

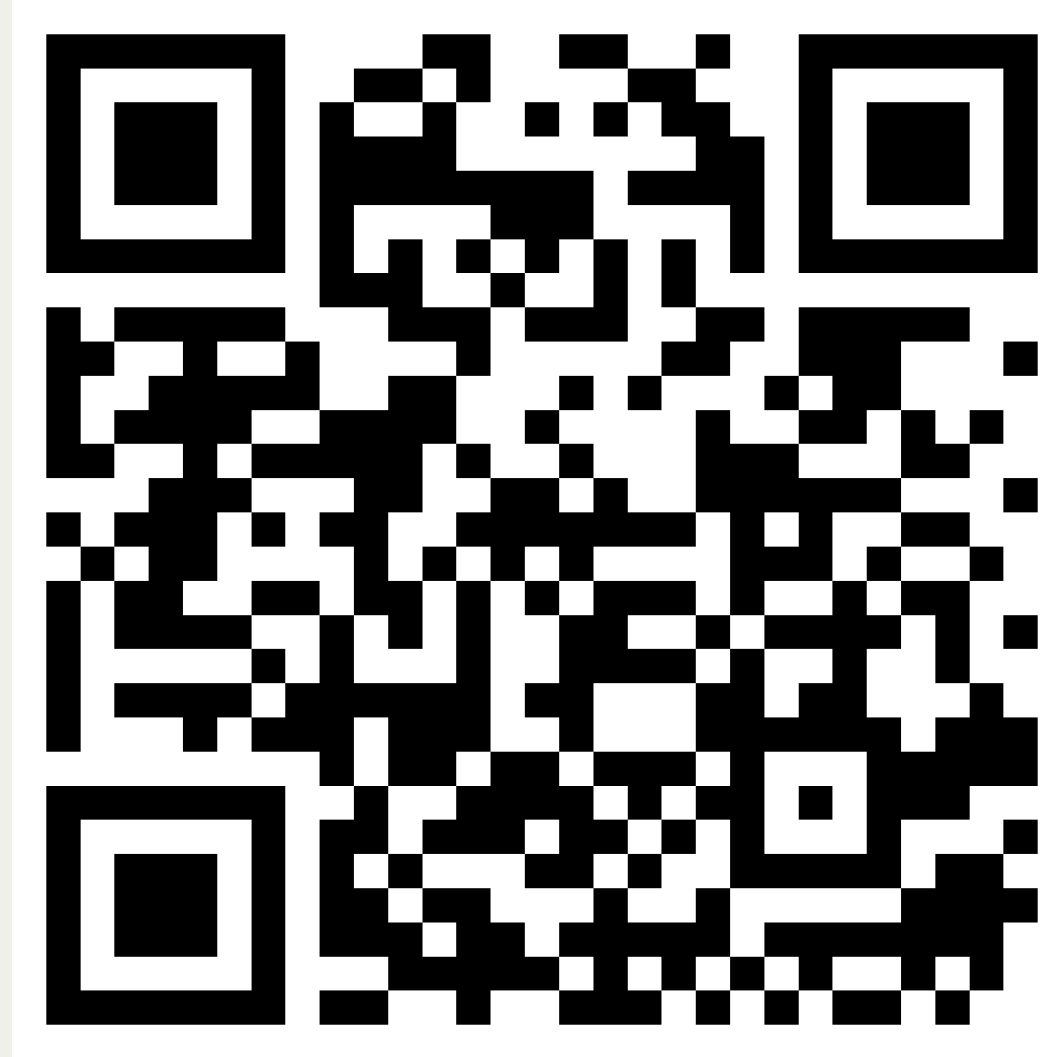
From threats to incitement

What were they **thinking?**

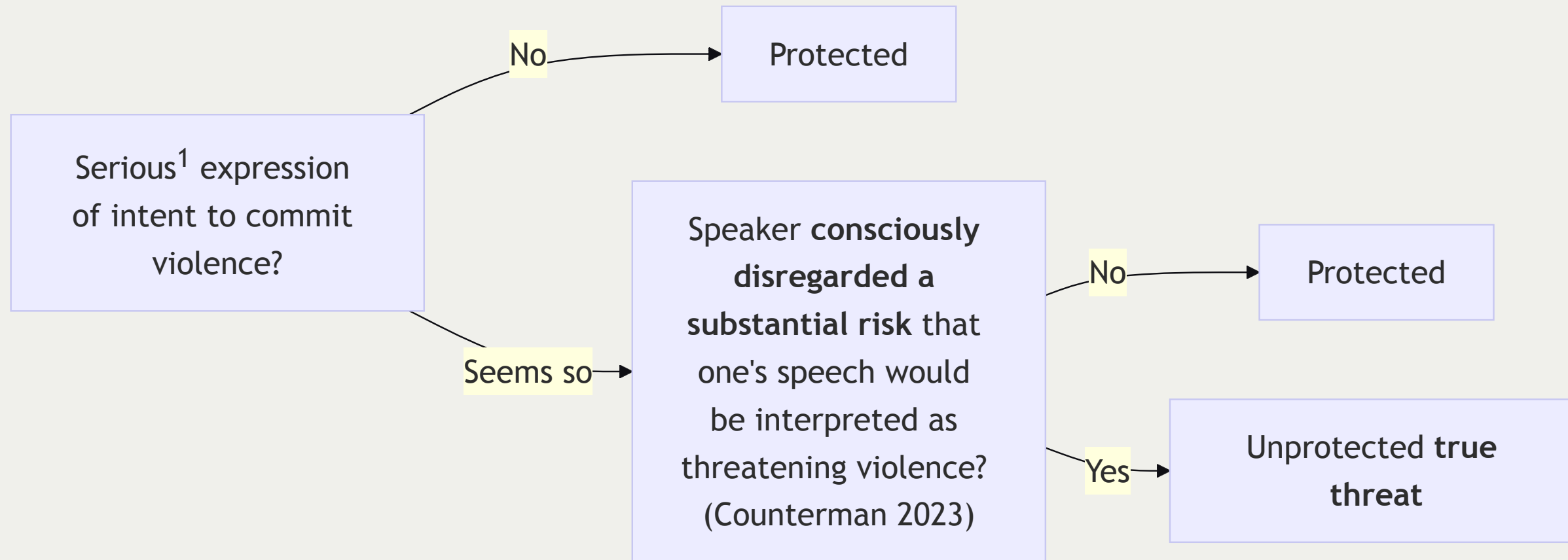
If a slide has this background, it's another **recap of a case we already talked about or additional examples to read at your leisure**. I will not discuss them in section. I put them in the slideshow to keep the order and make it easier to study later.



Weekly check-in (5 min.)



Threat or not (federal minimum)?



1

¹ Intent again! From the [Beal](#) opinion: "...not one said in jest, idle talk, or political argument." Virginia b. Black (2003) adds to this hyperbole and "obvious fiction or art".



From last week's check-ins

What you wrote about	# of responses	Where we pick it up
Rap and lyrics: art or threat? Is the law biased against rap?	30	Knox
Intent: how can anyone prove what someone meant?	20+	"How courts find a guilty mind"
Shouldn't the victim's fear count more?	several	Its own slide
Social media: is typing more deliberate than talking?	several	Its own slide
Mental health (Beal, Kaye)	a few	"Illness and the guilty mind"
Comey's "86 47"	a few	"You're the judge"
McConnell emails: who's responsible for violence by others?	1	Next week! ➡ incitement!



Some quick corrections

1. **Elonis** wasn't freed because he lacked intent. The appellate court decided his jury was asked the **wrong question**. On remand, his conviction was **upheld**. He served 44 months, mostly waiting for appeal.
2. **Howard Weiss** wasn't convicted for threatening McConnell at the time of our readings. The 9th Circuit **reinstated the charges** so the case could go to trial. I believe the case was eventually dropped -- but the paper trail gets weak, so it is up to you to sleuth it out if you want.



