What are "True Threats" Under the First Amendment?

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[00:00:00] Jeffrey Rosen: The Supreme Court recently heard a case about a Colorado man who was sentenced to over four years in prison for stalking because of threatening Facebook messages he sent to a singer called C.W. The Supreme Court has held that the First Amendment doesn't protect true threats, but what makes a true threat different from a statement that uses threatening words but is just a joke or shouldn't be taken seriously?

[00:00:27] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to *We the People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, we'll do a deep dive into Counterman versus Colorado and the history of the true threats doctrine under the First Amendment. We'll recap the oral arguments and break down the questions the justices asked as they grappled with the question of whether you need to intend to cause emotional distress in determining whether a statement is a true threat.

[00:01:07] Jeffrey Rosen: Joining us are two great experts on free speech and the First Amendment. Gabe Walters is an attorney at FIRE, the Foundation for Individual Rights and Expression, where he litigates free speech and free expression cases in federal and state courts. He co-authored a brief in support of the petitioner, Billy Ray Counterman, in the Counterman case. Gabe, welcome to *We the People*.

[00:01:29] Gabe Walters: Thanks for having me, Jeff.

[00:01:30] Jeffrey Rosen: And Genevieve Lakier is professor of law at the University of Chicago Law School, where she teaches and writes about freedom of speech and constitutional law. She co-authored a brief on the other side of the case supporting the respondent, the state of Colorado. Professor Lakier, it's wonderful to welcome you to *We the People*.

[00:01:46] Genevieve Lakier: It's very nice to be here. Thank you.

[00:01:48] Jeffrey Rosen: Let's begin with the facts, as they say. Gabe Walters, tell us about, uh, why, uh, the petitioner in this case was convicted, what he said, and what the dispute is about whether or not you need an intent standard to identify a true threat.

[00:02:04] Gabe Walters: Thanks, Jeff. So, Billy Raymond Counterman was the criminal defendant here. He was convicted under Colorado's stalking statute for repeatedly sending

messages via Facebook to a singer identified in the briefs as C.W., including messages such as, "Die, don't need you." Staying online is not good for community relations. I think I might be paraphrasing that one, but that's the general intent. These were repeated one-way messages toward a particular target. Billy Raymond Counterman suffers from a mental illness. He believed he was having a two-way conversation with the recipient of his messages. And of course he was not.

[00:02:53] Gabe Walters: And so at trial, he was convicted under the threat statute and not allowed to present evidence of his particular mental state. Whether he intended to make a threat or not, that evidence did not come in and the jury was specifically instructed not to consider his actual state of mind. So that's the issue in the case is whether a conviction under the stalking statute or a threat statute requires proof of the speaker's subjective intent to make a threat. And that's where we weighed in.

[00:03:30] Jeffrey Rosen: Professor Lakier, how would you describe the facts and the legal issue?

[00:03:35] Genevieve Lakier: That's interesting. I would describe them quite differently, I think. Because although the basic facts are the same, this is a case that illustrates how framing really does affect the legal analysis. One of the amazing things I think for me watching this case unfold is that on the different sides of the issue, people had such different understandings of what had happened and what the issues were.

[00:03:57] Genevieve Lakier: So the way I would recount the facts is that Billy Raymond Counterman, who clearly does suffer from mental illness, as Gabe said, thought he was having this two-way conversation with C.W., decided at a certain point, though, to start DM'ing her on Facebook, and sent her not just a dozen or so threatening messages that are identified, were identified on appeal, but hundreds and, perhaps, thousands of unwanted messages privately just to her, many of which were mundane, things like, "I'm going to the store. Want me to get you anything? And I saw you in, in your white jeep." And she does have a white jeep. You know just sort of sundry pleasantries.

[00:04:36] Genevieve Lakier: And then over time it escalated to more aggressive and threatening speech. But as C.W. testified at the trial, it was even the mundane stuff, the stuff that doesn't look at all like a threat, like, "I'm going to the store. Want anything?" That was very scary because she didn't know this person. She'd never met him. And she kept unfriending him. She's a musician, and so she says her policy is just to accept all friend requests. She bulk accepts. And so she would get the messages from him, and then once she started to identify that they were from this guy who seemed to be presuming that they had a relationship, she would unfriend him. And then he would create a new account under a new name and text her again or DM her again.

[00:05:15] Genevieve Lakier: And so, it was the course of these multiple [laughs], daily, hundreds and then thousands of messages that built and built and built and caused her, by all accounts, a lot of suffering. She started having significant anxiety. She didn't know who he was. She didn't know where he might be. And so she's a performer. She said she would start to imagine him at every concert, every performance. She didn't know if he was in the crowd. And it

wasn't so much or primarily, I think that she thought that when he said, "Die, why don't you," she thought he was saying, "I am going to kill you." It was that a person who would send someone they don't know these weird, intimate, repeated unwanted communications could do anything, and she just didn't know what he would do. And it caused her a lot of anxiety.

[00:06:01] Genevieve Lakier: And so, she eventually went to the cops. And he, Counterman was charged, and initially he was charged, just as Gabe said, for threats, for harassment, and for stalking under a stalking emotional distress prong of the Colorado stalking law. But prior to trial, the prosecutor actually dropped the threats charge, presumably, we don't know, but presumably because the prosecutor did not think that there was enough evidence to sustain threats on its own. Colorado has its own version to the True Threat statute. It's called Credible Threats. You have to show that you've made a credible threat, and the prosecutor dropped that credible threats charge. And at another point also, dismissed the harassment charge.

