

# Legal Theory

<http://journals.cambridge.org/LEG>

Additional services for *Legal Theory*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



---

## SPEECH AND OTHER ACTS

Susan J. Brison

Legal Theory / Volume 10 / Issue 04 / December 2004, pp 261 - 272

DOI: 10.1017/S1352325204040248, Published online: 01 December 2004

**Link to this article:** [http://journals.cambridge.org/abstract\\_S1352325204040248](http://journals.cambridge.org/abstract_S1352325204040248)

### How to cite this article:

Susan J. Brison (2004). SPEECH AND OTHER ACTS. *Legal Theory*, 10, pp 261-272 doi:10.1017/S1352325204040248

**Request Permissions :** [Click here](#)

## SPEECH AND OTHER ACTS

### *A Reply to Charles W. Collier, “Hate Speech and the Mind-Body Problem: A Critique of Postmodern Censorship Theory”*

Susan J. Brison

*Dartmouth College*

---

---

In an article published in 2001,<sup>1</sup> Charles W. Collier raises a number of objections to my article “Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence,”<sup>2</sup> beginning with an implicit objection embedded in the subtitle of his article: “Hate Speech and the Mind-Body Problem: A Critique of Postmodern Censorship Theory.” Since I advocate neither postmodernism nor censorship, and since I would have thought that “postmodern censorship” was an oxymoron, I found this characterization of my position surprising, to say the least.<sup>3</sup> Collier does not define “postmodern censorship theory” or even “postmodernism,” but he helpfully includes a note citing Steven Gey’s article, “The Case against Postmodern Censorship Theory.”<sup>4</sup> Gey, in turn, claims to have picked up the terminology from an article by Kathleen Sullivan, “Free Speech Wars.”<sup>5</sup> Curiously, though, Sullivan nowhere uses the phrase “postmodern censorship theory” in the article cited, although she does discuss a group of leftist legal theorists she dubs “the new speech regulators,” arguing that they:

demand a response from those who would leave speech mostly deregulated; and they deserve a response that goes beyond the rote and reflexive invocation of free speech as an article of faith. The appeal to the First Amendment as self-evident truth may be no more effective, as Professor Henry Louis Gates Jr.

1. Charles W. Collier, *Hate Speech and the Mind-Body Problem: A Critique of Postmodern Censorship Theory*, 7 LEGAL THEORY 203–234 (2001).

2. Susan J. Brison, *Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence*, 4 LEGAL THEORY 39–61 (1998).

3. I am an analytically trained philosopher whose views on language are influenced primarily by Ludwig Wittgenstein, J.L. Austin, and Nelson Goodman, not by theorists classified as “postmodernists.”

4. Steven G. Gey, *The Case against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193–297 (1996).

5. Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203–214 (1994).

recently cautioned, than Samuel Johnson's attempt to refute Bishop Berkeley merely by kicking a stone.<sup>6</sup>

However, since none of the "new speech regulators" she mentions is known as a postmodern theorist—in fact, one of them, Catharine MacKinnon, has published an article attacking postmodernism<sup>7</sup>—and none advocates censorship (although they do, as Sullivan rightly notes, advocate other forms of speech regulation), it would be a mistake to trace the origin of the phrase "postmodern censorship theory" to Sullivan. It is not clear what, if anything, the phrase denotes, but even assuming, charitably, that it refers to some view, it would be a mistake to attribute such a view to me.

Collier's critique examines, one by one, four claims defended in my article, namely, that "all speech is conduct, involving an agent, and all conduct, being intentional action, is expressive (of the motivating intentions)"; that

