Counterman v. Colorado: True Threats, Speech Harms, and Missed Opportunities

R. GEORGE WRIGHT*

Some Supreme Court cases amount, at their best, to missed opportunities. The Supreme Court's recent case *Counterman v. Colorado*[1] resolved, quite dubiously, one particular issue of mens rea. In the course of doing so, however, the Court ignored a variety of clearly presented issues of even greater significance.

The *Counterman* case involved a state court criminal conviction for issuing a true threat of violence, or more simply, a true threat.[2] True threats, as defined and limited by the Court, comprise a narrow, traditionally constitutionally unprotected category of speech.[3] Nevertheless, the majority in *Counterman* unnecessarily and unadvisedly extended a substantial measure of constitutional protection to issuing true threats.[4] This result was obtained not through applying the overbreadth or vagueness doctrines, or by working through the logic and purposes of free speech, but by dubiously selecting and imposing a particular mens rea requirement in criminal true threat cases.[5]

The constitutionally required mens rea was held, more specifically, to be that of a subjective level wherein the defendant must consciously understand the statement's threatening nature and act with reckless disregard of the substantial risk of the speech being construed as a violent threat.[6] More simply, the Court required what this Articles refers to as a "conscious reckless disregard" mens rea standard.

The *Counterman* case involved what many would think of as social media harassment, or cyber-stalking. Over a two-year period, the defendant, Counterman, who had never met the target-recipient, sent hundreds of Facebook messages to that target-recipient.[7] The target-recipient never responded to any of these messages, and indeed repeatedly blocked the defendant, who responded by creating new Facebook accounts and continuing to send unwanted messages to the target-recipient.[8]

The messages in question varied in their nature, tone, and content.[9] But there is no indication in any of the *Counterman* Court's opinions that they ever raised, touched upon, or implicated any subject matter of any public interest or concern. Some of the messages were inappropriate and disturbing, e.g., "Good morning sweetheart . . . I am going to the store would you like anything?"[10] Others implied

---

* Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law. To Mary Theresa: Love's not Time's fool.

1. 600 U.S. 66 (2023).
2. *See id.* at 72.
3. *See id.* at 74.
4. *See id.* at 72.
5. *See id.* On the subject of overbreadth, see R. George Wright, *The Problems of Overbreadth and What to Do About Them*, 60 HOUSTON L. REV. 1115 (2023).
6. *See Counterman*, 600 U.S. at 71.
7. *Id.* at 70.
8. *Id.*
9. *See id.*
10. *Id.*

personal on-site visual surveillance of the target-recipient.[11] A third category of messages further raised the stakes dramatically. These included: "Staying in cyber life is going to kill you;"[12] "Fuck off permanently;"[13] and "You're not being good for human relations. Die."[14]

Understandably, this continuing pattern of unsolicited messages from a complete stranger, repeated blockings, repeated evasion of those blocks, and repeated menacing communications had a number of dramatic and sustained effects on the target-recipient's life, work, finances, mental state, and lifestyle.[15]

The true threat cases have agreed a conviction requires at least that the defendant have known and understood the relevant content of any messages in question.[16] In the simplest case, a mere courier who otherwise innocently delivers a sealed true threat from a sender to a recipient cannot be convicted on a true threat theory.[17] The *Counterman* Court's focus was instead on questions of the defendant's state of mind regarding the threatening quality of the messages in question.[18]

The Court thus surveyed the traditional mens rea standards. In descending order of rigor and culpability, the standards begin with purposefulness. The Court declared that purposefulness exists when the defendant "'consciously desires' a result—so here when he wants his words to be received as threats."[19] Actually, though, judicially tying purpose, or specific intent, to a desire for a particular outcome is questionable. A terrorist who plants a bomb on a plane may have sufficient legal intent, or purpose, for a murder conviction of everyone on board. But he may actually desire the death of only one specific passenger and would be pleased or indifferent if everyone else on board somehow managed to survive. Strictly, it is also possible that the terrorist does not even desire specifically the death of his target, as distinct from somehow politically neutralizing the target. And in rather a different context, Abraham intended the sacrificial death of his son Isaac, and acted with that purpose, even though he did not desire the death of Isaac.[20]

