does not mean that none exists."[278]

When determining the necessary *mens rea*, the Court explained that "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."'"[279] While the defendant need not know that this action was illegal,[280] the "mental state requirement must . . . apply to the fact that the communication contains a threat."[281] But, the Court argued, "Elonis's conviction, . . . was premised solely on how his posts would be understood by a reasonable person."[282]

The Government disputed the Court's characterization, suggesting that "its approach would require proof that a defendant 'comprehended [the] contents and context' of the communication."[283] For example, an

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271. *Id*. at 731 ("The Government presented as witnesses Elonis's wife and co-workers, all of whom said they felt afraid and viewed Elonis's posts as serious threats.").
272. *Id*. ("Elonis moved to dismiss the indictment for failing to allege that he had intended to threaten anyone.").
273. *Id*. ("The District Court denied the motion.").
274. *Id*.
275. *Id*. at 732.
276. *Id*.
277. *Id*.
278. *Id*. at 734.
279. *Id*. at 736 (citing Carter v. United States, 530 U.S. 255, 269 (2000) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)).
280. *Id*. at 734 ("This is not to say that a defendant must know that his conduct is illegal before he may be found guilty.").
281. *Id*. at 737.
282. *Id*.
283. *Id*. at 738.

individual who did not understand English might knowingly send a communication but not understand that she was sending a threat. She would not have made a true threat, even if her communication might be understood by a reasonable person to be threatening.[284] However, "the fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence."[285] After all, "[c]riminal negligence standards often incorporate 'the circumstances known' to a defendant."[286]

The *Elonis* Court reversed the conviction because the "jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats."[287] The Court refused to say whether the Government's establishing recklessness would have sufficed,[288] although the Court specifically addressed that issue in a later case.[289]

A few points might be made about *Elonis*. The Court was addressing what the federal statue required rather than what the First Amendment requires. The Court did not discuss whether the evidence produced established that Elonis either knew that his postings were likely to be viewed as threats or at the very least was recklessly indifferent to whether they would be so viewed. For example, Elonis seemed quite aware his postings were being taken seriously by the FBI.[290] Elonis made sure that his wife saw the postings,[291] and he must have understood their effect on her if only because she sought and obtained a protective order, which he proceeded to ridicule.[292]

Perhaps the Court was merely suggesting that the jury instruction was incorrect but understood that the evidence presented might well have sufficed with a different jury instruction.[293] Perhaps the Court

284. *Id*.
285. *Id*.
286. *Id*.
287. *Id*. at 740.
288. *Id*. ("Elonis stated that a finding of recklessness would not be sufficient. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it.").
289. *See infra* notes 296–349 and accompanying text (discussing *Counterman*).
290. *Elonis*, 575 U.S. at 730 ("You know your s***'s ridiculous when you have the FBI knockin' at yo' door.").
291. *Id*. at 748 (Alito, J., concurring in part and dissenting in part) ("There was evidence that Elonis made sure his wife saw his posts.").
292. *See id.* at 729 ("Fold up your [protection-from-abuse order] and put it in your pocket[.] Is it thick enough to stop a bullet?").
293. *Cf. id.* at 748 (Alito J concurring in part and dissenting in part) ("[B]ecause the jury instructions in this case did not require proof of recklessness, I would vacate the judgment below and remand for the Court of Appeals to decide in the first instance whether Elonis's conviction could be upheld under a recklessness standard."). *See also* United States v. Elonis, 841 F.3d 589, 601 (3d Cir. 2016) ("Based on our review of the record, we conclude beyond a reasonable doubt that Elonis would have been convicted if

was merely telling Congress that when passing federal criminal statutes, it has to include at the very least a certain type of *mens rea*. The Court clarified some of these issues in the next true threat case that it addressed, although the Court's current position is wrong-headed for a few distinct reasons.

