

Professor Rod Smolla suggestion: Insert to (a) the following words: “intentionally or recklessly.”

The revised text would read:

(a) No person shall intentionally or recklessly intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce:

This suggestion comes from the Supreme Court’s 2023 decision in *Counterman v. Colorado*, holding that the First Amendment requires a showing of at least “recklessness” in threat cases. Here is the key passage:

The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices. Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest *79 to prove. A person acts purposefully when he “consciously desires” a result—so here, when he wants his words to be received as threats. *United States v. Bailey*, 444 U.S. 394, 404, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). Next down, though not often distinguished from purpose, is knowledge. *Ibid.* A person acts knowingly when “he is aware that [a] result is practically certain to follow”—so here, when he knows to a practical certainty that others will take his words as threats. *Ibid.* (internal quotation marks omitted). A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he “consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.” *Voisine v. United States*, 579 U.S. 686, 691, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden v. United States*, 593 U. S. —, —, 141 S.Ct. 1817, 1823–1824, 210 L.Ed.2d 63 (2021) (plurality opinion). But still, recklessness is morally culpable conduct, involving a “deliberate decision to endanger another.” *Voisine*, 579 U.S. at 694, 136 S.Ct. 2272. In the threats context, it means that a speaker is aware “that others could regard his statements as” threatening violence and “delivers them anyway.” *Elonis*, 575 U.S. at 746, 135 S.Ct. 2001 (ALITO, J., concurring in part and dissenting in part).⁵

Among those standards, recklessness offers the right path forward.

Counterman v. Colorado, 600 U.S. 66, 78–79, 143 S. Ct. 2106, 2117, 216 L. Ed. 2d 775 (2023)