Slightly less rigorous is a mens rea requirement of knowledge, in which a defendant knows of some impending result of his conduct without necessarily also

---

11. *See id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See id.* More generally, see Danielle Keats Citron, *Addressing Cyber Harassment: An Overview of Hate Crimes in Cyberspace*, 6 J. L., TECH. & INTERNET 1 (2014); and Mary Ann Franks, *"Revenge Porn" Reforms: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1261–69 (2017). On the *Counterman* case in particular, see Mary Ann Franks, *The Supreme Court Just Legalized Stalking*, SLATE (July 6, 2023), https://slate.com/2023/07/supreme-court-legalized-stalking.
16. For a sense of the established true threat case law, see, e.g., Elonis v. United States, 575 U.S. 723 (2015); Watts v. United States, 394 U.S. 705 (1969) (per curiam); United States v. Dutcher, 851 F.3d 757 (7th Cir. 2017).
17. *See Counterman*, 600 U.S. 66, 72, n.2 (2023).
18. *See id.* at 71–73.
19. *Id.* at 79.
20. For a classic discussion, see SOREN KIERKEGAARD, FEAR AND TREMBLING (Alastair Hannay trans., 1985) (reprint ed. 2003) (1843).

purposefully seeking, let alone desiring, that result.[21] Knowledge here refers not to any genuine inevitability of the result, but to something like the virtual, realistic, or more or less practical certainty of the result.[22] Thus one can have a mens rea of knowledge, or of knowing, even though the "known" result does not actually occur.

Below knowledge in the means rea hierarchy is the state of mind of conscious recklessness. Recklessness in this sense involves a conscious disregard of a substantial and unjustified risk of some cognizable harm.[23] Thus the defendant may have acted recklessly even where the harm in question was neither desired nor known to a practical certainty.[24] Recklessness in this sense still requires a conscious awareness, and a deliberate decision, to impose a substantial risk of unjustified harm.[25]

Beneath the recklessness standard is the level of negligence. Negligence liability attaches where the defendant was not consciously aware of imposing a risk, but where the law determines that the defendant should, reasonably, have been aware of that risk.[26] Negligence liability in this sense is thought to appeal to what is objectively reasonable under the circumstances.[27] Negligence is thus characterized by the Court as an objective standard,[28] and in particular, as a reasonable person standard.[29] The more rigorous mens rea standards above, implying greater culpability, are, in contrast, thought of instead as subjective mens rea standards.[30]

This widely accepted contrast between objective and subjective mens rea standards is, in reality, incoherent and thus ultimately untenable.[31] Fortunately, this supposed contrast between objective and subjective standards is also unnecessary in the mens rea context, and elsewhere in the law.[32] A moment's reflection reveals that supposedly objective mens rea tests incorporate, for the sake of fairness and sensitivity, presumably subjective elements. Not all competent, voluntarily acting adults are relevantly alike. The reasonableness of a defendant's actions typically depends on apparent subjectivities and mental elements that vary by race, gender, sexuality, age, physical capacity, and so on. Criminal and civil defendants and their accusers or victims relevantly vary in their legally relevant circumstances, histories, expectations, experiences, and backgrounds.

Supposedly objective tests thus inevitably rely on distinctively subjective elements. Equally, though, the legal system cannot read minds. So purportedly subjective tests inevitably rely crucially on objective considerations as proxies for subjective considerations. Thus, the supposedly subjective actual malice standard in

---

21. *See Counterman*, 600 U.S. at 79.
22. *Id.*
23. *Id.*
24. *See id.*
25. *See id.*
26. *Id.* at n. 5.
27. See *id.*
28. See *id.*
29. *Id.*
30. *See id.* at 80.
31. For discussion, see R. George Wright, *Objective and Subjective Tests in the Law*, 16 U. N.H. L. REV. 121 (2017).
32. *See id.*

defamation cases must rely on the typical public meaning of words used by relevant persons, the apparent availability of evidently reliable ways of checking false claims, the apparent implausibility of the defendant's claims, and whether there were evident grounds to doubt a defamatory claim.[33]

The courts generally cannot, and fortunately need not, classify mens rea tests as objective, subjective, or inextricably mixed. The point instead should be to adopt a mens rea requirement that best promotes overall social and jurisprudential values within the constraints of fairness to defendants. In this crucial respect, the *Counterman* Court's approach, and result, were ill-judged.