6. *Id.* at 213, citing Henry L. Gates, Jr., *Let Them Talk*, NEW REPUBLIC (Sept. 20 & 27, 1993), at 37–38. The only use (or mention) of the term "postmodern" in Sullivan's article occurs in the next sentence: "Let me briefly sketch here the tentative beginnings of such a response—the outlines of a defense of progressive free speech libertarianism even in a postmodern age," so this must be what Gey (and then Collier) picked up on. Sullivan suggests that "[t]he argument might take two forms. The first would try to articulate what distinctive attributes speech might have that make it different from the goods and services that government may freely regulate after the New Deal." Sullivan, *supra* note 5, at 213. I have argued that attempts to distinguish speech from nonspeech in this way have failed and are bound to fail. See Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312–339 (1988); and SUSAN J. BRISON, SPEECH, HARM, AND CONFLICTS OF RIGHTS (forthcoming). "A second approach," Sullivan continues, "would focus on institutional rather than on ontological concerns. It may be that any distinction we think of as ontological ultimately rests on institutional concerns, in which case the two approaches converge, but that's another lecture. An institutional approach would try to articulate why we might mistrust government regulation of speech more than we mistrust government regulation of markets for goods and services." Sullivan, *supra* note 5, at 213–214. This approach strikes me as much more promising, focused, as it is, on a constitutional category of speech, not as ontologically based but rather as a function of institutional concerns in a particular political context. I agree that in our current political climate, there are pragmatic arguments against regulating hate speech. As Steven Shiffrin has argued, although regulations on nontargeted racist speech are in principle justifiable, in practice "American society may be so thoroughly racist that nontargeted racist speech regulations would be counterproductive." Steven A. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43–103, 102 (1994).

7. Catharine A. MacKinnon, *Symposium on Unfinished Business: Points against Postmodernism*, 75 CHI.-KENT L. REV. 687–713 (2000). That MacKinnon, classified by Gey as one of the most prominent "postmodern censorship theorists," has no sympathy for postmodern theory of any variety could not be clearer. See, e.g., the final paragraph of the above article: "My feeling is, if the postmodernists took responsibility for changing even one real thing, they would learn more about theory than everything they have written to date put together. Instead, as practiced by postmodernists, the job of theory, as the blood sport of the academic cutting edge, is to observe and pass on and play with these big questions, out of touch with and unaccountable to the lives of the unequal. Their critically-minded students are taught that nothing is real, that disengagement is smart (not to mention career-promoting), that politics is pantomime and ventriloquism, that reality is a text (reading is safer than acting any day), that creative misreading is resistance (you feel so radical and comfortably marginal), that nothing can be changed (you can only amuse yourself). With power left standing, the feminism of this theory cannot be proven by any living woman. It is time to ask these people: what are you doing?" (at 712–713).

“speech does not differ from other conduct in being context-dependent and subject to interpretation”; that “speech is a physical phenomenon, having physical effects on its listeners, effects that can be caused by the content of the speech”; and that “verbal assaults can be harmful in the same ways that assaults involving direct bodily contact are.”<sup>8</sup> In what follows, I reply to Collier’s objections to each of these claims.

## I.

I said: “[A]ll speech is conduct, involving an agent, and all conduct, being intentional action, is expressive (of the motivating intention).”<sup>9</sup> In response to this claim, Collier notes that although

“[t]he term ‘speech’ in the First Amendment . . . is a term of art, . . . one possibility can be rejected at the outset: that there is no constitutionally significant difference between speech and any other form of intentional action. As the Supreme Court has recently noted: To hold otherwise would be to create a rule that all conduct is presumptively expressive.”<sup>10</sup>

I agree that this is the Court’s view, but I do not agree that it is correct, and certainly not for that reason alone. As others, for example Robert Post, have argued, it has proven to be notoriously difficult—some would say impossible—for the Court to distinguish speech from other forms of intentional action.<sup>11</sup> Collier cites *Spence v. Washington*, a flag-desecration case in which the Court’s analysis began with an inquiry into whether the defendant’s “activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”<sup>12</sup> The test used by the Court, which has come to be known as the *Spence* test, was whether “an intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.”<sup>13</sup> The *Spence* test, however, does not succeed in distinguishing speech from nonspeech conduct, as Robert Post has persuasively argued:

8. Brison, *supra* note 2, at 61.

9. Brison, *supra* note 2, at 61. The parenthetical phrase—“(of the motivating intention)” —is potentially misleading out of the context of the rest of the article, and I would now leave it out. A clearer but more long-winded way of putting my point would be: “all conduct, being intentional action, can be construed as expressing something, even if only that the agent intended to act in some way or other.” In any case, Collier’s comments do not address my original parenthetical remark, and I assume that this proposed rewording would not affect his objections.

10. Collier, *supra* note 1, at 204, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984).

11. Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249–1281 (1995).

12. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

13. *Id.* at 410–411.

