

# SPEECH, HARM, AND THE MIND-BODY PROBLEM IN FIRST AMENDMENT JURISPRUDENCE

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## I.

“Sticks and stones will break my bones,” Justice Scalia pronounced from the bench in oral arguments in *Schenck v. Pro-Choice Network*, “but words can never hurt me. That’s the First Amendment,” he added. Jay Alan Sekulow, the lawyer for the petitioners, anti-abortion protesters who had been enjoined from moving closer than fifteen feet away from those entering an abortion facility, was obviously pleased by this characterization of the right to free speech, replying, “That’s certainly our position on it, and that is exactly correct. . . .”

“And your point,” Scalia continued, “is that they’ve never used sticks or stones.”

Sekulow: “Not these clients,” Scalia: “No.” A moment later, however, one of the justices interjected, “But if in fact, coming right next to a person, right in their face, screaming at them and so forth, does physically hurt them, then it’s like a stick or stone,” to which Sekulow assented. “And,” Justice Breyer added, “if pressing around them and so forth hurts them as they’re going into a medical procedure, then it’s like a stick or stone,” which Sekulow also conceded, adding that his clients were not challenging the injunction against crowding.<sup>1</sup>

This article was first presented as an invited lecture at the December 1996 meeting of the Eastern Division of the American Philosophical Association in Atlanta. A commentary on the talk was presented by Frederick Schauer, to whom I am indebted for many helpful suggestions. I would also like to thank Ann Bumpus, Margot Livesey, and Thomas Trezise, who gave me insightful comments on earlier drafts.

1. Paul Schenck and Dwight Saunders, *Petitioners v. Pro-Choice Network of Western New York*, et al. No. 95-1065. United States Supreme Court Official Transcript. Wednesday, October 16, 1996. 1996 LW 608239 (U.S.Oral.Arg.), at 23. Although it is the policy of the Supreme Court not to identify which justice poses which questions, since they are ostensibly posed by the Court as a whole, the context often makes clear who the questioner is. And, where it does not, reporters, such as National Public Radio’s Nina Totenberg, sometimes give the questioner’s name, finding this information newsworthy because it can indicate the way in which a justice may be inclined to vote on a case. In the above exchange, Totenberg quoted Scalia as making the first statement, and the transcript clearly indicates that Breyer made the last statement, and it is a matter of speculation which justices made the statements in between.

Much recent debate about hate speech, like the above debate about whether anti-abortion protesters have a free speech right to speak, at close range, to those entering clinics, has focused on the question of whether or not such speech causes harms significant enough to warrant regulation, either in the form of criminal penalties or civil liability. Two commonly held views, both supporting the conclusion that so-called hate speech should not be restricted, are the “minimalist” view that speech causes no harm unredressable by more speech (or causes considerably less harm than other forms of conduct) and the “maximalist” view that speech can have high costs, but that they are always trumped by its transcendent value.<sup>2</sup> The tension between the view that speech is costless, because inert, and the view that speech is priceless, and thus worthy of protection even when hurtful, is not often addressed. In this article, I suggest that these two views, both of which are found in court opinions and in writings by First Amendment theorists, can be shown to be compatible only if one accepts the implausible claim that any direct injury that may result from speech is under the control of the victim and, thus, could have been avoided by that person.<sup>3</sup> I criticize both views—that speech is costless and that it is priceless—and I argue that they misconstrue not only the harms of assaultive speech, but also the harms of physical assaults with which speech-caused harms are typically contrasted. I argue that these harms have been misunderstood because of an implicit and unexamined acceptance, in First Amendment jurisprudence, of an extreme form of mind-body dualism—noninteractionist dualism—a view that is (to my knowledge) universally rejected by contemporary philosophers of mind.<sup>4</sup>

Scalia’s comment above about “sticks and stones” is as succinct a statement of minimalism as one could hope for. It is also, taken on its own,<sup>5</sup> a surprisingly naive and unhelpful interpretation of the First Amendment, for it does not provide any basis for the *heightened* protection of speech supposedly granted by the Constitution. Given that a background assumption of our constitutional democracy is a general principle of liberty stating that the government may justifiably interfere with individual liberties only to prevent people from harming others,<sup>6</sup> if speech is harmless there is no need to give it special protection.

If there is such a thing as a free speech principle, either as a fact of political morality, or as a fact about our particular constitutional regime,

2. Joshua Cohen, *Freedom of Expression*, 22 PHIL. PUB. AFF. 207–63 (1993).

3. I do not address here the question of indirect injury in which a speaker says something to a listener who, as a result, harms a third party. This kind of harm is discussed insightfully in Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS, 642–46 (1993).

4. For overviews of recent work in philosophy of mind, see David M. Rosenthal, ed., *THE NATURE OF MIND* (1991), and Richard Warner & Tadeusz Szubka, eds., *THE MIND-BODY PROBLEM: A GUIDE TO THE CURRENT DEBATE* (1994).

5. I acknowledge that this characterization of Scalia’s interpretation of the First Amendment is not exactly fair, as it is based on an impromptu comment made during oral arguments, possibly even in the guise of devil’s advocate. His position in *R.A.V. v. St. Paul*, 120 L.Ed.2d, 305 (1992), is certainly more sophisticated, although, even there, he underestimates the differential harm inflicted on victims of, for example, racist “fighting words” as opposed to other kinds.