Some quick corrections

3. [Sara Beal](#) was not acquitted on the 2023 appeal. The evidence was deemed sufficient under the pre-Counterterm test. After Counterterm, she got a [retrial](#) under the new test. Not sure how it ended. Is this the same Sara Beal? The location checks out.



Some quick corrections

4. As of now, [James Comey](#) has not been convicted or punished in any way. He was [charged](#) — and not under the same statute as Beal. Hers was a [Washington state](#) harassment charge, his is [federal](#).

Why was it automatically a federal case?



Part 1

Recap: the Oct 7 lecture



Four cases, one question

Case	Who spoke	Who was the audience? (important!)
Commonwealth v. Knox (Pa. 2018)	Two rappers	YouTube / Facebook, and the officers named
U.S. v. Weiss (9th Cir. 2021)	An angry constituent	Sen. McConnell's inbox
Planned Parenthood v. ACLA (9th Cir. 2002)	An anti-abortion group	The public, and the doctors on the posters
U.S. v. Kaye (S.D. Fla. 2022; 11th Cir. 2024)	A retiree on TikTok	Her followers, and the FBI agents coming over

Keep asking: who was the speaker **talking to?**



Knox: the facts

- Officers Zeltner and Kosko arrest Knox and Beasley on drug and gun charges
- Shortly after, the two record "F— the Police," a remake of N.W.A.'s 1988 song
- It names both officers, says "your shift over at 3," video shows their photographs. The song does **not** dox them, though, in spite of media coverage suggesting otherwise.