A small but telling example plainly demonstrates the problem with the Spence test. Consider laws imposing criminal sanctions for the defacement of public property. Such laws do not “bring the First Amendment into play”; a defendant accused of defacing a city bus would not have a First Amendment defense. This would be true regardless of whether the defacement took the form of random blotches of color spray-painted onto the walls, or the form of words like “Down with Clinton” or “Eric is Cool” carved into the seats. Although in the latter case the defendant has satisfied the Spence test—his words carry a particularized message that is likely to be understood by his audience—no court in the country would consider the case as raising a First Amendment question. This example can be multiplied indefinitely, for any action can at any time be made communicative in a manner that satisfies the Spence test.<sup>14</sup>

Although Collier adds, quoting Peter Meijes Tiersma, that “[t]o be functionally equivalent to speech, conduct must be the *means* of communication, rather than simply providing evidence or stimuli from which an observer might draw inferences or in some other way derive information,”<sup>15</sup> this qualification does not help to distinguish speech (and its functional equivalents) from other forms of intentional action. Post’s public-property defacement example meets this criterion as well, as indeed does any example of clearly criminal activity (including arson, rape, and murder) that is intended as a means for conveying a message. As Post notes, “[i]f the Spence test were to describe actual judicial practice, we would expect criminals routinely to attempt to immunize their crimes by endowing them with particular messages.”<sup>16</sup>

But Collier has more to say. To illustrate his view of what counts and what does not count as speech or its functional equivalent, he presents four scenarios for our consideration. Each takes place in a train compartment, and in each case, one occupant, X, smokes a cigar, prompting another occupant, Y, to cough.

Example 1: Y is asleep when X lights up a cigar. The smoke causes Y to cough, which wakes him up. In this case, as Collier notes, the cough is not “conduct in the sense of intentional action.”<sup>17</sup> So far, so good. The cough,

14. Post calls the doctrine embodied in the Spence test “transparently and manifestly false”; Post, *supra* note 11, at 1252. As Post points out, even an apparently nonlinguistic physical object can, under the right circumstances, count as speech. An example is Duchamp’s urinal: In a gallery, it is artistic expression. In a men’s room, it is part of the plumbing. It seems any object or event could—in the right circumstances—be speech, including “found objects” and even natural events. (Shakespeare found “sermons in stones, books in babbling brooks.”) A rainstorm by itself is not speech. But if I have told you that I will meet you at your house at 6:30 P.M. tomorrow if it is raining there then, the rain (there and then) is my way of telling you that I will meet you.

15. *Id.*, quoting Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of “Speech,”* 1993 WIS. L. REV. 1525, 1589.

16. Post, *supra* note 11, at 1252.

17. Collier, *supra* note 1, at 205.

I agree, is not an action, since it is not intentional under any description. It is like snoring or anything else one “does” while asleep or otherwise unconscious.

Example 2: Y is now awake, and the smoke is affecting his throat, but, being exceedingly polite, Y does not wish to cause a fuss. Eventually, though, “it becomes too much” and Y decides to clear his throat “with a brief, quiet cough.”<sup>18</sup> Collier stresses that, in this case, Y was not forced to cough. (He could have held his breath or rushed out of the compartment.) Instead, Y “freely decided that, all things considered, coughing was the best thing to do.” Y “meant (intended) to cough,” but “‘meant’ nothing else by it.” “So here,” Collier states, “there is intention and conduct but not (I shall argue) communication or speech.”<sup>19</sup>

The assumption here seems to be that in order to count as communication or speech, intentional conduct must be intended to be perceived by someone else as intentionally conveying a particular (that is, the intended) message. But no argument is given for this assumption, and there are good reasons for rejecting it. In deciding not to suppress the cough or leave the room, Y acted in a way that he knew would communicate *something* to X. The very fact that he thought about the alternatives to coughing and decided against them (“all things considered”), indicates that conveying a message to Y was at least a foreseeable consequence of coughing.

Now, one familiar with the doctrine of double effect could argue that even if conveying a message to Y was a foreseeable consequence of coughing, it need not have been an intended consequence (and in this scenario, we shall grant that it was not intended). Y’s coughing in this case is similar to one’s yawning (but not loudly or ostentatiously) when one has decided not to resist the urge to yawn during a talk that has gone on for too long, knowing (but not intending) that the yawn will signal the speaker to wind up the talk. This contrasts not only with the case in which one’s stomach growls because the talk has gone on past lunchtime (perhaps making the speaker aware that the talk has gone on too long) but also with the case in which one yawns because of a desire (that is, an intention) that the speaker stop talking. However, the yawn in both cases communicates to the speaker that the talk has gone on too long, whether or not the yawner intends this to be the message communicated.

