

Understanding the

# COUNTERMAN V. COLORADO

Supreme Court Decision

## Why are we discussing “Counterman?”

At the Stalking Prevention, Awareness, & Resource Center (SPARC) of AEquitas, we’ve been (understandably!) inundated with questions and concerns about the recent Supreme Court (SCOTUS) ruling in [Counterman v. Colorado](#). Stalking is a prevalent, traumatic, and dangerous victimization that is too often minimized or dismissed, and we’re sensitive to the survivor fears and trauma this case elicits.

Our role at SPARC is *not* to provide opinions, endorsements, or denunciations around any stalking legislation and/or judicial rulings, but rather to provide education and strategies to empower all victim service and criminal justice professionals to better help stalking victims and hold stalking offenders accountable. In that spirit, we’re breaking down the *Counterman v. Colorado* case and going back to basics to make sure stakeholders understand what the Supreme Court decided – and what that decision may mean for stalking prosecutions moving forward. This document is intended as a general explainer, and our colleagues at [AEquitas](#) are available to directly support prosecutors handling these cases.

The barriers to prosecuting stalking can be legal, attitudinal, and/or a combination of both. The *Counterman* decision, which only addressed speech-based stalking conduct, requires that prosecutors in every state and jurisdiction must establish that the perpetrator had some understanding that their speech might be viewed as threatening (a legal standard explained in more detail below); this standard is already required in the vast majority of U.S. states and jurisdictions (per [SPARC’s compilation of statutes](#)). **In other words, while the Counterman decision is important to understand and no one can predict all of its effects, this ruling is unlikely to change the vast majority of stalking statutes, pending cases, or past convictions.**

Much of the reporting and rhetoric we’ve seen around this decision has conflated the facts of this case with reactions that misrepresent the actual scope of this ruling, causing significant confusion and misinformation that might actually contribute to the attitudinal barriers to stalking prosecutions.

## Who is Counterman?

Billy Counterman is the name of a defendant who was convicted of stalking at the state level, in Colorado, in 2017. Counterman appealed his conviction, and there were several appeals before the case made it to the Supreme Court in 2023. The ruling is associated with his name because criminal cases are originally titled as *(State of Prosecution) v. Defendant*. After Counterman was convicted, he appealed the conviction and the case styling became *Counterman v. Colorado*.

## What happened in the original case in Colorado in 2017?

For something to be a crime, there must be a law (a criminal statute) against it. All crimes are legally recognized as bad behavior, but not all bad behaviors are crimes. Every jurisdiction in the U.S. has a law making stalking a crime. However, each jurisdiction has its own definition of the crime of stalking with its own required elements; in other words, every stalking law has certain elements that must be proven before a person can be found guilty of stalking.

In 2017, Colorado convicted Counterman of the crime of stalking for sending hundreds of messages from various social media accounts to an individual, C.W., over a period of two years. The Colorado stalking statute required the prosecution to prove three elements: 1) that Counterman communicated to the individual, 2) in a manner that would cause a reasonable person in that situation to suffer emotional distress, and 3) did actually cause that individual emotional distress. The prosecution established all three during the trial. The stalking statute did not require – and so the prosecution did not attempt to prove – that Counterman was aware the victim or a reasonable person would feel emotional distress from receiving the messages.

## Why is the Supreme Court involved?

The Supreme Court is the highest tribunal in the country for all cases and controversies arising under the Constitution or the laws of the United States. Counterman argued that the Colorado law – and his conviction under it – infringed on his free speech under the First Amendment, making it an unjust law that infringes on constitutional rights. He appealed the case, arguing that the prosecution never proved that he intended to be threatening. In other words, he said that prosecutors in Colorado should have had to prove intent behind his speech, not just how the victim (and/or a reasonable person in the victim’s situation would have) felt about his speech.

## Are there limits to free speech?

Yes. The relevant limit in this case is that of “true threats.” Here, a “true threat” is a legal term defined as **a serious expression conveying that a speaker intends to commit an act of illegal violence. By their nature, true threats subject a victim to a fear of violence and the disruptions to life caused by such fear.** “True threats” are not protected by the First Amendment. In the *Counterman* decision, the Supreme Court acknowledged that speech is a constitutionally protected right, but speech that is a “true threat” is not protected.