"Well your shift over at 3 and I'm gon' fuck up where you sleep"

- It ends: "Let's kill these cops 'cause they don't do us no good"
- The officers are due to testify against Knox about a month later. (This will be important. Why?)

Literal threat, or art, protest, and hyperbole?



Knox: how the court ducked the hard question

Pennsylvania's statute: a threat to commit a crime of violence "**with intent to terrorize another.**"

It remains an open question whether a statute which criminalizes threatening statements spoken with... knowledge or reckless disregard of their threatening nature, can survive First Amendment scrutiny.

— Pennsylvania Supreme Court (2018, pre-Counterman)

But the court found **purpose**: "In the aggregate, the evidence of subjective intent is plentiful." So it didn't matter in the end.



Knox: author as himself or the lyrical subject?

Our music was our weapon. Nonviolent protest.

— Ice Cube, on "F— tha Police"

From lyrics:

"Beat a police out of shape / And when I'm finished, bring the yellow tape / To tape off the scene of the slaughter"

— N.W.A, "F-- tha Police"

Outlaw country music is given much more poetic license than gangster rap...

— Killer Mike, supporting Knox's petition² to the U.S. Supreme Court (2019)

He cites:

"But I shot a man in Reno just to watch him die"

— Johnny Cash, "Folsom Prison Blues"

²[Petition for Writ of Certiorari, Knox v. Pennsylvania, No. 18-949 \(U.S. filed Jan. 18, 2019\)](#)



Knox: author as himself or the lyrical subject?



"I got my twelve gauge sawed off / I got my headlights turned off /
I'm 'bout to bust some shots off / I'm 'bout to dust some cops off"

— Body Count, "Cop Killer" (1992)

and

"Fuck Daryl Gates!"³

— Body Count, "Cop Killer" (1992)

³ Gates was the LAPD chief in 1991 (when Rodney King was beaten up)



The usual rationale: **specificity**

A joke doesn't usually come with a target, time, and place.

— one of you, in last week's check-in

True, although this case is about artistic expression.



The usual rationale: **specificity**

- N.W.A. aimed at "the police" in general;
- Body Count aimed at "the police" in general but in some recordings specified it's aimed mainly at LAPD
- Knox named two people, their schedule, and their homes, right before they testified.
- Elonis aimed at his wife.

California's 2022 Decriminalizing Artistic Expression Act (AB 2799) limits the use of lyrics as evidence in California trials.





Young Thug: not a free speech case

- Case in Georgia where lyrics of 17 songs published by his record label YSL were used as evidence.

- The charge was organized crime and racketeering (fraud)



Weiss: the McConnell emails

McConnell's website invites messages: "I look forward to hearing from you!"

Howard Weiss sends anonymous emails for over a year (2018–2019), some with racist slurs. One, from an address referencing "the resistance":

turtle, If you push this for Friday, the resistance is coming to DC to slash your throat. You will die in the street...



Weiss: "I just wanted to annoy him"

- Police interview him. He admits sending the emails, but says he meant to **annoy**, not threaten
- The officer tells him to be "**mindful**," because other people could see the emails as threats
- He keeps sending them
- 2020: the district judge dismisses the case on First Amendment grounds
- 2021: the 9th Circuit reverses. A reasonable jury could find a true threat, because the email described **when and how**

Why does the "be mindful" warning matter so much?

And he said "**the resistance**" would do it, not him. Does that matter?



Planned Parenthood v. ACCLA: the posters

- 1995: an anti-abortion group publishes "WANTED"-style posters naming abortion providers, with photos and home addresses (the "Deadly Dozen")
- Several doctors had already been killed after similar posters by others
- One defendant: "It wouldn't bother me if every abortionist in the country today fell dead from a bullet"
- The doctors sue

Is this the same as saying "stop, or I'll kill you"?



ACLA: the 9th Circuit's answer

The full court, **6–5** (2002): it's a true threat if

a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person.

The Supreme Court declined to review it.

After **Counterman**, would this test survive?