Example 3: Y is “getting a little peeved” by X’s continued smoking but, being exceedingly polite, wants to get the smoker to put out his cigar but “without seeming to complain.” This time Y’s cough (which “sounds exactly like the previous ones”) is intended to get the smoker to make the inference that the smoke is bothersome. “If [Y is] successful, the smoker will get the message without realizing [Y] was sending a message.”<sup>20</sup> This cough,

18. *Id.*

19. *Id.*

20. *Id.*

according to Collier, still does not amount to communication or speech, because Y “is simply trying to induce changes in [X’s] behavior as one might in training an animal.”<sup>21</sup>

Y’s coughing in this case is, to use an example related to hate speech, analogous to someone’s burning a cross on (or right next to) a black family’s lawn in an attempt to induce the family to move away, without intending that the black family view it as an act of terror by an identifiable white neighbor. Regardless of the cross-burner’s intentions, the cross-burning nonetheless communicates a message of terror to the black family.

Example 4: Y is losing patience and so coughs loudly and ostentatiously, with the intention of conveying to X: “Your smoking is bothering me, I want you to know that, I want you to know that I want you to know that, and I want you to stop.”<sup>22</sup> I agree with Collier that this cough counts as communication but not with his claim that this series of examples shows that communication “involves not only the conveying of an idea (Example 3) but also the realization [presumably on the part of the audience] that a message is intentionally being sent (Example 4).”<sup>23</sup> If this were the case, communicating anything that one does not intend to communicate would be impossible, making the everyday phenomenon of miscommunication impossible.

Collier assumes that one cannot send a message (or communicate anything) without at the same time sending a message that one is sending a message. But in the cross-burning example above, the cross-burner terrorizes the black family in spite of the fact that he does not want the black family to know that he is sending a message of terror.<sup>24</sup> Collier also claims that “[w]ith a true act of communication, I share my belief with you and also implicitly commend it to you for your own adoption.”<sup>25</sup> If this were the case, however, the only true (genuine) acts of communication or speech (Collier seems to use the terms interchangeably) would be clear, unambiguous, and truthful expressions of doxastic propositional attitudes that are understood by the listener exactly as intended. But speech does many things apart from (accurately) expressing our beliefs about things. It alarms, commands, degrades, honors, disgraces, consoles, cuts, seduces, and terrifies, among other things. It can be as soothing as a caress or as stunning as a slap. It quickens the pulse, puts you to sleep, makes you blush, and takes your breath away.

21. *Id.*

22. *Id.* at 206.

23. *Id.*

24. Collier also claims in this section, for reasons I do not yet understand, that in order “for there to be a communicative (expressive) way of doing something, there must also be a noncommunicative (natural or functional) way of doing it that contrasts with the communicative way.” *Id.* at 207. But this cannot be right. There is a communicative way of showing that I think (at least some of) the arguments in Collier’s article are unsound (that is, by writing this response). But there is no noncommunicative way of doing that.

25. *Id.* at 207.

Collier's theory of language is further revealed later in his article, when he tries to discern the message conveyed by the cross-burning in *R.A.V. v. St. Paul*.<sup>26</sup> Citing Ayer and Popper, Collier states that "we may classify statements as true, false, or meaningless,"<sup>27</sup> and it seems that for Collier this classification is exhaustive. The "translations" Collier gives of the burning cross are all statements that could be true or false. But there are also many translations that are not assertions having a truth value (e.g., "Get out of the neighborhood," "Leave town or else," "Whites only here," "Death to blacks," "N— go home"). But suppose, *per impossibile*, that Collier is right—that unless hate speech is meaningless, it is true or false. What follows? According to Collier, it is that the "contemptible and repugnant 'message' is what should be challenged and opposed, not the right to express it,"<sup>28</sup> although no argument is given to support this exhortation. What might the argument be? What might motivate the long discussion of hate speech as the sort of thing that can (and apparently must) be either true or false (since if it is meaningless, it does not convey any message and so, *a fortiori*, does not convey a hateful message)? Perhaps it is that if speech is the sort of thing that can (indeed, must) be true or false if meaningful, then, since actions are not true or false (they just are what they are), they cannot be meaningful unless they are accompanied by a verbal statement or some conventional sign that functions in some equivalent way. But speech is not the sort of thing that must be true or false in order to be meaningful, so this way of attempting to draw the distinction between speech and action never gets off the ground.<sup>29</sup>

Collier concludes his discussion of my first point by arguing that verbal hate speech is speech—more obviously than what he calls "symbolic speech" (e.g., cross-burning). The argumentative force of this is unclear until he reveals that he interprets me as saying that hate speech should be denied constitutional protection because it is not *really* speech. But nowhere do I say

26. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

27. Collier, *supra* note 1, at 229.

28. *Id.* at 232.