## So, if “true threats” are not protected, why was the case sent back to the Colorado court?

The actual issue in the case is what the Colorado statute required prosecutors to prove at trial. The statute only required that prosecutors prove the defendant intended to make the communication; **it did not require the defendant to be aware of the threatening nature of the communication.**

Most criminal statutes require that prosecutors prove the defendant acted with some sort of intent; different levels of intent are required for different types and levels of crime. For example, prosecuting a first degree murder case generally requires the prosecutor to prove a defendant purposely killed someone, while prosecuting a second degree murder case may only require the prosecutor to prove the defendant knew or should have known their actions would cause another's death.

A law can require one of four possible levels of an offender's state of mind, or "intent," when proving a defendant committed a crime. Generally, these are: purposeful, knowing, reckless, or negligent. When statutes do not explicitly state the level of an offender's intent that needs to be proven, the level of intent typically defaults to "recklessness." To prove recklessness, the prosecution only needs to prove that the defendant knew or should have known that their acts would have had the result they did.

However, the *Counterman* case is unique in that the Colorado statute not require proof of the defendant's intent to threaten or cause emotional distress – rather, it focused on the impact the conduct had on the victim and would have had on a reasonable person. The defendant's intent in sending the messages was not an element of the criminal offense.

Generally, individuals will not be held **criminally liable** for their actions unless the prosecution can prove some level of intent. In other words, accidents or mistakes are not usually criminalized. In *Counterman*, SCOTUS determined that the application of the Colorado stalking statute was unconstitutional because an individual cannot be held **criminally liable** for making "true threats" unless the prosecution **also** proved the defendant acted at least recklessly when they made the threats.

## So, what did the Supreme Court decide, exactly?

SCOTUS decided that in order to be criminally liable for threats, the State needs to show that the defendant was, at least, reckless in their communication. **Acting "recklessly" is a common standard for prosecutors to prove, and means the offender "consciously disregarded a substantial and unjustified risk" that their communication was threatening.**

This means SCOTUS said the prosecution must show that the defendant had some personal, subjective understanding of the threatening nature of their statements – with "subjective understanding" here meaning the defendant knew or should have known the threatening nature of their communication. Importantly, the Supreme Court stopped short of requiring prosecutors to prove the defendant intended to cause emotional distress, noting that "the First Amendment requires no more demanding a showing than recklessness."

## Did the Supreme Court say Counterman is innocent?

No. The Supreme Court **did not** rule that Counterman was innocent or that his actions were acceptable, nor did they state that they did not believe the victim and/or the harm caused by Counterman's actions. The Supreme Court sent the case back down to Colorado for further proceedings (hearings and/or decisions) consistent with the Supreme Court's new intent framework.

## Moving forward, does this mean that stalkers can make threats and then claim that the speech wasn't meant to be threatening and, therefore, is protected free speech?

Stalkers may make this argument (and currently do make this argument under statutes with intent requirements), but prosecutors have tools and strategies to prove offender intent and/or recklessness. For example, prosecutors often show intent and/or recklessness through showing “consciousness of guilt” like the defendant’s efforts to conceal their identity, continuing their behavior after being told to stop, or finding ways to overcome a victim’s efforts to block or end the communication. In *Counterman*, the prosecutors did not try to prove offender intent because it was not required that they do so under their statute at the time.

While the majority of stalkers do **not** have significant mental health diagnoses, a small percentage of offenders do; since these offenders may not understand that their behavior is threatening, it can be challenging to prove that they were reckless and/or had intent. However, this challenge is not unique to stalking charges. When a defendant claims that they are delusional, prosecutors have the opportunity to rebut or counter this claim with evidence of the defendant’s ill-intended conduct. For example, an offender might say they intended the contact as complimentary but then message a victim from multiple accounts because they had been blocked, this implies the defendant’s understanding that their contact was not wanted and their knowing choice to ignore the victim’s attempts to stop the contact (i.e., intent). Their other conduct – like following a victim, taking photos, or hacking accounts – may also be combined with their speech to help show intent.