6. John Stuart Mill, *ON LIBERTY* 9 (1978).

then it must be distinct from a principle of general liberty and must receive a distinct justification. It must hold that speech is special, in the following way, as articulated by Frederick Schauer: "Under a Free Speech Principle, any governmental action to achieve a goal, whether that goal be positive or negative, must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no limitations on speech are employed."<sup>7</sup> In a regime that accepts a free speech principle, the fact that harm results from the speech, even harm so serious that the government would normally be justified in restricting individual liberties in order to prevent it, is not sufficient justification for restricting the speech.<sup>8</sup>

Also striking in the above Supreme Court exchange is Sekulow's concession that if assaultive behavior not involving physical contact "does physically hurt" the target, then "it's like a stick or stone" and can justifiably be prohibited. The exchange reveals two interesting assumptions (1) that if something causes physical hurt, there is no First Amendment barrier to restricting it (since "it's like a stick or a stone") and (2) that speech does not cause physical hurt and therefore cannot be legitimately restricted. Neither assumption follows from the other, though they are so often run together that one wonders whether this isn't the result of a logical error.<sup>9</sup> Of course, one might accept both claims independently, as in the following (overly simplified and misleading) interpretation of Mill's harm-to-others principle:

If and only if an agent's act physically hurts someone else, then it can justifiably be restricted.<sup>10</sup>

But not all hurts, not even all physical hurts, are harms and not all harms hurt, as Joel Feinberg has so persuasively shown,<sup>11</sup> and a defense of the

7. Frederick Schauer, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 7–8 (1982). To state what a free-speech principle requires is not to state that such a principle is justified. In recent writings, Schauer has evinced a certain amount of skepticism about whether a distinct principle of free speech *can* be defended. In *The Phenomenology of Speech and Harm*, *supra* note 3, for example, he notes that his conclusion, *viz.* that we should reject the hypothesis that speech, as a class, causes less harm than nonspeech conduct, "puts more pressure on the positive arguments for a free speech principle, and perhaps no such argument will turn out to be sound," at 653. For insightful arguments against the existence of *any* justifiable general principle of free speech, see Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319–57 (1983) and Stanley Fish, *THERE'S NO SUCH THING AS FREE SPEECH—AND IT'S A GOOD THING, TOO* (1994).

8. This view is defended by, among others, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. PUB. AFF. 204, 204–26, (1972).

9. To see this quickly, let P=causes physical hurt; R=can be legitimately restricted. (1) can be symbolized as  $x (Px \rightarrow Rx)$  or, for any given instance of  $x$ ,  $Pa \rightarrow Ra$ ; (2) can be symbolized as  $x (-Px \rightarrow Rx)$  or, for any given instance of  $x$ ,  $-Pa \rightarrow Ra$ . It is a simple logical error to infer (2) from (1), or vice versa.

10. Mill, *supra* note 6, at 9.

11. An immunization I choose to have may (momentarily) hurt me physically, but it does not constitute a harm if I have chosen to be immunized. And defamatory statements that damage my reputation may harm me even if they cause me no physical or even psychological injury (as in the case in which I don't find out about them). See Joel Feinberg, *THE MORAL LIMITS OF THE CRIMINAL LAW: VOLUME I. HARM TO OTHERS* (1984).

“sticks and stones” account of the First Amendment must establish, not that words cannot cause physical hurts, but that words cannot cause harms.

Incorporating Feinberg’s terminological clarification, we may restate Mill’s harm principle as follows:

If and only if an agent’s act harms someone else, then it can justifiably be restricted.<sup>12</sup>

Feinberg has given an extensive and persuasive analysis of a harm as a wrongful setback to (or invasion of) someone’s interests, and I will presuppose this account in what follows.<sup>13</sup> Such setbacks can result from physical hurts, especially those involving severe and long-lasting injuries that undermine the injured person’s ability to function. In order to count as a harm, however, the physical hurt must not only constitute or result in a setback of x’s interests, but also be wrongfully inflicted by a person or group with moral agency. Many physical hurts, on this view, do not constitute or cause harms.<sup>14</sup> And many harms do not involve physical injury, but rather setbacks to interests such as our interest in “minimal intellectual acuity, emotional stability, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion.”<sup>15</sup> Although these “welfare interests” are, for Feinberg, minimal requirements, “necessary, but grossly insufficient for a good life,” they are also “the very most important interests a person has,” since without their fulfillment, no other goods can be attained.<sup>16</sup>

## II.

One answer to the question Why *should* verbal assaults be protected, when physical assaults are not?—the answer implied by Scalia’s comment above—is that speech deserves special protection because it has no costs, and thus causes no harms, unredressable by more speech. There are at least three variants of the “speech-has-no-costs” view (also known as “no cost minimalism”):<sup>17</sup>

12. This statement of the principle is still overly simplified. Among other things, in order for the restriction to be justified, it must not itself cause a greater or unacceptable variety of harm.

13. Feinberg, *supra* note 11.

14. Furthermore, not all physical assaults cause physical hurts. Contrary to Justice Scalia’s claim that “sticks and stones *will* break my bones” (my emphasis), they *may* do so, but, then again, they may merely graze me or hit with such slight impact that I am not, in Feinberg’s sense, harmed, since my interests are not invaded.