[00:06:38] Genevieve Lakier: And so, Counterman was actually prosecuted under a stalking statute that doesn't require proof of a threat. The jury that convicted him was instructed on the elements of the stalking law, which do not include, uh, any mention of the word threat. And they got no instruction on what a threat was. And so on appeal, he appeals to say, "My conviction is not constitutional under the First Amendment, because there was no proof of a true threat as the First Amendment understands it." And Colorado responded by arguing that, in fact, there had been sufficient evidence of a true threat.

[00:07:15] Genevieve Lakier: But on my understanding, that was a huge mistake, honestly, that he wasn't being prosecuted for making threats. He was prosecuted for a quite separate crime, and that crime is stalking.

[00:07:26] Jeffrey Rosen: I'm gonna read the language of the stalking statute, under which Counterman was criminally charged. It says that you're liable if you repeatedly follow, approach, contact, place under surveillance, or make any communication in a manner that would cause a reasonable person to suffer serious emotional distress, and did in this case cause C.W. to suffer serious emotional distress. Gabe Walters, tell us about why you think that that language should be construed to have an intent standard and that you shouldn't be liable if simply a reasonable person would find the communications likely to cause serious emotional distress.

[00:08:08] Gabe Walters: Sure, Jeff. And, and let me say, I don't think that our argument turns on the precise language of the statute in this case. That's one of the benefits of weighing in as amicus, or friend of the court. You can take a position on the question that's presented in the case without necessarily needing to take a position on whether Billy Raymond Counterman was rightfully or wrongfully convicted under the specific language of this, the criminal statute at issue. And so, let me just read the question presented, if I may. And you know, I take Professor Lakier's point to be that this case may have been an imperfect vehicle for the question that was presented for review by the court. And I think that her brief lays that out pretty well and people should read it.

[00:08:53] Gabe Walters: But the, the question presented according to the court was whether to establish that a statement is a true threat unprotected by the First Amendment, the government

must show that the speaker subjectively knew or intended the threatening nature of the statement or whether it is enough to show that an objective, reasonable person would regard the statement as a threat of violence. So, FIRE's position on that reasonable person standard is that speech that is at the margins of political or social acceptability, speech that might have low value under the First Amendment, might be punished as if it were a threat, even though the speaker of the words did not intend the statement to be threatening. So that's a question that has been percolating in the lower courts for at least 20 years since the 2003 Supreme Court opinion *Virginia v. Black*, and even before Black what is the mental state that's required on the part of a speaker to convict speech as threatening under the First Amendment?

[00:09:58] Gabe Walters: And, and our position is that, well, we know the First Amendment is not an absolute. We know that the Supreme Court has taken a categorical approach to kinds of speech that may be punished consistently with the history and tradition of the First Amendment. And, and true threats is one of those categories, but we need the court to definitively answer the question that is presented, whether it does it in this case or another case. And we want the court to draw that line in the place that is the most protective of speech so that people like Meredith Miller, and we can talk about her story she's one of the examples we cite in our brief, she posted on a social media app that if the, the Utes, the University of Utah football team, loses its upcoming game, she would detonate the campus nuclear reactor, which is, is not even possible. And of course, she was joking.

[00:10:55] Gabe Walters: But the, the university, in seeking to suspend her for two years from the university, argued that all it need do was prove that she had a general intent to make a statement that a reasonable person would deem to be threatening, not that she specifically intended for the statement to be interpreted as a threat. And so that's the real danger. And we cite several other examples of political speech or, jokes or, I think John Elwood, the petitioner's counsel, made a point about religious speech. You know, you can't have a test that slides too easily to the ear of the beholder or the subjective reaction of the listener, in order to punish speech that is and, and should remain constitutionally protected. We want to draw the line in a more speech-protective place.

[00:11:45] Jeffrey Rosen: Professor Lakier, what is your response to the argument that Gabe Walter just outlined on the question of whether true threats should require some kind of intent, standard and how did you hear that argument presented before the court?

[00:12:02] Genevieve Lakier: Okay. I guess I'll say two things in response. So one is, it's for sure in this case, the question presented was about the mens rea standard for true threats, notwithstanding everything I said before about how this was a stalking case. But I don't think that means that the fact that it was a stalking case is irrelevant. I think it should make us all very careful or, I hope, make the court careful when it writes its opinion to recognize that communication can be threatening in all kinds of ways and in all kinds of circumstances. And true threats is, it has been identified in the cases as referring to a certain kind of speech that, makes people afraid, this is, as the court defines it in *Virginia v. Black*, speech that communicates a serious intent to do bodily harm, serious physical violence or harm to another.

And um, and so I'm gonna come back to how do we think about that category and what mens rea you should have.

[00:12:57] Genevieve Lakier: But one wouldn't want... while I agree with a lot of what Gabe said, I too, I have to say, worry about the government using its power, school officials, school administrators, local municipalities you name it, using the sort of justification of a threats law or threats policy to put people in jail for or cause other, impose other sanctions on them, in this case, getting kicked out of school, for what are jokes or hyperbole or, from a First Amendment perspective, even worse, political criticism. You know, the history of using threats laws, there's a federal statute that makes it a crime to utter threats against the president.