The *Counterman* majority surveyed the above possible mens rea requirements for true threat cases in general and then selected the standard of recklessness.[34] The Court selected a presumably subjective, conscious disregard of the substantial risk (if not practical certainty) that the language in question, in isolation or perhaps cumulatively, would be reasonably viewed as threatening violence at some future time.[35]

Counterman arrived at the recklessness standard through a more or less intuitive process of weighing and balancing the conflicting, and indeed incommensurable, interests. On one side of the metaphorical interest balance are the free speech interests of the defendant and other actual and potential speakers. Among the latter are issuers of true threats, as well as speakers who are merely concerned about being improperly prosecuted, if not convicted, for speaking in ways that might be thought, incorrectly, to amount to a true threat. And then there are the free speech interests of actual and potential listeners to speech that might improperly be treated as a true threat. Some speakers and listeners may thus suffer from a speech-intimidating, repressive, chilling effect if the mens rea requirement for true threats is set too low.

The idea of avoiding an undue "chilling effect" on speech is familiar from the contexts of the substantial overbreadth and the undue vagueness cases.[36] The *Counterman* case majority, however, focused on a potential chilling effect of an unduly low mens rea requirement, rather than on, among other possibilities, an unduly broad or excessively vague restriction on speech.

So we have free speech interests on one side of the balance. But there are also free speech interests on the other side of the balance. Apparently, these latter speech interests are more easily overlooked or discounted. One thus might well wonder why the free speech interests of the targets of true threats are not generally taken into account, precisely as countervailing free speech interests. After all, in some cases, as in *Counterman* itself, the target of the alleged true threats wound up not exercising her own cognizable free speech rights as fully as before.[37] Speech suppression can thus be among the legally condoned harms of harassment, stalking, or threats.

---

33. See, classically, the public-official libel case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), followed by *St. Amant v. Thompson*, 390 U.S. 27 (1968) (clarifying the actual malice standard). *See also* Wright, *supra* note 31, at 138–39.

34. *See* Counterman v. Colorado, 600 U.S. 66, 79–80 (2023).

35. *See id.* at 79.

36. *See* Wright, *supra* note 5.

37. In particular, the target-recipient, apart from other enforced distractions, cancelled some of her own expressive music performances. *Counterman*, 660 U.S. at 70.

Instead, the free speech interests of the targets of alleged true threats are commonly assigned to the category of generalized police power harms to these targets. In *Counterman*, the harms included a number of basic health, psychological, work-performance, financial, and general lifestyle injuries and costs.[38] Typically, the courts do not explicitly consider any speech-injuries that might be avoided, rather than caused, by a "chilling effect" on threatening-adjacent speech. These speech injuries would include those suffered by persons who change their own innocent speech-behavior in light of a pattern of non-prosecution or reversals of true threat convictions. Such persons might fear that their chances of being harassed or threatened have increased as a result of the *Counterman*-imposed policies, leading these persons to lower their own speech-profile.

In any event, it is thus also possible that a mens rea requirement could be set not merely too low, but too high. The true threat mens rea would be set too high, given the balancing of incommensurable interests, if any free speech benefits from setting a high mens rea requirement are outweighed by, crucially, the cognizable harms to the targets of true threats.

But one might then wonder how courts are supposed to weigh and balance these conflicting, and indeed, incommensurable, interests. On one side, there are some more or less speculative true threat-adjacent speech interests. On the other side, there are some commonly unrecognized or minimized speech interests, along with the obvious health, welfare, and safety gains that may accrue from a lesser true-threat mens rea rather than some other, more rigorous, mens rea standard. These judgments are inevitably free-speech redistributive. They are also inevitably redistributive in other ways reflective of health, welfare, and safety interests.