B. *COUNTERMAN*

In *Counterman v. Colorado*,[294] the Court answered some of the questions raised by *Elonis*. This time the Court explained the requirements of the First Amendment rather than discussed the approach the Court would take when Congress passed a criminal statute without specifying the *mens rea* required. This time, the Court addressed whether recklessness would suffice for a person to be convicted of making a true threat.

At issue was the conviction of Billy Counterman under a Colorado statute for having sent numerous threatening messages on Facebook to a local singer whom he had never met.[295] For example, he suggested, "Fuck off permanently." and "Staying in cyber life is going to kill you."[296] He also said, "You are not being good for human relations. Die."[297] In addition, some of his comments suggested that he might be following her, commenting on what she drove or on how she looked with her partner.[298] The victim suffered various financial and emotional ill effects as a result of these messages.[299]

The trial court found him guilty based on an "objective, reasonable person standard,"[300] where the state merely "had to show that a reasonable person would have viewed the Facebook messages as threatening."[301] The Court vacated the decision,[302] holding that "the First Amendment . . . requires proof that the defendant had some

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the jury had been properly instructed. We therefore hold that the error was harmless, and uphold his conviction.").

294. 600 U.S. 66 (2023).

295. Counterman v. Colo., 600 U.S. 66, 70.

296. *Id.*

297. *Id*.

298. *Id*.

299. *Id.* Stating:

> The messages put C. W. in fear and upended her daily existence. She believed that Counterman was 'threat[ening her] life'; 'was very fearful that he was following' her; and was 'afraid [she] would get hurt.' As a result, she had 'a lot of trouble sleeping' and suffered from severe anxiety. She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain.

Id. (alterations in original) (citations omitted).

300. *Id*. at 71.

301. *Id*.

302. *Id*. at 83 ("We accordingly vacate the judgment of the Colorado Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.").

subjective understanding of the threatening nature of his statements . . . , but that a mental state of recklessness is sufficient."[303] The Court explained that "[t]rue threats of violence . . . lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content."[304] But in order to convict someone of making a true threat, the Court suggested "that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications."[305] However, immediately after suggesting that the defendant had to have some subjective awareness of the threatening nature of the comments, the Court clarified that "a recklessness standard is enough,"[306] i.e., the defendant does not really have to have any awareness that the statement is threatening but instead "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another."[307]

The Court justified the adoption of this standard by suggesting that the failure to adopt this more protective standard might chill protected speech,[308] explaining that adoption of the recklessness standard "offers 'enough "breathing space" for protected speech,' without sacrificing too many of the benefits of enforcing laws against true threats."[309] Yet, there is reason to think that the Court itself as well as lower courts trying to implement this approach will have difficulty in understanding what the standard is and how it should be applied.

In her concurrence in part, Justice Sotomayor worried about the implications of the opinion for internet speech. "Different corners of the internet have considerably different norms around appropriate speech. Online communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression. Moreover, it is easy for speech made in a one context to inadvertently reach a

303. *Id*. at 69.
304. *Id*. at 72.
305. *Id*.
306. *Id*. at 73
307. *Id.* at 79 (alterations in original) (quoting Voisine v. United States, 579 U.S. 686, 691 (2016)).
308. *Id.* at 78 ("[T]he ban on an objective standard remains . . . lest true-threats prosecutions chill too much protected, non-threatening expression."); *see also id.* at 75. Stating:

> [T]he First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not.' *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). Or he may simply be concerned about the expense of becoming entangled in the legal system.

Id.
309. *Id*. at 82 (quoting *Elonis*, 575 U.S. at 748 (Alito J., concurring in part and dissenting in part)).

larger audience."[310] Justice Sotomayor's point that there are differing standards about what is appropriate is no doubt accurate, although a separate question is what should be made of the point. It may well be, for example, that certain websites tolerate or encourage violence,[311] but a separate question is whether such speech is protected.