15. Feinberg, *supra* note 11, at 37.

16. *See id.* at 37.

17. This is the term used by Joshua Cohen, *supra* note 2.

1. The first variant, that speech is causally inert, is expressed in the “sticks and stones” refrain. Justice Scalia is not the only judge to have expressed this view. In his concurring opinion in *Collin v. Smith*, upholding a neo-Nazi organization’s right to march in Skokie, Illinois, Judge Wood admonished the public, quoting Solzhenitsyn’s Nobel Lecture, that “[i]t may also be well to remember that often ‘words die away, and flow off like water—leaving no taste, no color, no smell, not a trace’.”<sup>18</sup> It is doubtful that Wood’s use of this quote precisely captures Solzhenitsyn’s intended meaning (for if it did, why did he write?). In any case, the Holocaust survivors in Skokie who were faced with the prospect of having visceral memories of trauma triggered by a parade of neo-Nazis in storm troopers’ uniforms could hardly be expected to accept this view of the effects of speech.

2. The second variant comes from combining the “sticks and stones” refrain with a loftier sounding dogma—“the pen is mightier than the sword.”<sup>19</sup> This dogma would seem to be at odds with the one urged in the rhyme about “sticks and stones.” After all, “The pen is mightier than the sword . . . but words can never hurt me” has a decidedly paradoxical ring to it. These two dogmas about the power of words *can* be reconciled, but only if one assumes, implausibly, that speech can be a force for good and not for evil. This assumption is made by those who acknowledge the edifying effects of good books, but refuse to countenance the claim that speech can have deleterious effects. Much could be said in response to this view, but for now I’ll simply say that, absent some explanation for the proposed normatively unidirectional causative powers of speech, for the same reasons we consider speech to be a force for good, we must acknowledge that it can also be a force for evil.

3. On a third variant of the “no cost” view, speech may cause harm, but this harm can always be redressed by more speech. This is a very common refrain in court opinions and ACLU literature. It strikes me as indefensible for two reasons. First, some speech functions as something more like a slap in the face than like an invitation to dialogue. It is a kind of “preemptive strike” that precludes any rational reply.<sup>20</sup> Verbal assaults involving racist epithets, for example, are, as Justice Jackson put it in *Kunz v. New York*, “insults which do not spring from reason and can be answered by none.”<sup>21</sup> In the case of verbal assaults, there is insufficient time between the speech and the resulting injury for the remedy of more speech to prevent the harm from occurring. More speech can be an appropriate remedy, as Justice Brandeis observed, “[i]f there be time to expose through discussion the

18. 578 F.2d 1197 (1978), at 1210.

19. The full proverb, rarely quoted in its entirety, is “Beneath the rule of men entirely great/The pen is mightier than the sword.” Edward George Bulwer-Lytton, *Richelieu*, act 2, scene 2, line 307 (1839). Under such a wise and benevolent regime, one can imagine there being no use for swords.

20. Charles R. Lawrence III, *If He Hollers, Let Him Go*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (Mari Matsuda et al. eds., 1993).

21. 340 U.S. 290.

falsehood and fallacies, to avert the evil by the processes of education. . . .  
 "22 But this is not the case when the impact of a verbal assault is immediate.

Second, even if the harm of speech could somehow be addressed, or compensated for, by more speech, this would not eliminate the original injury. We do not, for example, consider those who have been victimized by either criminals or tortfeasors not to have been harmed if it turns out to be possible to compensate them adequately for the damages they sustained. To say that justice was ultimately done is not to say that no injustice was ever committed.

### III.

Another popular position, similar to no-cost minimalism, is that speech, while capable of causing harms unredressable by more speech, is less harmful than nonspeech conduct. Let us call this "low cost minimalism."<sup>23</sup>

How might this view be defended? A common strategy is to assume that the nature of the injury caused by verbal assaults is significantly different from that caused by physical assaults on the grounds that the former cause only "psychic" or "mental" injury whereas the latter cause primarily physical (although sometimes also psychic) injury.<sup>24</sup>

Let us suppose, for the sake of argument, that this is the case. Does this distinction between mental and physical injury help to explain why verbal assaults should be considered protected speech? It might, if one could show that mental hurts are less harmful than physical hurts. The following five reasons have been given for supposing that this is the case:

1. Mental hurts, it has been alleged, are typically of shorter *duration* than physical hurts. Some physical injuries (such as severed limbs) never heal, and in the case of nonpermanent physical injuries the pain lasts longer, so the argument goes, than the pain of injuries to the psyche. This presupposes that the mental hurt, if any, of hearing or viewing assaultive speech is momentary or short-lived and goes away upon averting one's gaze or blocking one's ears—or soon afterwards. But this isn't typically the case. Sometimes it is, but, as Schauer has argued, "with equal frequency such wounds linger in our minds as long as (and sometimes longer than) the wounds produced by physical intrusions."<sup>25</sup>

I would add that the psychic wounds resulting from a *physical* assault, such as a rape or a racist attack, frequently last much longer than the physical

22. Concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), at 377.

23. In Frederick Schauer's terminology, the view that speech either has no costs or else lower costs, as a class, than nonspeech conduct is the "lesser harm hypothesis." See Schauer, *supra* note 3.