[00:13:36] Genevieve Lakier: And, in his concurring opinion, I think, in the sort of original and most famous of the First Amendment's, the Supreme Court's true threats cases, *Watts v. United States*, Douglas goes through a really informative, very brief recounting of some of the prosecutions of political critics of the Johnson administration and the Wilson administration that government had used these threats against the president to put in jail people who, to our ears, and I think correctly, were just criticizing the president using strong language. So, I'm very sensitive to the, and sympathetic, to this worry about having unduly low standard about threats, but that said, language can threaten in all kinds of ways, can be scary. And so what Counterman did here was threatening, but not in the same way that, or the way it achieved its effect was because it was repeated, it was directed and it was, intimate in this way that was delusional.

[00:14:33] Genevieve Lakier: And so I suppose what I'm suggesting is that when we think about the First Amendment rules around threats, we should recognize that this actually a complicated category that includes lots of different kinds of contexts and circumstances and kinds of speech. And perhaps, we should have different rules for different kinds of speech acts. So in the brief I wrote with professors Eugene Volokh and Evelyn Douek, we suggested that there is a, perhaps a room under the First Amendment for multiple standards. So, you might distinguish between something like a standalone threats law where what the government is going after is a single instance threat uttered before a public audience, not directed at anyone, but just just threatening language, like the example that Gabe referenced of the student who's angry and says, "Oh, I'm gonna bomb the school," presumably joking.

[00:15:25] Genevieve Lakier: That's a standalone threat, and I agree that that kind of prosecution from my perspective raises the greatest concern about the chilling of political discourse because that looks very similar to ordinary political discourse. It could be criticism, it could be joking. It's the kind of general public address kind of speech that the First Amendment typically protects. I think that's very different than the kind of speech that was at issue here, where you are... it's a private DM. There's no public address, specifically targeted at someone, and repeated. And so, on my view, I think that there's a way in which one could take account of the very serious interests on both sides when we're talking about the regulation of threats.

[00:16:01] Genevieve Lakier: So, on the one hand, as Gabe suggested, I think we should worry about the chilling effect on speech and the government's ability to use its power to go after people it doesn't like. Like, all of that is a very serious concern, and I hear it when it comes to the

regulation of threats. On the other hand, as I think Colorado emphasized in its arguments before the court, there are very serious costs to those who are the recipients of threats. Threats chill speech just like, uh, overzealous government prosecution of threats chills speech. I am aware as a woman who speaks in the public sphere of how often and how easy it is, if you say something that people don't like, to receive, uh, hostile and in some cases, threatening communications. And that can be very scary and chilling in its own respect. So, I do not think we should understate the very problematic, the, sort of the chilling or the bad speech effects of having threats just percolating, circulating through our public sphere.

[00:16:58] Genevieve Lakier: And so, I think it's a difficult question, but I do think the easiest way to get, make some headway is distinguish different kinds of threats. We could think about standalone threats where the First Amendment interests are heightened with these kinds of direct, relational, targeted, maybe repeated threats. And so, I suppose I would say when it comes to Colorado's stalking law, you know, both prongs of it, there's the credible threats part of the stalking law, and then there's the emotional distress part of the stalking law, I'm not convinced that you need a very high mens rea standard when we are talking about directed private messages that are repeated at a particular person. That's also in many ways the scariest kind of threat to receive if someone is making it directly to your face, it's, uh, causes you harm, and it is reasonable that it would cause you harm. That feels like, I think as Justice Kagan said...

[00:17:44] **Justice Elena Kagan:** What's the area of speech that we think is really going to be chilled by drawing the line in the place where this state and many other states want to draw it? I mean, there's nothing that's sort of close to true threats but is super valuable.

[00:18:01] Genevieve Lakier: That's the kind of speech that if we worry about chilling, what's on the other side isn't such high value speech. This kind of direct, personal relational speech isn't the kind of speech about matters of public concern, about politics and government and the president that the First Amendment is ordinarily concerned about. So, I suppose I would think that the court ideally would recognize that that's a very different category of speech that requires a lot less First Amendment protection. Maybe not no First Amendment protection, but a lot less than when we are talking about standalone threats and public discourse. And the difficult thing about this case and the thing that makes me worry about this case but also makes it very interesting is it brings these two categories of threats together without the justices appearing to recognize the very significant difference between them for First Amendment purposes.

[00:18:48] Jeffrey Rosen: It brings these two categories together, the credible threat category and the emotional distress category. Well, let's unpack them. And, Gabe Walters, in your brief, you give us the history of the true threats jurisprudence, which you say began in 1969 with the Watts case, which involved a Vietnam protestor convicted of threatening President Johnson. And the Supreme Court reversed the conviction requiring intent, and that was reaffirmed in Virginia versus Black, a cross burning case where the Court held that you couldn't ban cross burning without evidence of an intent to threaten.

[00:19:23] Jeffrey Rosen: You put this in context. Why did this arise in the, in the late '60s around the time of the Vietnam protests? It was around the time when the court required an

intent to cause imminent lawless action in the *Brandenburg* case which is a central First Amendment case. And, and tell us, I know the question is long, but I'd love for you to set up the history of this, are... Since, *Watts* and *Virginia v. Black*, are there any states that allow threats to be criminalized without evidence of specific intent?

[00:19:53] Gabe Walters: Well, thanks, Jeff. I think that was a great introduction to the historical context here. I mean, as, as you say, Watts was not just, uh, in the, the milieu of the Vietnam War, but it was actually directly relevant to the facts of the case. Watts himself was an anti-Vietnam War protestor. I don't recall if he was drafted or was protesting the idea that he might be drafted, but what he said was, "If they ever put a rifle in my hand, the first person I'm going to get in my sights is L.B.J." And he, for that political speech at a political rally, he was convicted under the federal threats statute that prohibits threatening the, the life of the president.