By the same token, Justice Sotomayor's point that speech made in one context may inadvertently reach a larger audience is accurate, but a separate question is what to make of that. It may be, for example, that Watts did not intend that his speech would come to the attention of the Government,[312] but that alone would not immunize his speech. Else, anyone revealing a criminal conspiracy to a government informant would seem immune from prosecution.[313] Indeed, the point that speech may be disseminated more widely than desired might be thought to cut in a different way.[314] If, as a general matter, individuals should realize that speech on the internet may reach an unintended audience,[315] then individuals may be thought to be on notice that their postings might come to the attention of an unintended audience.[316] Such individuals might be thought negligent when the unintended audience becomes aware of that (possibly threatening) communication.[317] Furthermore, an individual who posts something threatening to a site that he or she knows or suspects that the victim will see might then

310. *Id*. at 87 (Sotomayor, J., concurring in part and concurring in the judgment).

311. *See* Bigwood v. U.S. Agency for Int'l Dev., 484 F. Supp. 2d 68, 76 (D.D.C. 2007) (discussing "websites that encourage the murder and kidnapping of employees of companies that manufacture mifepristone"); *see also* Nisha Ajmani, *Cyberstalking and Free Speech: Rethinking the Rangel Standard in the Age of the Internet*, 90 OR. L. REV. 303, 319 (2011) (discussing "websites that encourage stalking and violence against specific people").

312. *See supra* notes 5–21 and accompanying text (discussing *Watts*).

313. A separate question is whether one could be charged with a conspiracy if the only person with whom one conspired was a government informant. *See* United States v. Escajeda, 8 F.4th 423, 426 (5th Cir. 2021) ("[A]n 'agreement' with a government informant cannot be the basis for a conspiracy conviction because the informant does not share the requisite criminal purpose.").

314. Justice Sotomayor was worried about criminalizing too much speech. *See Counterman*, 600 U.S. at 87 (Sotomayor, j., concurring in part and concurring in the judgment) (discussing the "risk of overcriminalizing upsetting or frightening speech").

315. *Cf*. Rachel E. Lusk, *Facebook's Newest Friend-Employers: Use of Social Networking in Hiring Challenges U.S. Privacy Constructs*, 42 CAP. U. L. REV. 709, 715 (2014) ("While speakers intend communications to be purely personal-aimed at friends and family on the web-their audience has expanded to an unintended group such as employers, thereby opening communication to unwelcome uses and consequences.").

316. *Cf.* Cheryl B. Preston, *Lawyers' Abuse of Technology*, 103 CORNELL L. REV. 879, 948 (2018) (stating that "online posts and emails can be spread to potentially wide audiences").

317. *Cf*. Hayes v. SpectorSoft Corp., 2009 WL 3713284, at *8 (E.D. Tenn. Nov. 3, 2009) ("[T]he failure to implement . . . safeguards merely suggests negligence, rather than intentional disclosure of private communications.").

be thought to have been at least reckless with respect to whether the victim would be aware of the threatening content.[318]

Justice Sotomayor also noted that "[m]any of this Court's true-threats cases involve . . . charged political speech,"[319] and that "[m]uch of this speech exists in a gray area where it will be quite hard to predict whether a jury would find it threatening."[320] While that may be true, that point concerns what qualifies as a true threat rather than what meets the recklessness standard adopted in *Counterman*. That said, Justice Sotomayor might have made the same point about predicting when a jury would find that the recklessness standard had been met, as is illustrated by the differing views of what the newly announced recklessness standard requires.

Justice Sotomayor recommended that the recklessness standard be understood to require "a high degree of awareness that a statement was probably threatening or serious doubts as to the threatening nature of the statement."[321] In contrast, Justice Alito described the requisite recklessness as involving an "aware[ness] that others could regard his statements as a threat, but he delivers them anyway."[322]

But what must be established to show that an individual had a conscious disregard of a substantial risk that a statement would be perceived as threatening? Does she have to say or think to herself, "I know/suspect that there is a great risk that something will happen, but I choose to ignore that risk?" Or, will it suffice if she acts in a way that ignores that risk?[323]

Justice Barrett noted in her dissent that "there is an important difference between Counterman's knowledge of what his words meant and his knowledge of how they would be perceived."[324] But the difference pointed to here involves something else, namely whether the individual had to have been aware of the substantial risk of the danger at issue or whether instead the individual's manifestation of an

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318. *Cf. Elonis*, 575 U.S. at 748 (Alito J., concurring in part and dissenting in part) ("There was evidence that Elonis made sure his wife saw his posts.").