24. Here again I am referring only to the direct injury caused by verbal assaults, not to the indirect injury that is alleged to result when someone's speech causes a listener to physically assault a third party. Throughout this article, I use the nouns "hurt" and "injury" interchangeably, continuing to distinguish them both from harm, as defined by Feinberg.

25. Schauer, *supra* note 3, at 648.



wounds inflicted. Survivors of rape and of racially motivated assaults can take years to recover from the psychological symptoms precipitated by their assaults, even if their physical injuries healed in a few days. What matters from a legal standpoint, in any case, is the duration of the *harm*, not the duration of the hurt. A broken rib received by an innocent bystander in a barroom brawl might cause a low level of (physical) pain for several months, but not enough to set back any of the victim's important interests. This would constitute a less serious harm than the harm done to a rape victim who, while suffering no physical pain after the first few days, is so incapacitated by the symptoms of post-traumatic stress disorder (PTSD)<sup>26</sup> for months or years afterwards that her interests in keeping a job, having friendships, enjoying emotional stability, etc., are severely compromised.<sup>27</sup> Likewise, the victim of assaultive speech whose ability to function is impaired by PTSD symptoms for several months<sup>28</sup> is harmed to a greater extent than the barroom patron in the above example.

2. Mental hurts have also been considered to be, typically, less *intense* than physical hurts. Granted, some physical hurts are excruciatingly painful in a way most psychic ones aren't, but most physical hurts are not so painful. And some psychic hurts—for example, those that lead people to commit suicide—are, it could be argued, more excruciating than any physical harm, if by “excruciating” we mean unbearably painful. We cannot simply declare that all physical injuries are more intense than all psychic ones, since everyone would prefer a slight physical hurt to a grave psychological one.<sup>29</sup> And, again, as Schauer has persuasively argued, physical hurts, as a class, are not more intense than psychic hurts.<sup>30</sup> Furthermore, what matters, for legal purposes, is the intensity, or severity, of the *harm* and this does not map neatly onto the intensity of the hurt.

3. Mental hurts admit of greater individual differences than do physical hurts, that is, the same cause of psychic injury results in a wider range of degrees of injury among different people than does the same cause of physical injury. As Mark Rutzick puts it, “Every person has his own unique scale of emotional injury, and accurate interpersonal communication and comparison of that scale are impossible.”<sup>31</sup> However, because what matters from a legal standpoint is the degree of *harm* caused by a physical or psychic

26. For a clinical description of PTSD, see DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. rev., 1987).

27. For discussions of such harms, see Susan Brison, *Surviving Sexual Violence: A Philosophical Perspective*, 24 J. SOC. PHIL. 5–22 (1993); Judith Herman, *TRAUMA AND RECOVERY* (1992); Ronnie Janoff-Bulman, *SHATTERED ASSUMPTIONS: TOWARDS A NEW PSYCHOLOGY OF TRAUMA* (1992).

28. For examples, see Matsuda et al., *WORDS THAT WOUND*, *supra* note 20.

29. One could give similar analyses of the other characteristics of pain described by Bentham (*THE PRINCIPLES OF MORALS AND LEGISLATION*): certainty, propinquity, fecundity, and purity. It could be argued, along the lines suggested above, that psychic and physical pains cannot be distinguished along these dimensions either.

30. Schauer, *supra* note 3, at 635–53.

31. Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.–C. L. REV. 7 (1974).

injury, the difficulty of “interpersonal communication and comparison” arises for physical injuries as well. A concert pianist would suffer a far greater setback of important, indeed central, interests by having a finger chopped off by an assailant than would a singer or a schoolteacher. Although an appearance of universality of harm is created by, for example, the scale of compensation for different injuries determined by state crime victims boards (awarding, say, \$900 for a lost thumb, \$800 for an index finger, and \$600 for a pinkie), these monetary awards do not correspond to the losses actually suffered by different individual victims.

The fourth and fifth reasons for treating psychic hurts as less harmful than physical hurts also invoke evidentiary concerns.

4. Mental hurts are less easily observed than physical hurts. As Rutzick asserts, “Unlike the more tangible quality of [social] order, the interest in protecting ‘sensibilities’ has no physical component. The only manner in which an individual’s ‘sensibilities’ are known to be affected is by the individual’s statement to that effect.”<sup>32</sup> This assertion can be rebutted in several ways. First, even physical damages can sometimes be impossible to discern without the affected individual’s testimony. Second, what Rutzick labeled “sensibilities,”<sup>33</sup> that is, emotions, *can* be detected by a variety of scientific means. In addition to the more obvious physical, externally perceptible, manifestations of certain emotions—for example, the rapid pulse rate, perspiration, and rigid posture of fear—there are ways of detecting subtler physical changes associated with emotional reactions. For example, neurophysiologists can detect (and measure) certain emotions by monitoring skin conductance responses.<sup>34</sup> In addition, there are behavioral indicators of psychic injury (*e.g.*, the overt symptoms of PTSD) that are not under the conscious control of the victim, and hence not subject to exaggeration or confabulation. Such symptoms have been used as evidence of the credibility of victims’ testimony in some rape cases. And, once again, it is harms, not hurts, that are legally relevant, and harms, understood as setbacks to interests, are not typically “easily observed.”