[00:20:34] Gabe Walters: A jury heard the evidence, considered the context, and, and convicted him. And the court said that, well, actually, this was just political hyperbole, and what is political hyperbole must be distinguished from what is a true threat. So that's the first place we see that language, true threat, in a Supreme Court opinion. And I think Watts helpfully stands for the proposition that something more than a general intent to utter a statement that a reasonable person deems threatening is required before you can convict under the First Amendment. Justice Sotomayor has recognized that as well in some of her writing on this issue dissenting from a denial of certiorari in another case.

[00:21:20] Gabe Walters: And then you get to *Virginia v. Black*. These are really the two Supreme Court opinions that have addressed what a true threats is. You can throw in R.A.V. versus City of St. Paul if you want to look at the reason why true threats are excluded from the First Amendment coverage which is that, yes, statements that people made, make, while being speech, yet can cause significant harms, including the fear that the threat might be carried out. You don't have to actually intend to carry out the threat, but you know, if you say, "I'm going to kill you," you don't have to actually kill the person. But just uttering, "I'm going to kill you," under a particular context might actually be threatening and, and cause very significant harms.

[00:22:06] Gabe Walters: And then you get to *Virginia v. Black*, 2003, looking at the cross burning statute in the state of Virginia, which assumed from the act of cross burning that the burner of the cross had the requisite intent to place the target of the, that communicative act in fear. The Supreme Court in a split decision, four justices in a plurality and Justice Scalia concurring the judgment, said that the presumption of the intent to place the victim in, in fear was precisely what was constitutionally, wrong with the statute. Let me nuance that a little bit. I think the plurality said it was wrong as a matter of the Constitution, and Justice Scalia may have said it was wrong as an evidentiary matter.

[00:22:58] Gabe Walters: And so, let me bring that back to, to Counterman. You know, whether on these facts Counterman intended threaten or not intend to threaten, is not just a constitutional question under, I think, the court's precedence and the rule that we ask it to adopt in this case, which is the specific intent standard, but is also an evidentiary issue from the way that it was presented at, at trial. So it doesn't surprise me that on appeal, the counsel for

Counterman framed this as a threats issue because of the way the jury was instructed in his case. Now, I don't know whether Counterman can be convicted under a specific intent standard, but I think that he should, at the very least, have an opportunity to provide the jury with whatever context he thinks he can. And maybe the result is the same, right?

[00:23:56] Gabe Walters: So, our brief cites a number of truth rights cases from the lower courts where the speaker was convicted under the general intent standard and would not plausibly be able to argue that they actually did not have a specific intent to make a threat, considering the surrounding circumstances, the nature of what was said, and the context in which it was said. So, I don't necessarily disagree with Professor Lakier on the majority of the points that she has raised. I don't think this is a debate so much. I'm not entirely sold that there should be different standards based on different contexts. That's something I would like to consider much more carefully. But I think that at least as this case is presented to the court, drawing the line in favor of the subjective intent standard is the more speech-protective place to, to draw it.

[00:24:56] Gabe Walters: And, you know, it might, may turn out the justices do something a little more nuanced on the evidentiary issue. I think there might've been three justices whose questions suggested something along those lines.

[00:25:06] Jeffrey Rosen: Professor Lakier, how many, if any, states allow conviction under true threats under an objective intent test? John Elwood in the oral argument said that over 20 states use a subjective intent test, with others using a recklessness standard. Do the rest of them allow for convictions for objective intentions? And then give us a sense and this is a big question, I know, what, whether there's a different breakdown of the states when it comes to infliction of emotional distress, which ordinarily, uh, requires intentional infliction of emotional distress? Are there states that allow for conviction of emotional distress under an objective standard?

[00:25:46] Genevieve Lakier: So, I don't know the precise numbers about the objective standard, but it's roughly a dozen, maybe a little bit more than that. So, it's plenty of states, including my own, Illinois. Although states do differ on whether or not they think that the reasonableness should be assessed from the perspective of the speaker or the reasonableness should be from the perspective of the listener. You know, often the listener and the speaker will have different knowledge. They will know different things.

[00:26:07] Genevieve Lakier: So in this case, I think it matters because assuming, and I want to go back to what Gabe said about Counterman per se, but, assuming that this was a threats prosecution, the question would be, do you read the facts from Counterman's perspective where he has a relationship to this person? It's not true, but that's how he understands it. And then you think, well, was it reasonable for him to say what he said? Would he, should he have known that what he was saying was threatening? Or do you understand it, and this is Colorado's position, do you understand it from C.W.'s perspective? Her understanding is that she doesn't know this person at all.

[00:26:41] Genevieve Lakier: Now of course, if you read it from the speaker's perspective, it's more speech protective, and so we might feel more comfortable about that because it's gonna be

harder to bring successful prosecutions against deluded or delusional speakers. But it's means that obviously, any time you do that, it's possible that in cases like this you're going to prevent, um, people who are afraid, reasonably afraid, because they are not deluded and they actually do not have a relationship with the person who is speaking to them, you're going to leave them without any remedy. And potentially, I think likely without the ability to get a protective order. Because you know, part of the, sort of the implications of this case are not only what can the government do when it comes to putting someone in jail or expelling them from school, but when can the government, um, issue a protective order? That is to say, require someone to stay away from someone else or stop doing something on the basis of their threatening speech.