## How might this decision change the laws in my jurisdiction?

While there’s still a lot unknown about how this ruling will affect criminal stalking charges and prosecution, the SCOTUS decision centers on making offender intent a required element to prove a stalking crime when the defendant’s speech is the basis of the charge – and, again, this is already incorporated in most stalking laws. The majority of stalking statutes already require that the prosecution establish the defendant’s intent as recklessness or something higher; many include language requiring that the defendant “knew or should have known” their conduct would cause a reasonable person to feel fear. Prior convictions that included a demonstration of the stalker’s intent as recklessness or something higher are unlikely to be affected.

Stalking statutes will need to be reviewed if they do not currently require proof of a defendant’s intent at the level of recklessness or higher when speech is used as the basis for the crime.

## What kinds of stalking cases might this decision impact?

While we can’t predict with certainty how the *Counterman* decision will play out in courtrooms, it’s worth noting that most stalking cases are **not** solely based on the communication/speech issues that came up in this ruling. Most stalkers engage in a variety of behaviors to scare their victims, and the totality of these incidents add up to a pattern or course of conduct. These behaviors frequently include speech or

communication *as well as other tactics* to surveil, sabotage, attack, or otherwise harm their victims. For example, a stalker might text their victim as well as follow them in a vehicle, hack into the victim's accounts, and/or damage the victim's property.

The *Counterman* case relied entirely on speech, and this ruling is about speech. The Supreme Court is **not** requiring that statutes change to include intent for other stalking behaviors. In other words, there is no intent requirement universally being added for stalking behaviors like following, violating privacy, or damaging property. In the majority of stalking cases, the course of conduct is not limited to speech/communication.

### Too Long Didn't Read (TLDR) Version

- Much of the rhetoric and reporting around the *Counterman* decision has exaggerated the likely impacts of this case. The perception that the *Counterman* ruling poses a major obstacle can become its own barrier to reporting and prosecuting stalking.
- The vast majority of stalking statutes and decisions are unlikely to be affected by the *Counterman* decision, because many statutes already require a showing of recklessness and many stalking cases are based on more than communications.
- The Supreme Court **did not** rule that *Counterman* was innocent or that his speech was acceptable.
- “True threats” are still not protected speech under the First Amendment.
- What changed? To hold someone criminally liable for a “true threat,” prosecutors now need to prove that the offender had some personal, subjective understanding of the threatening nature of their statements – with “subjective understanding” here meaning the defendant knew or should have known the threatening nature of their communication.
  - The standard is “recklessness” – that the offender “consciously disregarded a substantial and unjustified risk” that their speech was threatening to the victim.
  - This is a common standard of intent that prosecutors must meet to prove a crime.
  - Colorado, and all U.S. jurisdictions, will need to review their statutes and make any necessary revisions.

## What's next? Resources and Next Steps

Everyone has a role to play in elevating the issue of stalking, supporting stalking victims, and holding offenders accountable. Reflect on how stalking has affected people in your life and consider boosting your support for victims and survivors. Even if the *Counterman* decision does not dramatically impact your jurisdiction, the headlines, conversations, and news stories can cause stress, trauma, and misunderstandings for those who have experienced stalking. Reach out, touch base, and be an open ear for those affected by this spike in the national focus on stalking.

- Check out our [guidance on supporting friends and loves ones experiencing stalking](#)
- [Learn about your stalking statute](#)
- Learn more about stalking at [StalkingAwareness.org](http://StalkingAwareness.org)

### For Prosecutors

If you're a prosecutor, hone your skills and learn all the ways you can establish a defendant's intent! Need some help?

- Check out our [resources for prosecutors](#)
- Contact [AEquitas Attorneys](#) for assistance
- Attend [upcoming office hours and trainings](#)

### For Victim Service Providers

This is a great opportunity to revisit and enhance your response to stalking – and to reassure victims that the *Counterman* decision does not negate their voices, experiences, or legal options.

- Check out our [resources for victim service providers](#)
- Reflect on your stalking response with our [checklist for DV/SA organizations](#)