5. Mental hurts are less easily quantified than are physical hurts. According to Rutzick, “There is no objective measure of the extent of harm to ‘sensibilities’ from the utterance of any specific words.”<sup>35</sup> However, the same problems about objectivity of measurement arise in the case of physical injury (or at least concerning the determination of the pain and/or disability resulting from it, which is why we count it a harm) as in the area of mental injury.

32. *Id.*

33. The Supreme Court used the term “sensibilities” in *Street v. New York*, asserting that the state had “an interest in protecting the sensibilities of passers-by who might be shocked by appellant’s words about the American flag.” 394 U.S. 576, at 591.

34. This is done by connecting a pair of electrodes to the subject’s skin and to a polygraph. (See Antonio Damasio, *DESCARTES’ ERROR* 207 (1994).

35. Rutzick, *supra* note 31.



There are, in addition, two more sweeping objections to the hypothesis that speech is, as a class, less harmful than nonspeech conduct. First, the claim I accepted above for the sake of argument, *viz.* that verbal assaults cause only psychic harms whereas physical assaults cause (primarily) physical harms, can be shown to be false. I discuss this at length later in this article. Second, “no-cost/low-cost” accounts of speech fail to perform the job they are supposed to do, namely to provide a plausible basis for the First Amendment, since they do not say what is *special* about speech such that it merits heightened constitutional protection. For according to the harm principle, there are no justifiable grounds for restricting *any* conduct that does not cause harm-to-others, on balance, taking into account long-term costs and benefits, so the free speech principle is not distinct from a general principle of liberty.<sup>36</sup>

But, contrary to minimalism, speech undeniably *does* cause (sometimes serious) harm, our childhood indoctrination notwithstanding. As Robert Post and many other legal theorists have pointed out, several categories of harm result from hate speech, or speech vilifying individuals or groups on the basis of such characteristics as race, sex, religion, and sexual orientation: harm to identifiable groups (caused by shock waves spreading through the targeted community); harm to individuals directly attacked by the speech; harm to the marketplace of ideas (which gets skewed by the silencing effects of hate speech); and harm to the educational environment (which is a special harm wrought by hate speech in schools and on college campuses).<sup>37</sup>

The focus here is on the direct harm to individuals that results from assaultive speech. Why is this kind of injury so hard for some to see? One reason may be that the words “injury” and “injustice” have the same etymological root. In the Oxford English Dictionary (OED), “injury” is defined as “Wrongful action or treatment; violation or infringement of another’s rights.” This slippage between the two terms may lead us to think that one can be injured by another only if one has been treated unjustly. Furthermore, the existence of the First Amendment right to free speech can lead us to ignore the harm resulting from speech. One reason why I think the apparently irresolvable debate about hate speech codes can be useful is that such a debate forces us to acknowledge that hate speech can be harmful, even if, in the end, we decide, as a matter of constitutional principle or for purely pragmatic reasons, that it should not be restricted.

36. In *Freedom of Expression*, Joshua Cohen rejects no-cost minimalism because of its denial of the direct and indirect costs of speech. But he does not present arguments intended to persuade those who deny such costs. (*supra* note 2).

37. Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 *ETHICS* 654–78 (1993). Post lists an additional kind of harm, which he calls the “intrinsic harm,” or the “elemental wrongness” of hate speech. Such expression, on Post’s view, violates the respect for equality that is at the core of the Fourteenth Amendment. I believe this reduces to harm to individuals or harm to groups, since the “respect for equality” is not the sort of thing that can be harmed, given the definition of “harm” I am using.

## IV.

How *does* hate speech harm individuals? First, I need to say more about what I am calling “hate speech.” I am going to focus on that subset of it known as “assaultive speech.” A good definition of assaultive speech is the definition of “harassment by vilification” given in the Stanford Code.

Speech or other expression constitutes harassment by vilification if it:

(a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and

(b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and

(c) makes use of ‘fighting words’ or non-verbal symbols [which] are commonly understood to convey direct and visceral hatred or contempt. . . .<sup>38</sup>

“Fighting words” are words or symbols “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>39</sup> As the fighting words doctrine was applied in *Chaplinsky* and subsequent cases, the first half of the disjunction dropped out. The doctrine, as it has been developed in case-by-case adjudication, holds that to be considered unprotected speech, fighting words must be abusive words (1) directed at an individual, (2) *about* that individual, (3) made face-to-face, and (4) likely to cause an immediate breach of the peace by the actual addressee. In effect, the “clear and present danger” standard has been incorporated into the fighting words doctrine—that is, there must be a clear and present danger that the listener is going to haul off and hit the speaker.

The fighting words doctrine got a lot of things wrong, and these have been amply discussed in the literature.<sup>40</sup> But it also got something right, namely that some speech causes immediate injury not under the control of the listener. I think this is implied by *both* disjuncts in the doctrine. The “immediate injury” inflicted by assaultive speech is an emotional reaction like the reaction to a slap in the face; it is *also* what leads to a suspension of

38. From Matsuda et al., *supra* note 20, at 67. The Stanford code was struck down by the California Superior Court of Santa Clara County (in 1995) on the grounds that the code restricted constitutionally protected speech. A California state law known as “the Leonard Law” requires even private educational institutions in California to abide by the U.S. Constitution.

39. This definition of “fighting words” comes from *Chaplinsky v. New Hampshire*, the 1942 U.S. Supreme Court case upholding the conviction of a Jehovah’s Witness for violating a New Hampshire law forbidding any person to address “any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place.”