29. In discussing what should be done about hate speech, Collier writes: "Hate speech expresses an attitude but potentially also a judgment; the difficult analytical problem is to assess the judgment without necessarily sharing the attitude." *Id.* at 233. But why is "the" problem (ours? the law's?) to "assess the judgment"? Consider two of Collier's proposed translations of the cross-burning: "I wish black people would just go away (and I might hurt them if they don't)" and "Black people should just go away (and they should perhaps be hurt if they don't)." *Id.* at 229. What "difficult analytic problem" is posed in assessing these judgments? The first statement, as expressed by the cross-burner, is presumably true. But even supposing it were not (imagine that the cross-burner is deeply conflicted and thinks in the course of the cross-burning: "I wish black people would go away," "No I don't," "Yes I do"), what difference would that make? The second statement is false. Only a Cartesian skeptic could entertain the possibility that it might be true, but such a skeptic would have the same grounds for doubting that there was indeed a burning cross on the lawn. After all, even our most firmly held convictions (mathematical and perceptual as well as moral) could be falsehoods implanted in our minds by an evil genius. In any case, the cross-burning in *R.A.V.* is arguably not a constative speech act with a truth value, nor is "Fuck the draft," for that matter, but the latter is nonetheless speech that Collier thinks—and I agree—should be protected.



that (nor do I believe it). Nor am I committed to it by anything I do say. (Does this mean that my article was not “a true act of communication” since I did not succeed in “sharing my belief” about this with at least one reader?)

## II.

In response to my claim that “speech does not differ from other conduct in being context-dependent and subject to interpretation,”<sup>30</sup> Collier contrasts someone shouting “Blurp!” at him with someone chopping off his finger and suggests that no matter how he interprets someone shouting “Blurp!” at him, it is worse for him to have his finger chopped off. I agree, but this is not because “Blurp!” is subject to interpretation and finger-chopping is not but, rather, because the finger-chopping causes lifelong, irreversible harm (the extent of which will vary from individual to individual,<sup>31</sup> but will still be significant). Take a slightly different example: Which is more harmful: being constantly subjected to distracting, humiliating, brain-disordering racist speech in one’s workplace, or having one’s finger broken (in a way that will swiftly heal) because of a malfunctioning piece of equipment? The former can easily be seen to be a more serious setback to one’s significant interests, especially if it makes functioning well on the job impossible. But my point was not that verbal assaults are (always or even often) more harmful than physical assaults, but simply that sometimes they *can* be.

I also argued that the context of a physical assault *can* (again, sometimes, not always) affect the extent to which it is harmful. Collier responds by comparing the case in which an assailant hacks off his finger to the case in which his finger succumbed to “some form of organic disease” and had to be removed by a surgeon. “The fact that this context is a blind force of nature rather than a violent criminal attack,” he observes, “does not matter to my

30. Brison, *supra* note 2, at 61.

31. Adopting Joel Feinberg’s definition of “harm” as a setback to an important interest, I claim that a concert pianist would suffer greater harm from having a finger chopped off than would a singer, say, or a schoolteacher. *Id.* at 46. See JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: VOL. I: HARM TO OTHERS* (1984). I suspect that one reason the example of having one’s finger chopped off seems worse to Collier than any verbal assault could possibly be is that it results in irreversible physical damage. But suppose the assault consisted in someone breaking his arm but in such a way that it healed completely in ten minutes. Should this still be considered an assault, on Collier’s view? Why? Or consider the act of burning someone else’s house down—another clear case of an unprotected criminal act, presumably even on Collier’s view (even if no one is physically harmed in the process)—and perform the following thought experiment: Suppose one could burn a house down and have it reconstructed (exactly as it was before with all its contents, including living creatures) ten minutes later. Should this still be considered a criminal act on Collier’s view? Why? The owner/resident was arguably not harmed or harmed only psychically by the ten minutes of shock and the lingering emotional aftereffects. Suppose it was done to frighten the occupant and it succeeded in its goal. Then whatever harm was done seems equivalent to that resulting from a cross-burning in front of a black family’s home (or a demonstration of people circling the house wearing Klan robes and masks or waving Confederate flags).

finger."<sup>32</sup> But the physical damage to one's finger is not the sole arbiter of the degree to which one has been harmed. Compare having one's finger broken in an accident with having one's finger broken (with exactly the same physical damage) by a Mafia don who says, convincingly, "next time I'll kill you." The contextual difference does not matter to your finger, but it makes all the difference to you.