Whether recognized or not, problems of incommensurability pervade the law. For present purposes, we may think of incommensurability as a lack of any distinctively reasonable comparability of conflicting values. Often, the relevant legal interests cannot be jointly measured along any common yardstick. In some moods, the Court tends to see such value tradeoffs as indeed incommensurable, thus requiring an arbitrary decision where neither possible case outcome is rationally superior to the other.[39] Trying to place the speech and police power interests in true threat cases on any sort of common measurement scale is, in such cases, deemed impossible, or at least beyond judicial capacities.[40] Classically, the view is that courts at the very least have no business trying to determine whether a particular rock is as heavy as a particular line is long.[41] Counterman says nothing about when incommensurability disqualifies courts, and when it does not. Ultimately, most problems of incommensurability in the law can indeed be managed. But courts should first understand how, and then offer some public account of the processes by which incommensurable value conflicts in the law can be reasonably managed.

---

38. *See id.*

39. *See, e.g.*, National Pork Producers Council v. Ross, 598 U.S. 356 (2023).

40. *See id.* at 380–81.

41. *See id.* at 381 (quoting Bendix Autolite Corp. v. Midwesco Enterp., Inc., 486 U.S. 888, 897 (1988)) (Scalia, J., concurring in the judgment). More broadly, see R. GEORGE WRIGHT, POLITICAL RIVALRIES AMONG THE STATES, THE LIMITS OF INCOMMENSURABILITY, AND THE DORMANT COMMERCE CLAUSE (2023).

But in other cases, as in *Counterman* itself, the Court, with no explanation, displays no such reservations about incommensurability. The *Counterman* majority grants that "with any balance, something is lost on both sides: [t]he rule . . . is neither the most speech-protective nor the most sensitive to the dangers of true threats."[42] The idea is thus to optimally reduce any chilling effect on legitimate speech while somehow not unduly downgrading the health, welfare, and safety interests at stake in the choice among mens rea standards.

For the Court in *Counterman*, this balancing resulted, largely intuitively, in adopting the "conscious reckless disregard" standard, as distinct from, say, requiring either a specific purpose to threaten, or adopting a mere negligence mens rea standard with regard to the threatening nature of one's communications.[43]

The Court seemed particularly concerned with the problems of chilling merely true threat-adjacent speech, and of undue self-censorship by protection-worthy speakers. Speakers might cautiously stay suboptimally far from any constitutionally contestable messaging. Speakers might fear undue prosecutorial, or civil plaintiff, overzealousness. Courts might tend to err on the side of the prosecution, or of a civil plaintiff. Or speakers might simply fear a costly, distracting, stressful, and protracted involvement in the criminal or civil judicial system, even if their legal claims are ultimately vindicated.[44] Thus the *Counterman* Court chose the conscious recklessness mens rea standard in attempting to balance the various interests at stake.

On the merits, though, this is at best a dubious result. Even in the increasingly contested area of an actual malice requirement in civil defamation cases,[45] a standard of conscious reckless disregard of the falsity of the defendant's claims is not universally applauded.[46]

The Court's proper focus instead belonged elsewhere. While the courts have not been entirely consistent on the matter,[47] they have often rightly tended to extend, or strengthen, free speech protection in some kinds of cases, and to rightly limit speech protection in others. Specifically, free speech protection is extended most stringently where the speaker seeks to address, however inarticulately, unpopularly, or unpersuasively, some subject that can be considered a matter of public, rather than merely personal or private, interest or concern.[48] The distinction between matters of public versus merely personal concern seeks to be about as ideologically neutral as is feasible. The underlying aim, presumably, is to thereby track the consensually

---

42. Counterman v. Colorado, 600 U.S. 66, 82 (2023).

43. *See id.* at 79–80.

44. *See id.* at 77–78.

45. *See, e.g.*, Berisha v. Lawson, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 2428–30 (Gorsuch, J., dissenting from denial of certiorari). *See also* R. George Wright, *Doing Surgery on the Constitutional Law of Libel*, 74 SMU L. REV. F. 145 (2021).

46. *See* Gertz v. Welch, 418 U.S. 323 (1974); *see also* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).

47. *See infra* notes 54, 58, 59 and accompanying text.

48. See, e.g., in the government employee speech discipline context, *Rankin v. McPherson*, 483 U.S. 378 (1987) (reports of an attempted presidential assassination and welfare reform as the topics).

accepted fundamental reasons for constitutionally protecting speech at a distinctively high level.