40. Several arguments against the use of the “fighting words” doctrine in hate-speech codes are (a) the doctrine can be used to provide counter-speakers with a heckler’s veto; (b) it presupposes that the only reason for regulation of hate speech is the public interest in preserving the peace, whereas a more compelling reason is to secure the intended victim’s right to equal protection; (c) it fails to provide protection to those most vulnerable and least likely to fight back; and (d) it assumes that people can be harmed only by face-to-face insults.

reason, which is, allegedly, what causes a tendency toward retaliatory violence in an otherwise calm and orderly listener.<sup>41</sup> But in the case of both disjuncts, something is alleged to happen to the victim of the speech that is beyond her control.<sup>42</sup> The ability to reason is dependent on the right degree and kind of emotion and can be incapacitated by the response to assaultive speech.<sup>43</sup> This explains how speech can “set fire to reason.”

The injuries such speech inflicts on its immediate victims have been extensively documented.<sup>44</sup> Assaultive speech can prompt an instinctive “fight, flee, or freeze” response, which precludes the possibility of a reasoned reply. It can trigger other uncontrollable somatic responses, such as increased heart rate, elevated blood pressure, sweating, shaking, and, some time later, effects such as insomnia, anxiety, and lethargy. Although victims’ responses to assaultive speech have often been dismissed as “merely” emotional responses (“hurt feelings”), it is interesting to note that one prominent, and persuasively defended, view of the nature of emotions is that they are essentially *physiological* responses. According to Jenefer Robinson’s recent defense of this view, “what makes a response an *emotional* response is that (1) it is a bodily response of a certain characteristic sort, (2) it directs attention to the conception that causes it, and (3) it picks out that particular conception for me to focus on from the myriad other thoughts and imaginings jostling for my attention, because the body ‘tells’ me that *this* conception is significant to me and my well-being.”<sup>45</sup> On this account of emotions, the typical response to assaultive speech is a *physical* response, albeit one mediated by a *conception* of one’s environment, though this mediation, as I shall argue, does not make the response any more voluntary than other physical responses. As Antonio Damasio notes, in an emotional response the body “contributes a *content* that is part and parcel of the workings of the normal mind,”<sup>46</sup> a contribution, I would add, that is no more under the control of the person than is the perceptual content contributed by the senses’ representations of the environment.

To illustrate the physical changes constituting an emotional response, in this case fear, Damasio asks us to consider the case of someone walking home alone late at night who realizes that he is being persistently followed by someone not far behind him. What happens, according to Damasio, is that “[t]he neural and chemical aspects of the brain’s response cause a

41. Most people can be socialized, however, not to respond violently to even the most extreme provocation. It is consistent to hold people responsible for their actions while recognizing that their emotional *reactions* may be out of their control.

42. Whether or not we consider people able to control their reactions depends, in part, upon normative views about what they *ought* to be able to do. (See Schauer, *supra* note 3.)

43. The view that the ability to reason is dependent on having the right degree and kind of emotion is defended in Damasio, *supra* note 34, at 52–53, and in Ronald de Sousa, *THE RATIONALITY OF EMOTION* (1987).

44. See Matsuda et al., *supra* note 20.

45. Jenefer Robinson, 92 *Sturtevant, J. PHIL.* 64 (1995).

46. See Damasio, *supra* note 34, at 226.

profound change in the way tissues and whole organ systems operate. The energy availability and the metabolic rate of the entire organism are altered, as is the readiness of the immune system; the overall biochemical profile of the organism fluctuates rapidly; the skeletal muscles that allow the movement of head, trunk, and limbs contract; and signals about all these changes are relayed back to the brain, some via neural routes, some via chemical routes in the bloodstream. . . .<sup>47</sup> The fact that this response is an emotional one, determined largely by the belief that one is being followed, does not make it voluntary.

Now consider what happens when assaultive speech is added to the scenario. Take, for example, the actual case of a black female student being followed at night on campus by a group of white males shouting, among other things, "I've never tried a nigger before."<sup>48</sup> How the victim responds *physically* is a function of many things: the perceived meaning of the word "nigger," including its association with a long and continuing history of violence against blacks; the victim's awareness of sexual violence against women, especially the rape of black women by white men; and the victim's memories of previous experiences, if any, of physical and verbal assaults. These "mental" factors influence the "body's" response, which in turn conveys a message to the "mind" about the nature of the threat. The "mental" and "physical" aspects of the victim's response are so interdependent as to be inextricable from one another.<sup>49</sup>

Fear is but one response to assaultive speech. Others include anger, humiliation, and feeling that one's brain is disordered. All of these responses can lead to setbacks in the victim's interests and so such speech should be considered capable of causing harm as "genuine" and as severe as that caused by physical assault.

47. *Id.*, at 224.

48. For more examples of harmful hate speech, see Howard J. Ehrlich, *CAMPUS ETHNOVIOLENCE: A RESEARCH REVIEW* (1992) and Laura J. Lederer & Richard Delgado, *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* (1995).