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

320. *Id*. (Sotomayor, J., concurring in part and concurring in the judgment).

321. *Id*. at 103 (Sotomayor, J., concurring in part and concurring in the judgment).

322. *Elonis*, 575 U.S. at 746 (Alito J., concurring in part and dissenting in part).

323. *See* Kirk v. Cnty. of Washtenaw, 2018 WL 6178979, at *5 (E.D. Mich. Nov. 27, 2018) (stating that "officers consciously disregarded a detainee's serious medical need, detoxing and diabetes, because they only allowed the detainee access to a restroom"); *see also* United States v. Maestas, 642 F.3d 1315, 1321 (10th Cir. 2011) ("[A] defendant's conduct involves a reckless risk if the risk of bodily injury would have been obvious to a reasonable person"). *But see* United States v. McCord, Inc., 143 F.3d 1095, 1098 (8th Cir. 1998) ("[T]he government must prove not only that the fraudulent conduct created a risk of serious bodily injury, but also that each defendant was in fact aware of and consciously or recklessly disregarded that risk.").

324. *Counterman*, 600 U.S. at 111 (Barrett, J., dissenting).

indifference to such a risk will suffice. If an individual says, "I never even thought about whether there was a great risk that the victim would have perceived the statements as threatening," and the jury accepts that testimony as true, must the jury acquit the defendant of having made a true threat?

In *Farmer v. Brennan*,[325] the Court explained that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[326] In his concurrence and dissent in *Elonis*, Justice Alito cited *Farmer* when discussing his understanding of recklessness[327] and the *Counterman* Court cited to Justice Alito's *Elonis* concurrence and dissent.[328] Presumably, this means that the justices do not require a conscious awareness of a substantial risk where that risk is obvious.

The *Counterman* Court explained that the recklessness "standard involves insufficient concern with risk, rather than awareness of impending harm."[329] But insufficient concern with risk is presumably established when there is no concern for the risk, e.g., when the person does not even think about whether there is a particular risk, and does not require that the person realize that there is a risk but consciously decide to ignore it.

The true threat jurisprudence is disappointing, at least in part, because it is focused on a particular bogeyman—the objective standard which allegedly puts an individual at risk of prosecution for true threats whenever a reasonable person would interpret an expression as threatening. But that is not a plausible interpretation of the standard.[330] The Court instead has adopted a "subjective" approach,

325. 511 U.S. 825, 842 (1994).

326. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *see also* Universal Health Servs., Inc. v. United States, 579 U.S. 176, 191 (2016) ("[B]ecause a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to 'deliberate ignorance' or 'reckless disregard.'").

327. *Elonis*, 575 U.S. at 745 (2015) (Alito J concurring in part and dissenting in part) ("[r]ecklessness exists 'when a person disregards a risk of harm of which he is aware'") (first quoting *Farmer*, 511 U.S. 825, 837 (1994); then citing MODEL PENAL CODE § 2.02(2)(c)).

328. *Counterman*, 600 U.S. at 80–82 ("That standard, again, is recklessness. It offers 'enough "breathing space" for protected speech,' without sacrificing too many of the benefits of enforcing laws against true threats." *Id.* (citing *Elonis*, 575 U.S. at 748 (Alito J., concurring in part and dissenting in part))).

329. *Id*. at 79.