[00:27:35] Genevieve Lakier: And from my perspective, if the First Amendment precludes the government from putting someone in jail for making a threat without subjective intent, the same standard logically should apply when it comes to protective orders. And so, the, the consequence, although we'll see whether the Supreme Court agrees with this. This came up during oral arguments, and it will be interesting to see how the court deals with the protective order issue. But the implications could be very significant for the tens of thousands of victims of domestic violence and stalking and threats who maybe don't want to necessarily bring charges against the person who's threatened them. They just want them to stay away.

[00:28:14] Genevieve Lakier: Colorado's position and the position of Illinois and many states is that this is the standard is the best way to protect these victims against a very, very scary, possibility of real violence. It may be that the person who's threatening them or stalking them is not gonna do anything, but they don't know that. And it can profoundly disrupt and undermine your life.

[00:28:37] Genevieve Lakier: On the question about in this case, I find this case so difficult. The, as we saw at the oral arguments, some of the justices were making light of the claim that Counterman's statements were threats. So, there's a period in the arguments where Chief Justice Roberts, picks up on the statement, the message that Counterman sent to C.W. and where she says...

[00:28:59] Chief Justice John Roberts: "Staying in cyber life is gonna kill you. Come out for coffee. You have my number." In which, in what way is that threatening, almost regardless of the tone?

[00:29:08] Genevieve Lakier: Which is identified during the whole appellate process, you know, you have to figure out if this is a true threats prosecution, what are the true threats? This is a true threat. And Chief Justice Roberts says...

[00:29:17] Chief Justice John Roberts: This is, I'm sorry, this isn't remotely like that. It says, "Staying in cyber life is gonna kill you." I can't promise I haven't said that. Come out-

[00:29:26] Speaker 6: [laughing].

[00:29:27] Chief Justice John Roberts: Come, come out, come out for coffee. You have my number. I think that might sound-

[00:29:30] Genevieve Lakier: And of course, what he's suggesting is that decontextualized, when you just look at the content of that statement, it doesn't seem that scary. It's hyperbole. It's jokey. But to C.W., who has received by now hundreds and hundreds of unwanted messages from a person she doesn't know, this is just [laughs], you can imagine that the, what that statement feels like is very different. The attorney general from Colorado responded in some way, but I was thinking afterwards, does Chief Justice Roberts make that statement to people who have blocked his messages after having made hundreds of others? It's very difficult to understand this case without understanding the context.

[00:30:08] Genevieve Lakier: And so all of which is to say that I worry that if this is magically transformed through the magic of the appellate process into a case about threats when it was always prosecuted as a case about stalking, and the requirement is that Counterman be proven to have specifically intended or may even recklessly, I think, to communicate a serious intent to do harm or physical violence, it will be difficult to convict him or the thousands and thousands of other stalkers who are not trying to do harm, or that's not their intent. They are trying to develop a relationship. They're, uh, you know, in their minds, in love with the objects of their stalk, of their stalking. They're trying to become friends. They're not trying to do terrible things.

[00:30:49] Genevieve Lakier: But the thing is, their speech is scary. It violates social norms, and the history of stalking is that this is not infrequently does result in actual physical violence when these attempts to become friends or more get rebuffed. And so particularly in this case, the dangers of subjective intent standard and a subjective intent standard that requires subjective intent to threaten seems to fundamentally misunderstand the nature of the harm here.

[00:31:15] Jeffrey Rosen: As you say, during the oral arguments, uh, questions of context came up frequently. Uh, John Elwood said his mother frequently said to him, "Drop dead," and there was laughter about that in an exchange with Justice Gorsuch and Barrett, showing the difficulty of showing context. Gabe Walters, just so I understand this historically, is it right to say that true threats and infliction of emotional distress were prosecuted as, as state tort law for a long time, and in the '60s, the court began to apply the First Amendment and say that you needed specific intent in order to minimize the harms on speech?

[00:31:47] Jeffrey Rosen: And now they're trying to figure out whether there should be a national standard for, uh, true threats? You know, is, is that, is that correct as a historical matter? And then, and then tell us about the different standards that the justices were considering, including, uh, subjective intent and also a recklessness standard, which, uh, John Elwood said would be better than an objective standard. And un- unpack all this for our listeners because I know it's very technical.

[00:32:10] Gabe Walters: I'm not sure it's correct as a historical matter to, to frame exactly that way. I mean, in, in Watts, the court does not definitively say that a specific intent standard is required. But you look at the holding of the case, and I think it's quite clear that something more than a general intent is required. And so, then the question for the justices, and Justice Sotomayor frames this similarly in the dissent I mentioned earlier in a different case, the question is, well, what does that more mean? Is it recklessness? Is it knowledge? Is it purpose? And, I

think the justices questioning of John Elwood and of Colorado and the US government also participated as amicus in the oral argument here, I think the, the questioning reflects their, their grappling with that standard and, and where they should draw the line.

[00:33:04] Gabe Walters: I think Justice Kavanaugh kind of pejoratively, I imagine, would say that this was essentially policymaking. And so, I'm not sure that he's comfortable with the court choosing from among those standards. But you know, you mentioned defamation earlier, and you mentioned, you alluded, at least, to the seminal case, *New York Times v. Sullivan*, where the court lays out an actual malice standard under the First Amendment to, uh, hold somebody liable for defamation. And the standard there is either knowing falsity or reckless disregard as to truth or falsity. So, let's consider reckless disregard in this context of making a threat. It's not exactly knowledge or constructive knowledge, did you know or should you reasonably have known? The recklessness might be a conscious, subjective, in your own mind consideration of the risk of harm and then, a disregard of that risk. And then you go on and can make the statement.