There are a variety of common understandings of why speech deserves special constitutional solicitude. But there is something of a consensus that several identifiable values are at stake. Thus, it is thought that free speech promotes the search for meaningful truths.[49] Additionally, or in the alternative, free speech is essential to genuinely meaningful representative self-government.[50] And free speech is often thought to promote individual or collective autonomy, self-realization, or genuine flourishing.[51]

This is not to imply that free speech cases should be decided by directly holding up the case circumstances to the light of these basic reasons for protecting speech. But logic itself requires some appropriate relation between free speech legal doctrines and the ultimate reasons for protecting speech, often at substantial social cost, in the first place.

Without committing ourselves to any controversial understanding of the reasons for protecting speech in general, it is entirely appropriate to ask how any of those basic reasons might be somehow implicated, directly or indirectly, to any meaningful degree, in *Counterman* or in similar cases. Recall that Counterman's repeatedly blocked messages ranged from the oddly inappropriate; to implying visual surveillance of the target-recipient; to the ominous, explicitly hostile, menacing, or threatening.[52]

However we reasonably understand the basic grounds for distinctively protecting speech, those reasons are not at stake in anything like the *Counterman* circumstances, except, ironically, on the side of the target recipient. The defendant Counterman was not seeking humbly to join the ranks of Galileo, Newton, Pasteur, and Einstein in somehow pursuing some dimension of the knowable or the true. Nor was he seeking to somehow participate in any process of democratic self-government. Nor, in any meaningful, non-trivial sense, was he therein engaged in any sort of Aristotelian or Millan process of self-actualization, in which he sought to somehow transition from an underdeveloped acorn-like status to a potential oak tree-like flourishing. Or if we choose to credit him on the latter count, we must then ask whether his flourishing outweighs the obvious substantial impairment, in basic respects, including in her own ability to speak, of Counterman's target-recipient.

More generally, most persons in the defendant's general circumstances cannot point to any meaningful connection, direct or indirect, between their speech and any of the basic reasons for special constitutional protection of their own or any other speech.

This is not a matter of somehow disagreeing with, or rejecting, any claims in the defendant's speech. Nor is it to deny that in some sense, continual messaging to the

---

49. *See, e.g.*, William R. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 4 (1995); Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991).

50. *See, e.g.*, Alexander Meikeljohn, *Free Speech and Its Relation to Self-Government*, 110 NW. U. L. 1097 (2016).

51. *See, e.g.*, FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 22 (2017); C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011).

52. *See* Counterman v. Colorado, 600 U.S. 66, 70 (2023).

target recipient in Counterman was clearly important to the defendant. Judicial agreement or disagreement with the content of the defendant's message is irrelevant. And the personal importance to the defendant of continually messaging the unwilling target recipient is irrelevant, at best, to any plausible set of reasons for protecting speech.[53] If any verbal act of self-assertion counts as self-realization, any harasser or threatener's self-assertion then immediately clashes with, and undermines, the self-realization of the target. This would at best tie the logic of free speech into a knot.

The closest that the Supreme Court has come to a useful general distinction in this neighborhood is between speech that seeks to address some matter of public interest or concern, and speech, however personally important, that addresses matters of merely private, or personal, concern.[54] This distinction between public and private interest-related speech is applied in some cases involving disciplined speech by government employees,[55] and in some defamation cases.[56] The Court has unfortunately been unclear as to precisely how much difference this distinction makes. In some instances, the Court sensibly concludes that speech that attempts no more than to address a matter of purely personal or private interest, as in Counterman, should receive no distinctive constitutional free speech protection at all.[57] But the Court has, on occasion, also held that such speech should still retain some reduced, or rarely available, distinctive free speech protection.[58]

The most important advantage of either of the latter approaches is that speakers are thereby usefully incentivized to formulate their communications in less purely personally focused terms and, without distorting their real thoughts and sentiments, to thereby bring the underlying reasons for distinctively protecting speech into play.

In any event, the *Counterman* majority displayed no interest in any such possibilities. Instead, the *Counterman* majority attempted to optimize the balance between encouraging free speech and the otherwise appropriate level of mens rea. How effective the Court's choice to re-calibrate the mens rea requirement is likely to be in this regard is at best unclear.