330. At the very least, an individual making the statement would have to understand what it meant. *Cf. Elonis*, 575 U.S. at 738 (remarking the Government strained to argue that it is not merely requiring that the reasonable person would understand that expression as a threat but in addition that the person making the statement understands its meaning).

requiring that an individual recklessly disregard that his statement might be perceived as threatening.[331]

Regrettably, members of the Court do not seem certain what this subjective standard requires—does it require a conscious disregard or simply a reckless disregard?[332] Given this confusion in the *Counterman* opinion, lower courts will likely disagree about what must be established with respect to the *mens rea* requirement,[333] some requiring that the defendant be conscious of the risk while others will merely require that there have been a substantial likelihood that the comments would be perceived as a threat.

The Court should be clear about the standard rather than offering different formulations, especially because the difference in the formulations may determine whether an individual will be acquitted or convicted. For example, the individual who is so focused on his need for catharsis[334] that he does not even think of how others might react would not have been conscious of how others would perceive the

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331. *Counterman*, 600 U.S. at 107 (Barrett, J., dissenting) ("The Court holds that speakers must recklessly disregard the threatening nature of their speech to lose constitutional protection.").

332. *Id.* at 69 ("The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence."). *But see id*. at 73 ("[W]e hold that a recklessness standard is enough. Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim."). Justice Barrett suggested both positions in her dissent. *Compare id.* at 107 (Barrett, J., dissenting) ("The Court holds that speakers must recklessly disregard the threatening nature of their speech . . . ."); *with id.* at 120 (Barrett, J., dissenting) ("[A] devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her."). Justice Sotomayor realized that the relevant test involves recklessness, *see id*. at 84 (Sotomayor, J., concurring in part and concurring in the judgment), but then implied that some subjective awareness is required. *See id.* at 99 (Sotomayor, J., concurring in part and concurring in the judgment) ("So long as Evers had some subjective awareness of some risk that a reasonable person could regard his statements as threatening, that would be sufficient.").

333. *Elonis* was intended to clear up a split in the circuits. *See Elonis*, 575 U.S. at 750 (Thomas, J., dissenting). Stating:

> We granted certiorari to resolve a conflict in the lower courts over the appropriate mental state for threat prosecutions under 18 U.S.C. § 875(c). Save two, every Circuit to have considered the issue—11 in total—has held that this provision demands proof only of general intent, which here requires no more than that a defendant knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context. The outliers are the Ninth and Tenth Circuits, which have concluded that proof of an intent to threaten was necessary for conviction.

Id. Regrettably, the Court has adopted and explained a standard that the circuits will likely interpret in different ways. *See supra* notes 309–48 and accompanying text (noting that there is a split in the circuits on what must be consciously understood in order for someone to be deemed reckless).

334. *Cf. supra* note 254 and accompanying text (discussing Elonis's claim that his postings were therapeutic).

comments.[335] If he needed to be subjectively aware of the risk that his comments would be perceived as threatening, then he might have to be acquitted. If instead a reckless disregard would suffice, then he could be convicted.

Yet another matter is whether the Constitution really precludes convicting an individual of having made a true threat[336] where he did not consciously consider how others would react to his talking about blowing up a kindergarten class.[337] Even if he did not consciously consider whether others would perceive his comments as a threat but, instead, merely recklessly disregarded that the comments would be so perceived, the damage still occurs.[338]

If indeed a reckless disregard of the substantial risk is all that is required, then one must wonder how much of an effect the adoption of this standard will have. True. Many states will have to change their laws[339] or, perhaps, have them construed by the courts to include this added element.[340] But if *Elonis* and *Counterman* are any guide, the added burden of the recklessness standard will not prove insurmountable. In *Elonis*, the defendant knew that his wife had gotten a protective order (which presumably showed some awareness of her having felt threatened), and then asked whether the paper on which such an order was written would, if folded up, provide protection against a bullet.[341] In *Counterman*, the defendant made a number of comments indicating that he wished the victim's injury or death.[342]

Consider the jury who finds that the defendant's comments are reasonably perceived to be threats. The jury would also be likely in many cases to say that there was a substantial risk that the reasonably perceived threat would in fact be viewed as threatening by the victim. If indeed the statement is reasonably perceived to be a threat,

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335. *But see infra* text accompanying note 345 (noting that a jury might choose to disbelieve that the defendant was not conscious of the likely effects of his statements on the victim).