[00:34:05] Gabe Walters: John Elwood did make the statement that recklessness would be a better, more speech-protective standard than, than what we have now. The justices seemed in their questioning that some of them might be willing to, you know, move the, the standard to recklessness or, or adopt that standard. I don't think there seems to be a majority for a purpose standard. In other words, you have to know and intend that you are making a threat. You have to intend to place the person in fear. But those are the various standards that they could adopt, and, and reading the tea leaves from questions asked at oral arguments is always a dicey proposition.

[00:34:47] Jeffrey Rosen: It is, indeed. And thank you for laying out the standards. Professor Lakier, how are the standards created at the state level? Are they essentially tort standards that state judges chose among and now the Supreme Court is trying to nationalize them? And, uh, if you could lay out the various options, which include knowledge, purpose, recklessness, and relate it to the really important debate about defamation law, which of, of course hit the news this week with the Fox News settlement, that would be great.

[00:35:20] Genevieve Lakier: Sure. You know, it's an interesting history... *New York Times v. Sullivan* today is remembered as this iconic, foundational First Amendment case that we all love, although I think [laughs], or I suppose I should say that as of five years ago. I think in recent years there's been increasing criticism of it, but it is understood to be iconic. At the time, though, it was quite a controversial decision because prior to this period, what the Supreme Court had basically done is left it to the states to define the terms of libel, figure out what kinds of mens rea, what elements you need to establish to bring a successful libel prosecution.

[00:35:56] Genevieve Lakier: In an earlier case, uh, the court had essentially said that libel, because it involves false truths, which is defining as falsity, libel hadn't always been defined in terms of falsity or false speech. The Court says, "Well it's false, so it's doesn't really have value under the First Amendment 'cause the First Amendment cares about true speech. And so the state legislatures can do what they want." And so prior to *New York Times v. Sullivan*, we have a range of standards, and it is essentially just tort law, and the states are defining it.

[00:36:24] Genevieve Lakier: Now, this is a huge problem though. By the time we get to the Civil Rights Movement, what we find is what happens I think unsurprisingly, is that segregationist forces are unhappy with the, uh, the ability for supporters of Martin Luther King and the Civil Rights Movement to use the northern newspapers and *New York Times*, *Washington Post*, to communicate pro civil rights sentiment. So, there is this campaign to bankrupt the *New York Times* or to get it to stop putting in ads that are pro civil rights, um, in their content. And so this is the background against which the court decides *New York Times v. Sullivan* and constitutionalizes a huge swath of what had been up until then largely deconstitutionalized tort law. It's a very aggressive move. We're suddenly expanding the scope of the First Amendment dramatically, and at the time it is controversial. What is the court doing here, right? This was the view. Why? This is a act of judicial imperialism overriding all of these contrary state judgments.

[00:37:23] Genevieve Lakier: With the hindsight of history, we understand that it is incredibly important protection, um, that to protect the press against these kinds of militias or politically motivated libel prosecutions. And so even if we might differ, disagree on the specific standard that *New York Times v. Sullivan* adopts, efforts to limit it or to maybe think about the groups to whom we apply the kind of recklessness or knowledge standard in a somewhat more limited way, I think the, for the vast majority of First Amendment scholars, litigators and judges, including I think justices on the court, there's recognition that at its core, it's incredibly important to have this kind of First Amendment protection for the press, and we do not want to go back to a situation in which this is all deconstitutionalized and up to state legislatures.

[00:38:13] Genevieve Lakier: So that's the world we are in where I think there's no disagreement. Maybe Justice Thomas disagrees, but for the most part the consensus is that there is going to be First Amendment protection when it comes to the, libel prosecution. And I think also there's just no question that the First Amendment is gonna apply to the regulation of threats. And so all of the disagreement is, focuses on this question of mens rea. What exactly do you need to prove when it comes to intent or knowledge when it comes to... in order to be able to evade the protection of the First Amendment and prosecute for libel or for threats anyway?

[00:38:52] Genevieve Lakier: And when thinking about the options on the table now when it comes to true threats, there's purpose, there's knowledge, there's recklessness, there's negligence, there's strict liability. That's the classic different mens rea standards. And there's lots of different ways we can think about, how do we pick among these? It’s true, you're just sort of making a decision. And so, one way is to operate analogically. I think this was a lot of the arguments, a lot of the, sort of the briefs, and during the oral argument we heard, like, "Is this more like this or like that?" So, we might think fighting words, which is another category of unprotected speech where you directly address someone, and you utter a word that is likely to lead to a fight or causes inherent injury. This is the language from an old case which first articulated this doctrine. So, we're talking about, you know, you're swearing at someone or you're insulting them right to their face. That hasn't been understood to require a heightened mens rea.

[00:39:41] Genevieve Lakier: And so, a previous case involving a question about how do we define true threats, Justice Thomas had said, "Well, the threats shouldn't be more protected than

fighting words. It's sort of similar kind of speech act, so we, we don't really need much more than negligence." And then others say, "Oh, no, no. This is like incitement to violence where what we're worried about is that this is going to lead to violence." But on the other hand, right next door to the speech that we think is very dangerous is speech that has very high value. Just like the defendant in Watts, you know, he said, "If L.B.J. gets in my sights, I'm gonna shoot him." That looks kinda like political criticism, and we vigorously protect that. There is a lot of political speech that is inciting [laughs] that we want to protect, even if it isn't incitement in the unprotected sense. And so some other justices have said, "No, no, this looks just like incitement, so we should have the same specific intent standard."