By the end of his article, Collier concedes that "[i]t is true that one can usefully 'interpret' both speech and conduct. And it is true that conduct can seem more or less 'harmful,' depending on the context. But these analytical truths," he concludes, "do not somehow affect the preexisting and obviously experienced differences between speech and conduct."<sup>33</sup> As flattering as it is to see these two claims of mine elevated to the status of "analytic truths," on no account of analyticity that I am familiar with can these statements be considered analytically true. Nor could experienced differences (between speech and conduct) be considered to "preexist" analytic truths.

### III.

I said: "[S]peech is a physical phenomenon, having physical effects on its listeners, effects that can be caused by the content of the speech."<sup>34</sup> Collier replies: "Saying that speech is a physical phenomenon is like saying that playing chess is moving pieces of wood."<sup>35</sup> This is intended to be a fatal objection, a *reductio ad absurdum* of my position, since "someone who thought that chess was nothing but moving pieces of wood would have deeply misunderstood the game of chess."<sup>36</sup> But to say that chess is moving pieces of wood is not to say that it is nothing but moving pieces of wood, and to say that speech is a physical phenomenon is not to say that it is nothing but a physical phenomenon (and that it cannot be described in any other way). Obviously speech is not simply vibrating one's vocal chords and moving one's lips. It is not even simply vibrating one's vocal chords and moving one's lips in a very precisely determinate way (otherwise homonyms would be impossible and "Empedocles leaped" would mean the same thing as "*Empedokles liebt*").

It is a mystery why Collier spends so much time attacking the view that playing chess is nothing but moving pieces of wood (and by implication that speech is nothing but a physical phenomenon), since I can think of no one who holds this view. As Collier rightly points out, in order for behavior to count as human action, it must be intentional under some description, and the context in which the behavior occurs can make all

32. Collier, *supra* note 1, at 209.

33. *Id.* at 232–233.

34. Brison, *supra* note 2, at 61.

35. *Id.* at 210.

36. *Id.*

the difference. Under “special circumstances,” Collier writes, “the physical phenomenon (correctly) described as ‘moving pieces of wood’ has or takes on the meaning (or ‘symbolic content’) of being a chess move.”<sup>37</sup> That is a perfect illustration of my point that the meanings of physical actions are context-dependent (and thus subject to interpretation).

Collier still wants to distinguish speech (including expressive actions) from actions that do not (and cannot) count as speech, however, and so he states: “Meaningful actions are, unlike actions in general, *necessarily intentional*; there is no such thing as an unintentional greeting, or chess move, or auction bid.”<sup>38</sup> But, given Collier’s claim that a behavior must be intentional under some description to count as an action, there is no such thing as an action that is *not* intentional; indeed, all actions are, by his own definition, intentional under some description.

Collier assumes, without examination, the premises that (1) if speech is a physical phenomenon, it cannot also be meaningful; and (2) if something is a cause, it cannot also be a reason. (It took me quite a while to realize that this was why he thinks I must accept “a theory of communication based on classical conditioning.”<sup>39</sup>) But these premises presuppose the very mind-body substance dualism that I claim the traditional speech-action distinction is grounded in (a claim Collier seems to think is absurd). For only a substance dualist would (or could) hold that if *x* is a physical phenomenon, it cannot be meaningful (i.e., intentional), and that if *x* is meaningful (intentional), it cannot be physical. These claims presuppose the truth of a Cartesian-type dualism according to which anything physical, by definition, has no mental characteristics (such as intentionality), and anything mental, by definition, has no physical characteristics. But this ontological view has been thoroughly discredited by work in philosophy of mind. Even if Collier wants to cling to this outmoded solution to the mind-body problem, it would seem to be not only a philosophical mistake but also a pragmatic error to attempt to ground an account of free speech in a metaphysical theory that is so widely rejected.