336. *Cf. Counterman* 600 U.S. at 121 (2023) (Barrett, J., dissenting) ("[T]he Court concludes that Counterman can prevail on a First Amendment defense. Nothing in the Constitution compels that result.").

337. *See supra* note 267 and accompanying text (reproducing one of Elonis's online postings).

338. *Cf. Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part) ("[W]hether or not the person making a threat intends to cause harm, the damage is the same.").

339. *Counterman*, 600 U.S. at 115 (Barrett, J., dissenting) ("Many States have long had statutes like Colorado's on the books.").

340. *See*, *e.g.*, State v. Taylor, 866 S.E.2d 740, 755 (N.C. 2021) ("Based on the foregoing analysis, and consistent with our interpretation of the First Amendment and cited relevant precedents, we determine that the State is required to prove both an objective and a subjective element in order to convict defendant under N.C.G.S. § 14-16.7(a).").

341. *Elonis*, 575 U.S. at 729.

342. *Counterman*, 600 U.S. at 70 ("[A] number . . . envisaged harm befalling her.").

then it is not entirely clear what kind of evidence could be presented to undermine that there was a substantial risk that the victim (as a reasonable person) would perceive the statement as a threat, especially because it is not even necessary to show that the victim was aware of the threat.[343]

Justice Sotomayor noted that many of the Court's true threat cases involve political speech[344] and then pointed out, "Much of this speech exists in a gray area where it will be quite hard to predict whether a jury would find it threatening."[345] The same point might be made with respect to jury findings of the requisite substantial risk. But if indeed the difficulty of predicting what juries will do chills speech, then one would expect that the adoption of the recklessness standard will not prevent the chilling of speech.

As a separate point, the difference between a conscious disregard and a reckless disregard may not often result in a change of outcome. In many cases, the jury might disbelieve the defendant's claim that he never consciously considered whether the victim would feel threatened.[346]

Consider the cross burning in *Black* which took place next to a state route. The Ku Klux Klan could have moved to a more remote area but rejected that alternative.[347] Perhaps that more remote location was rejected out of a desire to send messages both to individuals who were like-minded and to individuals who were targets of hate. Suppose that Black had been asked whether he took into account that passing motorists might feel threatened by the burning cross and he replied, "Yes, but that didn't matter to me" or, perhaps, "Yes, that was part of the point." The Court will have to decide whether such speech is protected, notwithstanding the substantial risk that it would be viewed as threatening or even the subjective desire to make the target group feel threatened. As Justice Sotomayor points out, "Given the violent history of the symbol, it is hard to imagine that any politically motivated cross burning done within view of the public could be carried out without awareness of some risk a reasonable spectator would feel threatened."[348]

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343. *Id*. at 85 (quoting *Watts*, 394 U.S. at 707) (Sotomayor, J., concurring in part and concurring in the judgment) ("True-threats doctrine covers content-based prosecutions for single utterances of 'pure speech,' which need not even be communicated to the subject of the threat.").

344. *Id*. at 88 ("Many of this Court's true-threats cases involve such charged political speech.").

345. *Id*.

346. *Cf.* United States v. McNair, 605 F.3d 1152, 1196 (11th Cir. 2010) ("The jury was free to disbelieve the defendants' claims of gifts for friendship and to find corrupt intent.").

347. *See supra* note 151.

348. *Counterman*, 600 U.S. at 96 (Sotomayor, J., concurring in part and concurring in the judgment).

The *Counterman* Court implied that adoption of the recklessness standard struck the correct balance and would prevent the chilling of speech.[349] But there is ample reason to doubt that the Court will have prevented much chilling of speech if only because juries should easily be able to find that the recklessness standard has been met, so adding such a requirement is unlikely to persuade many to speak when their speech would have been chilled without such a requirement.