[00:40:30] Genevieve Lakier: That's one way of doing it. You're just saying, "Is this more like an apple or an orange?" It's tricky, though, because as lawyers know, you can make analogies in multiple ways, by focusing on different aspects or character, framing the speech in question in different ways. And so, I think this is probably gonna be part of the reasoning. There's gonna be analogies thrown around. I don't find it that satisfying. From my perspective, the question of mens rea and *New York Times v. Sullivan* makes this clear that this is how the court was thinking about it in that case too is, what standard of intent or knowledge or recklessness or what have you, mental state standard do we need in order to protect against a significant chilling of what we think of as valuable speech?

[00:41:12] Genevieve Lakier: And so you have to think about, what are the effects of having another standard on the quality of the speech environment, on the willingness of people to engage in the kind of public discourse that we think is important, on the ability of the government to abuse this power to go after speech? These are all the questions I think that should be on the table much more than analogies. And here, this is again where I'll just go back to my old hobbyhorse. I think different threats raise different, uh, pose different, uh, problems, um, implicate different concerns. Because if we have threats in public discourse or threatening speech, perhaps hyperbolic, perhaps, you know, funny, whatever it may be, like incitement maybe or like libel, we might think that this is very closely related to speech that we want to protect.

[00:41:54] Genevieve Lakier: And so, I suppose from my perspective, a recklessness standard seems like a good way to go because what the court did in *New York Times v. Sullivan* is it recognized that there are speech interests on both sides. There are, or there are significant interests on both sides. In libel cases, it's the reputational interest of the person who's libeled, but it's also the interests of the press. And so, when balancing these two interests, the Court hatched onto a recklessness standard. The specific intent standard which we apply in incitement typically, there's not as direct an injury to another person in incitement. You're making a general political statement, you should go and do this unlawful, violent thing. You're not targeted at any particular person, or that's not the classic case. In *Brandenburg v. Ohio*, we're talking about a rally in which there's a, um, a discussion about a march that's gonna occur. And it's not the same sort of conflict between two private interests. And then in that case, the court says, you need specific intent. You need a very high standard of mens rea.

[00:42:49] Genevieve Lakier: From my perspective, and here I'm relying on analogies [laughs], um, but with an interest to thinking about the health of the, you know, broader speech environment, looks to me like threats are closer to libel than to incitement. But again, realistically, I'm not sure what a different, how much of a difference it'll make to actual prosecution. If you have to prove recklessness, you know, you have to prove that the person knew about the threat, the, the possibility that their speech would be taken to communicate the serious threat, and did it anyway versus you have to know that they intended. And that's a pretty fine difference. I'm sure that there will be some cases in which it makes a difference, but I don't think it'll be such a, a significant difference.

[00:43:27] Genevieve Lakier: But if what we're talking about is threatening speech that is directed on a person, is private, is about this interpersonal relationship, well, then all of a sudden I think the, the concerns for the health of the speech environment look a lot more like the concerns we have when it comes to fighting words or other kinds of speech where we don't require so much, such a high mens rea standard. I just don't think that the, the threat of chilling the kind of speech that Counterman engaged in here is a very serious one that we need to worry about. I really do worry about people making public addresses and being prosecuted for threatening language. I do not worry a lot about people DM'ing other people hundreds of times after they received very clear indication that that person does not want to receive your messages. That's the kind of speech I'm just not that worried about chilling. And so in that context, I do not think we need specific intent, knowledge or recklessness.

[00:44:17] Jeffrey Rosen: *We the People* listeners, I know this is technical, but I'm learning so much. And I'm going to restate what I've heard so far. Around the 1960s, the Supreme Court began looking at the state tort law and applying the First Amendment. And when it came to incitement in the famous Brandenburg case, it said, just general statements can't be prosecuted. You have, the speech has to be intended to and likely to cause serious violence. In the case of libel in *New York Times v. Sullivan*, the Court said, you have to either intend to speak falsely or act with reckless disregard whether you're speaking falsely. And the question now is whether true threats, uh, which is another category of state od tort law, should also require some kind of specific intent or recklessness standard.

[00:45:03] Jeffrey Rosen: Gabe do I have that right? And if so, or if not, tell *We the People* listeners why you think that in addressing this true threats category, it's really important to have some kind of specific intent standard, or else all sorts of other valuable speech would be chilled?

[00:45:22] Gabe Walters: Well, Jeff, I think you have the, the summary right. I would say when analogizing true threats to fighting words, it's important to recognize that the fighting words doctrine has faced deep criticisms and many commenters con- consider it to be on its last legs. I mean in the Chaplinsky case, which is the seminal fighting words case, the speaker called a police officer a damned fascist. I think that, especially in the context of a political rally maybe in, in most, if not all, contexts, is and should be protected political speech especially when criticizing an, and officer of the state.

[00:46:04] Gabe Walters: So, there are further glosses on Chaplinsky too. John Elwood mentioned this in his argument on behalf of Billy Raymond Counterman, where he says, "The court has, has sort of reframed the fighting words doctrine with language such as calculated to provoke and imminent breach of the peace." So, calculated to provoke might suggest something more than a general intent standard, but your question is about where's the harm in a general intent standard. And I think that it's exactly in the examples of speech that is maybe low value or maybe walks near the line but doesn't cross it. Speech where the speaker does not intend to cause harm but inadvertently causes harm. And I think that at the very least, evidence of the speaker's intent is part of the context that should be taken into account in any state punishment in a civil context or certainly prosecution in a criminal context.