#### IV.

In response to my saying that “verbal assaults can be harmful in the same ways that assaults involving direct bodily contact are,”<sup>40</sup> Collier claims: “There is a definite biological basis for the criminalization of assault, but speech is not normally part of an assault.”<sup>41</sup> On his view, only the allegedly non-communicative aspects of physical acts contribute to their being assaults. As

37. *Id.*

38. *Id.* at 212 (Collier’s emphasis).

39. *Id.* at 216.

40. Brison, *supra* note 2, at 61.

41. Collier, *supra* note 1, at 222. In a footnote to this sentence, he cites books on animal instinct, bird song, and olfactory stimuli and aggression, as well as one titled STUDIES OF THE

an example of an assault, he mentions the act of someone who “walks into my office, says ‘I’m going to kill you,’ and briefly opens his jacket to show me that he has a gun.” What makes this an assault, according to Collier, is “the physical menace of displaying the gun.”<sup>42</sup> He calls this entire episode a “noncommunicative” act.<sup>43</sup> If no threat is communicated in this scenario, however, there is no reason to feel threatened and hence no assault. If you were a police officer and your partner walked into your office before you headed out on assignment, briefly opening his jacket to show you that he had a gun, you would take this to be the opposite of a threat. It would be an assurance that he would be able and willing to protect you from assault. His act of showing you his gun has meaning only within a given context, and that context is affected by the speech involved in the act. The message conveyed by your partner’s act of showing you that he had a gun would change dramatically if accompanied by his saying “I’m going to kill you.”<sup>44</sup>

Collier further asserts that to hold, as I do, that speech can not only contribute to the harmfulness of a physical attack but also be a form of assault in itself presupposes a “therapeutic model,” the first step of which “is to change the focus from actual physical injuries (‘hurts’) to ‘harms,’ understood as setbacks to important interests.”<sup>45</sup> This “step” is not an original move on my part,<sup>46</sup> however, nor does it have anything to do with therapy. The law already takes into account harms understood in this way. Even in the case of physical injury, it is not merely the extent of the hurt (the physical pain or damage) that is taken into account by the law, but rather the harm, construed so as to include long-term financial and emotional damage. Collier claims that my view pathologizes targets of hate speech, turning them into victims by attributing to them harms that they, absent the theory, would not be considered to have suffered. This is no more plausible than the claim that tort law (or antidiscrimination law, including sexual harassment law) turns complainants into victims by attributing to them harms that they would not otherwise be considered to have suffered.

Granted, before sexual harassment was recognized as a legal category, the conduct constituting it was not (legally) recognized as harmful. Likewise, had case law developed differently from the way it in fact has, certain harms currently recognized as such in tort law would not be (legally) recognized as harms. Even clearly physical assaults considered to be crimes have not

PSYCHOLOGY AND BEHAVIOR OF CAPTIVE ANIMALS IN ZOOS AND CIRCUSES, but the relevance of these texts to his claim is not explained.

42. *Id.* at 223.

43. *Id.*

44. Of course, other factors contribute to the context and thus to the communicative import of the act as well. Your partner’s showing you his gun and saying “I’m going to kill you” would not count as an assault if it is clearly a joke or part of a skit prepared for the department’s annual talent show.

45. *Id.* at 226.

46. In defining “harm” in terms of setbacks to important interests, I am, as I have acknowledged before, following Feinberg.

always been recognized as harms to those physically assaulted. Rape was once considered not as a harm to the raped woman but rather as a harm to her husband or father. (And the reason we treat rape so seriously now is not because of the lasting physical harm to the victim but rather because of the psychological damage wreaked by the soul-destroying message conveyed by the assailant.) Our assessments of harm have shifted over time, shaping the law and in turn being shaped by it.

Collier ends his article by waxing nostalgic for the days when things were “so much simpler” and “the ‘liberals’ were those who stood for free speech”<sup>47</sup> and—it is very tempting to add—men were men, and women knew their place, and blacks had their hands full getting rid of Jim Crow, and gays were clearly criminals, and harm was defined by those with the power and privilege to dismiss conduct *they* could not imagine being harmed by as being simply a matter of the construction the alleged victims chose to put on it. But I would not want Collier to suppose that I have suggested that he might think anything like this, and, fortunately for me, on his view of speech, I have not.

47. Collier, *supra* note 1, at 233.