Statements must be considered in context before they can be construed as true threats.[350] The context requirement speaks to whether the expression is a threat rather than whether there is a substantial risk that it will be perceived as one. But those who feared that their allegedly non-threatening statements might be misperceived as threats,[351] context notwithstanding, might also fear that a jury might find that there had been a substantial risk that the allegedly non-threatening statement would be perceived as threatening.

The *Counterman* Court also implied that incitement is a distinct kind of speech issue easily cabined from true threats.[352] But the line

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349. *Id*. at 82 ("[R]ecklessness . . . offers 'enough "breathing space" for protected speech,' without sacrificing too many of the benefits of enforcing laws against true threats."). *See also id*. at 118 (Barrett, J., dissenting) ("The reality is that recklessness is not grounded in law, but in a Goldilocks judgment: Recklessness is not too much, not too little, but instead 'just right.'").

350. *See Elonis*, 575 U.S. at 747 (Alito, J., concurring in part and dissenting in part) stating:

> But context matters. 'Taken in context,' lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person. Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously.

Id. (quoting *Watts*, 394 U.S. at 708)); *see also Counterman*, 600 U.S. at 74 ("The 'true' in that term [true threat] distinguishes what is at issue from jests, 'hyperbole,' or other statements that when taken in context do not convey a real possibility that violence will follow." *Id.* (citing *Watts*, 394 U.S. at 708)); *id.* at 113–14 (Barrett, J., dissenting) ("[T]he statement must be deemed threatening by a reasonable listener who is familiar with the 'entire factual context' in which the statement occurs. 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." *Id.* (quoting State v. Taveras, 271 A.3d 123, 129 (Conn. 2022)); Clay Calvert, *Taking the Fight Out of Fighting Words on the Doctrine's Eightieth Anniversary: What "N" Word Litigation Today Reveals About Assumptions, Flaws and Goals of A First Amendment Principle in Disarray*, 87 MO. L. REV. 493, 526–27 (2022) ("Context thus is crucial for resolving First Amendment protection not only in the realm of fighting words disputes, but also in obscenity and true threats cases.").

351. *Counterman*, 600 U.S. at 78 (majority opinion) ("The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats.").

352. *Id*. at 81–82. Stating:

> A strong intent requirement was, and remains, one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core. But the potency of that

between incitements and threats has not been as clear as the Court suggests.[353] For example, while *Elonis* was a true threat case, it also had elements of advocacy or incitement.[354] While *Brandenburg* is the paradigmatic incitement case,[355] the case also involved threats,[356] and an apparent desire to disseminate those threats—newsmen were invited to record the event so that it could be shown on local and national news.[357] The overlap between threats and incitement suggests that the Court's less than careful treatment of true threats may have even broader implications for speech protection.[358]

IV. CONCLUSION

Society is currently extremely polarized[359] and, in addition, many individuals perceive violence to be increasing.[360] Add to this some "violent and extreme rhetoric"[361] and the scene is set for needed guidelines about what kinds of frightening speech are protected.

> protection is not needed here. For the most part, the speech on the other side of the true threats boundary line—as compared with the advocacy addressed in our incitement decisions—is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions. It is not just that our incitement decisions are distinguishable; it is more that they compel the use of a distinct standard here.

Id.

353. Recent Case, *First Amendment - Freedom of Speech - Second Circuit Affirms Threats Conviction in Internet Speech Case. -* United States v. Turner, *720 F.3d 411 (2d Cir. 2013).*, 127 HARV. L. REV. 2585, 2585 (2014) ("[C]ourts struggle when faced with cases that contain elements of both threats and incitement."); Dr. JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U. L. REV. 585, 630 (2019) ("[C]ourts seem willing to use true threats and incitement somewhat interchangeably, applying one where, factually, the other seems to be more apt.").

354. *See Elonis*, 575 U.S. at 728 (urging someone else to fire a mortar into his ex-wife's home).

355. Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA L. REV. 887, 906 (2005) ("*Brandenburg v. Ohio* is the paradigmatic incitement case.").

356. *See supra* notes 202–11 and accompanying text (discussing the threats made in *Brandenburg*).

357. *See Brandenburg*, 395 U.S. at 445 ("Portions of the films were later broadcast on the local station and on a national network.").

358. Strasser, *supra* note 81, at 339 ("[M]uch of the protection offered by Brandenburg can easily be swallowed up by the true threat doctrine.").

359. A.C. v. Raimondo, 494 F. Supp. 3d 170, 176 (D.R.I. 2020), *aff'd sub nom.*, A.C. by Waithe v. McKee, 23 F.4th 37 (1st Cir. 2022) ("We are a society that is polarized as much as any time in our history.").

360. Megan Brenan, *Record-High 56% in U.S. Perceive Local Crime Has Increased*, GALLUP, https://news.gallup.com/poll/404048/record-high-perceive-local-crime-increased.aspx ("Americans are more likely now than at any time over the past five decades to say there is more crime in their local area than there was a year ago.").

361. United States v. White, 670 F.3d 498, 525 (4th Cir. 2012) (Floyd, J., concurring in part and dissenting in part); *see also* Peter A. Joy & Kevin C. McMunigal, *When Do Misleading Statements Cross the Disciplinary Line?*, 37 CRIM. JUST. 46, 46 (Winter 2023) ("Trump lawyers Alina Habba, Christina Bobb, and Lindsey Halligan . . . [made] additional misleading and inflammatory statements on various public media outlets. A

Given the sometimes-violent political rhetoric that is sometimes articulated,[362] an important issue that must be addressed involves whether there are messages reasonably perceived as threatening that are nonetheless protected.[363] Deciding which, if any, of those kinds of messages are nonetheless protected is difficult, as is specifying why those should be protected whereas others should not be. But the *Counterman* Court implied that the difficult issue is figuring out how to offer extra breathing room so that non-threatening messages are not punished.[364]

The standard adopted in *Counterman* does not offer much extra breathing room because an individual fearful that her comments will be construed as threatening will also likely be fearful that a jury might find that there was a substantial risk that those comments would reasonably be perceived as threatening. A more concerning element of *Counterman* was its refusal to address or even acknowledge that many comments made in the political arena are intended both to rally the base and to strike fear in opponents' hearts.

Perhaps some of those comments are nonetheless constitutionally protected. But the real work is in figuring out which, if any, of those comments are protected and why. The Court should not simply offer a standard (which, thankfully, permits convictions in cases like *Elonis* and *Counterman*), and then declare victory in defending speech. Such a victory is hollow, both because it has not achieved much and because it falsely implies that the difficult work is done. The Court must try harder—too much is at stake for the Court to pretend that it has protected the First Amendment and pat itself on the back, while ignoring a central problem plaguing society today as tensions rise and political threats multiply.[365]

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marked increase in violent rhetoric, threats of violence, and acts of violence against federal officials and offices soon followed.").

362. *See generally* Alan Feuer, *As Right-Wing Rhetoric Escalates, So Do Threats and Violence*, N.Y. TIMES (Aug. 10, 2022) https://www.nytimes.com/2022/08/13/nyregion/right-wing-rhetoric-threats-violence.html.

363. *See* Counterman v. Co., 600 U.S. 66, 89 (2023) (Sotomayor, J., concurring in part and concurring in the judgment) ("[T]here will be some speech that some find threatening that will not and should not land anyone in prison.").

364. *See id.* at 78 ("But the ban on an objective standard remains the same, *lest true-threats prosecutions chill too much protected, non-threatening expression*.") (emphasis added).

365. *Cf.* United States v. Fieste, 84 F.4th 713, 726 (7th Cir. 2023) ("The government's imperative to demonstrate intolerance of political violence—which weakens our institutions of government and undermines democracy—has rarely been higher.").