[00:47:09] Gabe Walters: And you know, whether that was done properly in Billy Raymond Counterman's case or not…you know, maybe not. Maybe what he needs is a new trial where he is permitted to put on evidence of, of what his actual intent was or what his mental state was, if it was delusional. And he was, I think, denied that opportunity here. Whether we separate out intimate, relational speech as between people who know each other in an intimate setting or, a delusional person who thinks he's having a two-way conversation and harassing or stalking or trying to win the affections of, of someone who would rather not be speaking to him at all that's a separate question, I think, from what standard should apply in an actual true threats context.

[00:48:03] Gabe Walters: And so that gets back to, I think, the initial point of this conversation. You know, it may be the case that this case is not the right vehicle to ask this question about what mental state should pertain to true threats prosecutions. And yet that question is an important one that needs to be resolved. The court last had an opportunity to resolve it in the *Elonis v. United States* case about I think nine years ago now. And it punted ultimately on the constitutional question but found as a matter of statutory interpretation under the federal threats statute that a specific intent to, to threaten or to cause somebody to fear bodily harm was a necessary element of that federal crime.

[00:48:44] Gabe Walters: And so I think consistent with that approach and consistent with what the court held in *Virginia v. Black* and consistent with, *US v. Watts*, which demonstrates that a general intent to make a statement that somebody deems threatening is not sufficient. I think it is the specific intent standard, whether we place that at reckless disregard or knowledge or purpose, that best protects speech that's at the margins of political and, and social acceptability. And I think may have low value but doesn't have no value. And I think that consistent with, as *New York Times v. Sullivan* recognized, our profound commitment to wide open and robust debate on matters of public concern, I think is the test that best draws the line and gives breathing space to, to speakers to say what they think to participate in debate freely and, and openly without self-censoring, without fearing crossing over the line to liability.

[00:49:50] Jeffrey Rosen: Professor Lakier, last word in this great discussion is to you. Tell our listeners why you think that when it comes to infliction of emotional distress under stalking statutes in particular, a specific intent standard is not required and the court should not adopt it.

[00:50:11] Genevieve Lakier: Well, I guess I'll say it's definitely not a specific intent to threaten because that misunderstands what the, what's happening here. Often, there's no intent to threaten whatsoever, but the speech can still be very harmful. Whether you need a specific intent to harass, a specific intent to continue to communicate in unwanted fashion, I think that's interesting and important question, uh, but it's definitely not the question presented by this case. But absolutely not a specific intent to threaten when what is going on very often in these cases from the perspective of the speaker has nothing to do with threats whatsoever.

[00:50:42] Genevieve Lakier: One final point, if I may, about the true threats standard, the standard that question presented in the case asks. And just to go back to your earlier question about the Fox lawsuit. You know, so when we're thinking realistically about what, say, requiring recklessness would mean you can look at it both in a kind of glass half empty or glass half full way, because a recklessness standard is a very demanding standard. It's often going to be, and this is the critique often of *New York Times v. Sullivan* that we've been hearing from Justice Thomas, Justice Gorsuch, it's going to encourage an irresponsible press. Because it's going to be so often very difficult to show the kind of subjective knowledge, you know, you know that there's a possibility that you are doing this bad thing, that recklessness requires. So it's a demanding standard, but it also allows plaintiffs to succeed.

[00:51:35] Genevieve Lakier: And so, uh, you know, it's just interesting thinking about how do we make sense of the settlement in the Fox, uh, Dominion lawsuit from a constitutional perspective? What is it telling us about recklessness standard as a mens rea? Well, I think it's telling us that both parties have something to fear. Fox clearly was worried that it would lose, that Dominion would be able to satisfy its burden to show recklessness in this case, given all the, uh, evidence that it had, which is why it was willing to settle and to settle with such amounts. But Dominion also, it seems like, had, uh, cause for, uh, concern, that it wasn't at all sure that, given how demanding recklessness is, it could win.

[00:52:09] Genevieve Lakier: And so I think we're trying to think about, what would recklessness mean? I think it would mean that as a standard, it would mean that it's, it's going to be quite difficult in many cases to succeed on these, uh, in these cases. And whether or not we think that's a good thing will depend, I think, upon an underlying view of whether or not it's better to protect this threatening but potentially hyperbolic speech, the kind of, sort of on the margins speech that Gabe was talking about, or whether it's better to protect who are generally and reasonably afraid when they hear the speech. And, recklessness is going to give a lot of protection to speakers. We may think that's a good thing, but we have to recognize the consequences are going to be that there's a lot of, um, scared people who will have no recourse.

[00:52:54] Jeffrey Rosen: Thank you so much, Gabe Walters and Genevieve Lakier, for ailluminating, uh, deep and great discussion of a really important First Amendment case. I learned a lot and I know our listeners did too. Gabe, Genevieve, thank you so much for joining.

[00:53:10] Genevieve Lakier: Well, thanks for having me.

[00:53:11] Gabe Walters: Thank you, Jeff.

[00:53:13] **Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Bill Pollock, and Sam Desai. It was engineered by Greg Scheckler. Research was provided by Sam Desai. Please recommend the show to friends, colleagues, or anyone who's eager for a weekly dose of civil dialog and constitutional debate. And always remember that the National Constitution Center's a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to civil dialog of folks like you who are inspired by our nonpartisan mission of constitutional education and debate.

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