

True threats

Weekly check-in (8m)



Week 1: What's protected and for whom?

Doctrine	Governing case(s)	Rule in one sentence	Key facts	What it did NOT decide	Nearest look-alike + difference
State action	Text of the 1st Amendment; 14th Amendment Due Process Clause (Gitlow v. New York, 1925)	The First Amendment limits only government (federal, state, local), not private companies, employers or critics.	Dr. Seuss Enterprises pulled six books (2021), which was a private decision. A Berkeley Top Dog worker was fired after he was photographed at Charlottesville (2017), by a private employer.	It doesn't mean private punishment is always legal. Statutes can protect speech where the Constitution doesn't. California bars private employers from punishing employees' political activity (Lab. Code §§ 1101–1102).	Ermold v. Davis (6th Cir. 2025) runs the other way. When an official wields state power, the act is the government's , so she can't claim First Amendment protection for it.
Public employee speech	Pickering v. Board of Education (1968)	A public employee's speech is protected if (1) it's made as a private citizen, not as part of the job, (2) it's on a matter of public concern, and (3) its value outweighs any harm to the government's efficiency.	Teacher Marvin Pickering was fired for a letter to the local paper criticizing the school board's budget priorities. The Court ruled his firing was unconstitutional.	It's a balancing test with no bright line. "Public concern" was defined later (Connick v. Myers , 1983), and speech made as part of the job was excluded later (Garcetti v. Ceballos , 2006).	USD professor Hook (2025) : off-duty, private Facebook post calling Kirk a "hate spreading Nazi." A federal judge blocked his firing with a TRO, and the university dropped it on Oct. 3, 2025. Kim Davis refused licenses as part of her job, so it's state action, not protected speech.
Obscenity (preview; full row week 10)	Miller v. California (1973)	Unprotected only if (1) the average person, applying community standards, finds it appeals to the prurient interest, (2) it depicts sexual conduct in a patently offensive way, and (3) taken as a whole it lacks serious literary, artistic, political or scientific value.	Cincinnati's Contemporary Arts Center and its director were prosecuted in 1990 over the Mapplethorpe exhibition, and the jury acquitted. The question at trial: "Is that art?"	Whose "community" sets the standards online (open until week 10).	Indecency (week 5): broadcast-only and regulated, but not banned.

Section office hours

Thursday, 12:00 - 1:00PM @ Rolfe 2133

True threats, now for real

Quick case 1: Me at school

A high school student reposts a meme (?) on his public TikTok: a silhouette of a man in a school hallway holding an assault rifle, finger on the trigger, captioned "Me at School." His ex-girlfriend finds it while scrolling his account, screenshots it and reports it. He says he reposted it by accident, it's his "dark sense of humor," and he deleted it right away.¹

Threat or not?

¹ Commonwealth v. Ushon U., SJC-13793 (Mass. Apr. 24, 2026)

Quick case 2: Costco "assassination"

A man walks up to a Costco manager and says: "Right now, there is a legitimate death threat that I have made to assassinate [a local judge]... I don't want to do that. But I'm willing to do that." He records the conversation and emails it to the manager. The next day he tells police he'll kill someone within a day if he isn't taken seriously. At trial he says he has Tourette syndrome, and that he was trying to get arrested so he'd get psychiatric treatment. He thought a threat "so over the top" was harmless.²

Threat or not?

²State v. Hensley, No. 57518-3-II (Wash. Ct. App. Feb. 27, 2024) (unpublished)

Quick case 3: Dad in the ditch

A man finds his daughter's dog dead in a ditch, shot. He's furious that the sheriff's office won't investigate. He goes to the convenience store where a detective's son works and tells him: "You're the man I'm looking for." He says he has friends in Kansas City "that don't mess around," and that the son is going to end up finding his dad in a ditch. He later says he never meant to threaten anyone.³

Threat or not?

³ State v. Boettger, 310 Kan. 800 (2019); State v. Phipps (Kan. Ct. App. Oct. 20, 2023)

Elonis recap

The facts

- 2010: his wife leaves with their two kids, and he loses his job
- He starts posting violent "rap lyrics" on Facebook as "[Tone Dougie](#)"
- The targets: his wife, coworkers, a kindergarten class, an FBI agent
- He adds disclaimers: it's fiction, it's therapeutic, it's art

Elonis recap

What he wrote

There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined.

His wife asks for a civil protection order.

Elonis recap

There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts.

— Anthony Elonis

Bonus:

Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined.

— Anthony Elonis

His wife asks for a civil protection order.

After she was granted the protection order, Elonis posted again asking whether it was "thick enough to stop a bullet."⁴

⁴United States v. Elonis, No. 12-3798 (3d Cir. May 2, 2016) (on remand).

The trial

Charge: federal law makes it a crime to transmit "any communication containing any threat... to injure the person of another" (18 U.S.C. § 875(c)). Up to 5 years.

Jury instruction: would a **reasonable person** see the posts as threats?

Result: convicted. **44 months.**

Elonis disagrees about the instruction and appeals: no, the question is whether **I** meant them as threats.

Our case (2015)

Is it enough that a **reasonable person** would see a threat?

Or does the government have to prove something about **what Elonis knew or intended**?

Lower courts were split on this, which is why the higher Court took the case.