49. I am obviously struggling with terminology that presupposes the very mind-body dualism I am attempting to undermine. The best I can do for now is to put misleading terms in scare quotes, as this is the only language I've got (apart from one or two others, which are no better in this respect). One thing that makes the mind-body problem so intractable is the forced dichotomy between dualism and monism. The question is posed: Is the mind a physical thing—part of the body—or is it a mental thing, distinct from the body? Both of these alternatives are unsatisfactory, but no other options are given. The question—and any sensible answer to it—assumes that either dualism or materialism is true. However, as Wittgenstein observes, "Thinking is not an incorporeal process which lends life and sense to speaking, and which it would be possible to detach from speaking, rather as the Devil took the shadow of Schlemiehl from the ground." Ludwig Wittgenstein, *PHILOSOPHICAL INVESTIGATIONS* 109 (G.E.M. Anscombe trans., Macmillan 1953). Wittgenstein adds: "But how 'not an incorporeal process'? Am I acquainted with incorporeal processes, then, only thinking is not one of them? No; I called the expression 'an incorporeal process' to my aid in my embarrassment when I was trying to explain the meaning of the word 'thinking' in a primitive way." I thank Robert Fogelin for bringing this passage to my attention.

## V.

If assaultive speech is to be protected *in spite of* its harmful effects, a justification must be given for its special legal status. Many contemporary liberal theorists, and a number of judges in recent hate-speech cases, hold, in contrast to the speech-has-no-or-low-costs view, the speech-is-priceless view, or “maximalism,” explicitly acknowledging that speech can be very harmful and yet still warrant protection.<sup>50</sup> As Thomas Scanlon notes, “on any strong version of the doctrine [of freedom of expression] there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences harms which would normally be sufficient to justify the imposition of legal sanctions.”<sup>51</sup>

Maximalists tend to give nonconsequentialist accounts of free speech, according to which the right to free speech always trumps mere considerations of social utility. The advantage of such rights-based approaches is that, if they succeeded in providing an a priori foundation for free speech, they would explain why speech should be immune to balancing against utilitarian considerations. Elsewhere I have argued that such approaches fail to provide a foundation for free speech,<sup>52</sup> and I do not have the space to repeat my critique now. I will just add that even rights-based accounts of free speech cannot avoid relying on empirical assumptions about the nature of the injuries caused by speech if they claim this right to be of transcendent—that is, trumping—value. To see this, imagine that simply uttering the words “drop dead” invariably caused those within earshot to drop dead. On any rights-based account, the right not to be killed unjustly would take priority over the right to free speech in such a case, so the right to free speech does not *always* trump other interests. It is not, literally, priceless, but must on occasion be weighed against other competing interests, at least those significant enough to count as rights.

But now suppose, more plausibly, that some speech causes, not instant death, but nonetheless quite serious harms, such as the emotional responses discussed above, or the undermining of equal educational opportunity, as Judge Cohn conceded in *Doe v. University of Michigan*,<sup>53</sup> or battery, rape, and employment discrimination, as Judge Easterbrook conceded in *American Booksellers Association v. Hudnut*.<sup>54</sup> Why should the right to free

50. Cohen (*supra* note 2) rejects maximalism because of what he perceives to be its sectarian commitment to the value of autonomy. My own view, defended in *The Autonomy Defense of Free Speech*, 108 ETHICS (Jan. 1998) 312–339, is that no plausible account of autonomy yields a defense of free speech. Here, I approach the issue from a different angle, asking, Why is it assumed (by some theorists, *e.g.*, R. Dworkin, Nagel, and Scanlon) that *assaultive* speech does not cause harms of the sort that would count as violating someone’s right to autonomy?

51. Scanlon, *supra* note 8, at 204–26.

52. Brison, *supra* note 50.

53. 721 F. Supp. 852 (E.D.Mich. 1989).

54. 771 F.2d 323 (1985).

speech be taken to override the right to equal educational opportunity or rights not to be battered, raped, or discriminated against in the workplace?

Although the courts have not responded to this question by providing a theory of the overriding importance of the right to free speech, a suggestion of such a theory can be found in their statements stressing the importance of what Judge Easterbrook calls "mental intermediation." After conceding that pornography causes serious harms to women, Easterbrook adds that all the harmful effects are brought about through "mental intermediation."<sup>55</sup> On this view, any direct injury caused by speech is considered to be under the control of the target, not the speaker.<sup>56</sup> Whereas, in the case of a physical assault, a hit on the head is a hit on the head, the effect of a verbal assault is all a matter of the construction the listener chooses to put on it. If one accepts the empirical claim that any hurt caused by speech is under the control of the listener, then it follows from the liberal legal maxim that one cannot be harmed by something to which one consents, that one cannot be harmed by speech *even* if one is hurt by it. Since, on this view, one could have chosen *not* to be affected in that particularly hurtful way by the speech, one is assumed to have consented to the hurt. The problem with this view, however, is that it presupposes an implausible account of the mental, and of emotions in particular, according to which any reaction involving "mental intermediation" is under the control of the person who has that reaction.<sup>57</sup>

I want to suggest that the maximalist account of free speech presupposes, implausibly, that speech causes only mental hurts, which are, unlike physical hurts, "mentally intermediated," or, to use Judith Thomson's term, belief-mediated. This, in turn, is taken to mean that mental distress is more under the control of the victim than is physical pain. As Thomson has argued with respect to incidents of belief-mediated distress, people "bear some responsibility themselves for how long they have them and how intense they are, even for whether they have them at all."<sup>58</sup> To see the alleged distinction between non-belief-mediated distress and belief-mediated distress, contrast the hurt of my yelling into your ear loudly enough to puncture your eardrum with the hurt of my verbally assaulting you using a racist or sexist