Kaye: "Angry Patriot Hippie"

FBI agents call to interview her about January 6. Three days later she posts videos:

I know my fucking rights... My 2nd Amendment right to carry a gun, to shoot your fucking ass if you come to my house.

Defense: political hyperbole, "intended to communicate strongly held views."

Prosecution: whether she owned a gun or meant to shoot "is of **no moment**. Her threat was clear, direct, and specific."



Kaye: outcome

- Convicted on **one** count, acquitted on a similar one; **18 months**
- 11th Circuit **affirmed** (2024): no error in excluding her expert or refusing three of her jury instructions

Watts was protected. Kaye was convicted. Both were conditional ("if..."). What's the difference?

You asked: if she had no gun, doesn't that prove it wasn't a threat? Was she convicted because FBI agents had just been shot nearby?



Recap: what was the evidence of mind?

Case	Evidence of what the speaker knew or wanted	Result
Knox	Named officers, their shift and homes, timed before testimony	Convicted (court found purpose)
Weiss	Police warned him to be "mindful," and he kept going	Case reinstated
ACLA	Prior posters followed by killings; "fell dead from a bullet"	Liable (under the old negligence standard)
Kaye	Agents had already called, so specific people were coming	Convicted, affirmed

Similar facts, different outcomes? Look at the middle column.



Part 2

More true threats cases



Virginia v. Black (2003): defining a true threat

"True threats" encompass those statements where the speaker **means to communicate** a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.

— Justice O'Connor

Intimidation is a type of true threat: directing a threat at someone **with the intent** of placing them in fear of bodily harm or death.



Black: same symbol, two cases

The rally

Barry Black leads a Klan rally on private property, with the owner's permission. A cross is burned. Passersby on the road can see it.

The neighbor's lawn

Two men try to burn a cross in the yard of their Black neighbor.

Which one is a threat?

Virginia's law said burning a cross was itself **prima facie evidence** of intent to intimidate.



Martinez: "red dot" (S.D. Fla. 2025)

A 21-year-old posts a 38-second Instagram story to his **private** account. From his car, he points a laser-sighted gun at a police car: "I'm on yo ass like white rice my boy... red dot, red dot," then laughs.

- The jury convicts
- The judge **acquits**: barely enough to call it objectively threatening, but **nothing** to prove what he knew

The jury was left to "stack inference upon inference" to guess at Martinez's mental state.



You asked: how do you prove what someone meant?

From the Martinez opinion, two routes:

1. **The words themselves** are so "violent, explicit, and resolute" that the speaker must have known
2. **Outside evidence**: an admission, a warning or restraining order (notice), a prior grudge, how the audience reacted

Which route fits **Knox**? **Weiss**? **Kaye**?



Illness and the guilty mind

Beal: in a paranoid episode, a mother tells her 15-year-old, "I'm going to kill you. I'm going to bash your head in."

- **Against her:** minutes earlier she pulled the SIM card from her daughter's phone. "Even during her episode, Ms. Beal understood what to do to prevent her daughter from calling 911 again"
- **For her:** she believed cameras were hidden in the air conditioner, and her daughter didn't think she'd "actually do it"

Under the old test, her illness barely mattered. Under **Countermand**, it's central.



Shouldn't the victim's fear be enough?

Some of you: "If I was the target, I would definitely feel threatened regardless of intent." "The effect on victims is more important."

The Court (Counterpart): a victim-only test chills speech near the line. People self-censor if they can be punished for how others might read them.

What would a victim-only test do to cases like Watts's (Vietnam Draft) or Comey's (86 47)?



Does posting online make it more deliberate?

One of you: writing and posting "takes more thought and effort" than speaking, so it's stronger evidence of knowledge or purpose.

Sotomayor and Gorsuch (Counterman): online messages lose tone, context and audience, so it's easier to be misread.

Who's right? Does it depend on the platform? How to interpret edits, takedowns, reposts?



Quick check: the Moynihan texts

A Jan 6 rioter convicted and pardoned by Trump. In 2025 he sends a private text message:

Hakeem Jeffries makes a speech in a few days in NYC I cannot allow this terrorist to live... Even if I am hated, he must be eliminated... I will kill him for the future.

— Christopher Moynihan, private text

Threat or not? Who's the audience? What's the mode of speech? What rung of the ladder? Is it more or less of a threat than Elonis?



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Threat or not? Who's the audience? What's the mode of speech? What rung of the ladder? Is it more or less of a threat than Elonis?

Arrested by New York State Police in Oct. 2025; pleaded guilty in Feb. 2026.