The holding (7–2, Roberts) (2015)

Negligence is **not enough** under this statute.

Purpose or **knowledge** is enough: he posted to threaten, or knowing it would be seen as a threat.

"Wrongdoing must be conscious to be criminal." -- where does this principle come from?

Vicious will or forbidden acts or omissions⁵

Morisette picks up and sells bomb debris claiming he thought it was abandoned.

Is honest mistake criminal?

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand...

— Justice Robert H. Jackson

... if the statute does not say otherwise.

⁵ Morisette v. United States, 342 U.S. 246 (1952)

The Elonis remand case (2016)

- 3rd Circuit **upheld the conviction anyway**⁴
- **Counterfactual test**: had the jury been given the correct instruction, would they still have convicted Elonis based on the evidence available at the time? If yes, the error was harmless.

⁴United States v. Elonis, No. 12-3798 (3d Cir. May 2, 2016) (on remand).

What all these cases have in common?

Objective v subjective standard!

What all these cases have in common?

Objective v subjective standard!

Here, **objective** really means the **reasonable recipient test**

What would a reasonable, ordinary person—not an expert or unreasonably sensitive person, but someone of average intelligence and perception—understand from this communication?

So more intersubjective than simply objective. More accurately described as "not concerned with the state of mind of the accused"

Old problem

Dolus Malus ~ intentional wrongdoing

Culpa ~ unintentional fault or negligence (slight, gross -- which also decided whether one was liable for damages; cf. Lex Aquilia⁶)

⁶ Old Republican Law (3rd c. BC)

What about recklessness?

Tricky.

Later (in the principate period): *culpa lata dolo aequiparatur*.
(_ gross negligence is equivalent to intentional fraud)

Intention ladder

"if Jake shows up tonight I'm going to kill him"

Purpose

you want Jake scared

Knowledge

you know he'll read it as a threat

Recklessness

you know there's a real chance he takes it as a threat, and you send it anyway

Negligence

you never thought about it, but a reasonable person would have (ruled out in *Elonis* 2015)

Doctrine check

Left half: **Counterman v. Colorado**
(2023)

In pairs, 5 minutes:

1. **Facts:** two sentences
2. **Rule:** (and test for the rule)
3. **Scope:** what does it cover, and what not?
4. **Look-alike:** closest case among our readings (obvious here)

Where we landed: **Counterman**

- **Facts:** years of unsolicited Facebook DMs to a singer ("Die. Don't need you."). She was terrified, and he kept making new accounts after she blocked him
- **Rule:** the government must prove the speaker at least **consciously disregarded a substantial risk** that the message would be seen as threatening violence
- **Scope:** the constitutional floor for every true threats prosecution. Statutes can demand more.
- **Look-alike:** *Elonis* (2015) asks the same question about a federal statute, not the Constitution

Why recklessness?

Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries.

— Justice Kagan

A higher bar would "prevent States from convicting morally culpable defendants."

Sotomayor and Gorsuch: online messages lack tone of voice and expression, so they'd set the bar higher.

So, "me in the school"

Does joking matter?

Only if he really didn't see the risk.

So, "me in the school"

Before: a jury found him delinquent. The judge then softened it to "continued without a finding" plus probation until he turns 19.

After: in April 2026, the Massachusetts high court held that Counterman applies to threats against places like schools, not just people. Remanded.¹

No change, though. When the school resource officer confronted him, he admitted the image "puts people in fear." That one line is his recklessness.

¹ Commonwealth v. Ushon U., SJC-13793 (Mass. Apr. 24, 2026)

The Costco "assassination"

Before: convicted of felony harassment. Washington's test asked whether a reasonable speaker would foresee the statement being taken seriously.

After: in 2024, Washington's Court of Appeals reversed and ordered a new trial (unpublished). The jury had conflicting evidence about what he was actually thinking, so the error wasn't harmless.²

²State v. Hensley, No. 57518-3-II (Wash. Ct. App. Feb. 27, 2024) (unpublished)

The ditch

Before: the jury convicted him of reckless criminal threat.

After: Counterman says recklessness **is** enough. In 2023 the Kansas Court of Appeals said Counterman effectively overruled **Boettger**. On the same facts today, the conviction would likely stand.

New rows for the Tracker

Doctrine	From	Rule in one line
Guilty-mind presumption	Elonis (2015)	If a criminal statute says nothing about intent, courts read one in, and negligence isn't enough
Chilling effect / breathing room	Counterman (2023), borrowing from NY Times v. Sullivan (1964)	Speech rules need a buffer, or people self-censor protected speech near the line
Political hyperbole	Watts (1969)	Crude, conditional political talk, read in context, isn't a true threat
Overbreadth	State v. Boettger (Kan. 2019)	A law that sweeps in a lot of protected speech can be struck down entirely, not just as applied to one person

Mental state depends on the category

Category	What the speaker has to know or intend	Source
True threats	At least recklessness	Counterterm (2023)
Incitement	Intent to produce imminent lawless action	Brandenburg (1969); described this way in Counterterm
Defamation of public officials	Knowledge of falsity or reckless disregard	NY Times v. Sullivan (1964)
Federal threats statute	Purpose or knowledge (recklessness open)	Elonis (2015)

A statute can demand more than the Constitution, never less.