Potential speakers who fear prosecution for true threats, along with or perhaps somehow distinct from cyberstalking or cyber-harassment, would in theory now seek to more clearly display a mens rea of, frankly, cluelessness, or of mere negligence, as distinct from conscious reckless disregard, or intent, with respect to the threats in question. Presumably, the constitutional free speech disvalue of the speech remains the same, post-*Counterman*. Adjusting the mens rea requirement upward in this fashion in defamation cases, at least for public official and public figure libel

---

53. *See supra* notes 50–51 and accompanying text; Smart v. Swank, 898 F.2d 1257, 1250–51 (7th Cir. 1990) (Posner, J.); Trejo v. Shoben, 319 F.3d 878, 887 (7th Cir. 2003).

54. For discussion in the context of social media harassment, stalking, and threats in general, see R. George Wright, *Cyber Harassment and the Scope of Freedom of Speech*, 55 U. CAL. DAVIS L. REV. ONLINE 187 (2020).

55. *See, e.g.*, Rankin, *supra* note 48.

56. *See, e.g.*, Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).

57. *See, e.g.*, Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996); Waters v. Churchill, 511 U.S. 661, 668 (1994).

58. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451–52 (2011); Phila. Newspapers v. Hepps, 475 U.S. 767, 774 (1986); Rowland v. Mad River Sch. Dist., 470 U.S. 1009, 1012 (1985).

plaintiffs, has been standard, if currently more controversial.[59] Special constitutional free speech solicitude for those who defame private figures, on matters of purely personal or private interest, does not seem appropriate.

In contrast, the dissenting opinion authored by Justice Barrett helpfully focused on constitutional-level benefits and corresponding costs, at a broad and relatively uncontroversial political level.[60] At least in cases of nonpolitical true threats, the constitutional benefits of such speech, especially in light of their commonly severe costs in terms of the target's own free speech and other values, may be virtually nil.[61] Justice Barrett observed that most states have to this point not required a mens rea of recklessness in true threat cases, without any flood of prosecutions for ultimately protection-worthy speech.[62] Justice Barrett helpfully concluded by distinguishing between true threats that do, and that do not, address matters of public concern.[63] The elevated mens rea requirement for cases of incitement to violate the law, and for classic subversive advocacy, reflects the reality that such speech typically addresses matters of broad public policy and other clearly political issues.[64] Such cases typically bear no constitutional resemblance to *Counterman*-like true threats, and to the persistently epidemic stalking and harassment cases, many of which bear no detectable political elements.

Of course, there can indeed be cases of politically infused true threats, stalking, or harassment. True threats of assassination attempts against public officials would typically fall into this category.[65] How, then, should the law address the close cases in this narrower political context? Tinkering with the required mens rea is one possibility, but the defendant's state of mind has little to do with any political or other free speech value of the threatening political speech in question. On any sensible balancing, reasonably protecting the targets of political true threats, along with preventing collateral damage from any attempt to execute the threat, is the highest priority.

In cases of political true threats, the law should instead strongly incentivize formulating, or reformulating, one's speech in such a way as to preserve, if not upgrade, one's political expressiveness and emotional intensity, while at the same time radically diluting, or completely deleting, any more or less literal threatening elements. Typically, it should be entirely possible to convey, however fervently and articulately, one's undistorted political message to any appropriate audience, but without any literal or hyperbolic personalized threats.[66]

---

59. *See* Gertz v. Welch, 418 U.S. 323 (1974); *see also Greenmoss Builders*, 472 U.S.

60. *See Counterman*, 660 U.S. 66, 107 (2023) (Barrett, J., dissenting).

61. *See id.*

62. *See id.* at 112–13, 115.

63. *See id.* at 118–20.

64. *See id.* at 118.

65. *See, e.g.*, United States v. Dutcher, 851 F.3d 757 (7th Cir. 2017) (threats against President Obama).

66. Note, for example, the language of the Communist Manifesto that plainly transcends mere description or prediction, but that cannot possibly be construed as personally threatening any individuals or narrow groups, hyperbolically or otherwise. See KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (Samuel Moore trans., 2002) (1848).

Overall, then, the focus of the Court in *Counterman* is misdirected, resulting in an intuitive judicial balancing with likely negative net effects, a distraction from more important considerations, and a missed opportunity to upgrade the relevant law.