55. *Id.*

56. Likewise, any indirect injury resulting from the speech is considered to be under the control of, and hence the sole responsibility of, the audience members who choose to act on the basis of the speech. This presupposes, however, an implausible "bucket theory" of responsibility. The term "bucket theory" comes from Robert Nozick, who criticizes such accounts of responsibility in *ANARCHY, STATE, AND UTOPIA* 130 (1974). It refers to the view that there is only so much responsibility to go around, so if we hold the person who acts on the basis of the speech 100% responsible, we cannot also hold responsible the speaker who incites or in some other way causally contributes to the audience's action.

57. To see that not everything "mental" is under our control, consider the degree of control you possess over the perceptual images you have of your environment right now, or the degree of control you have over whether or not to believe something for which you have considerable inductive evidence, such as that the sun will rise tomorrow.

58. Judith Jarvis Thomson, *THE REALM OF RIGHTS* 253 (1990).



epithet. I say “alleged” distinction because the degree of ongoing distress and the *harm* caused by the puncturing of your eardrum will depend on your beliefs about such things as how long it will take to heal, *why* I yelled in your ear in the first place, whether I (or people like me) are likely to do this again, whether you will be able to protect yourself should this happen, and how valuable you believe your unimpaired hearing to be.

Frederick Schauer and Anthony Ellis have presented convincing critiques of Thomson’s account of belief-mediated distress, pointing out that it is not generally true that one can “steel oneself” more easily against, say, the psychic injury of a verbal assault and that, even if one could, that wouldn’t provide us with any reason to blame the victim. For even if one could take precautions (against mugging, rape, murder, etc.), we don’t (or shouldn’t) hold victims of such crimes responsible.<sup>59</sup> As Ellis has pointed out, the extent to which I am physically injured if someone punches me in the stomach is in large part a function of my actions—did I get in good shape? did I see it coming and flex my stomach muscles before the blow?<sup>60</sup> But this does not make me responsible for my injuries.

The view that victims of verbal assaults are responsible for their psychic injuries can be seen to be a function of a larger Cartesian legacy informing many aspects of our society, including not only the legal and political spheres, but also the domain of medicine. The mental is, on the Cartesian account, the realm of free will, whereas the physical realm, which includes the brain, is deterministic. The distinction between brain and body on the one hand, and mind on the other, yields, for example, a distinction between “neurological” disorders and “psychological” ones according to which, as Damasio puts it, “[d]iseases of the brain are seen as tragedies visited on people who cannot be blamed for their condition, while diseases of the mind, especially those that affect conduct and emotion, are seen as social inconveniences for which sufferers have much to answer. Individuals are to be blamed for their character flaws, defective emotional modulation, and so on; lack of willpower is supposed to be the primary problem.”<sup>61</sup>

On my interpretation of maximalist accounts of free speech, speech may cause direct psychic injury, but this injury is under the control of, and hence the responsibility of, the audience, not the speaker. Lack of willpower, on the part of the victim, is the primary problem. On this view the injury can be avoided, in some cases, by simply averting one’s eyes (or plugging one’s ears, or drawing one’s shades—or changing schools, quitting a job, or moving out of the neighborhood). Or, if all that fails, one can render oneself immune to verbally inflicted injuries by a regimen of psychic calis-

59. Unfortunately, we do often hold victims of some crimes responsible if they did not take what we consider to be reasonable precautions. Rape victims are still told, by some, that they were “asking for it” by their behavior, dress, location, etc.

60. Anthony Ellis, *Thomson on Distress*, 106 *ETHICS* (1995) 112–19.

61. See Damasio, *supra* note 34, at 40. I thank Ann Bumpus for drawing my attention to this book and to this passage.

thenics. The view that any harm from speech can always be avoided by a conscientious enough target was revealed in a response Norman Dorsen gave to the suggestion that hate speech can cause, not mere offense, but actual injury. He replied that our First Amendment doctrine presupposes a certain hardiness among the citizenry.<sup>62</sup>

The attitude expressed by Dorsen exacerbates one problem with psychic injury (and the psychic pain accompanying physical injury), which is precisely that it *doesn't* leave easily perceptible traces. This leads some to think that it is nonexistent, or slight, or "all in the head" of the self-described "victim." Psychic pain, however, can be as paralyzing as a physical injury, and yet one is still expected to get up and walk.<sup>63</sup>

In his book, *Holocaust Testimonies: The Ruins of Memory*, Lawrence Langer discusses numerous survivors whose psychic wounds have never healed. I mention two of these not to trivialize the horror they endured by comparing it to the trauma sometimes suffered by victims of assaultive speech, but, rather, to underline my point that psychic pain must be taken as seriously as the pain of a physical assault. Decades after the war, one Auschwitz survivor said, "I feel my head is filled with garbage: all these images, you know, and sounds, and my nostrils are filled with the stench of burning flesh. And it's . . . you can't excise it. . . ."<sup>64</sup> Another told the story of the humiliation of a whipping she received from an SS guard, saying "My body healed, but it never healed, my soul, that I had been humiliated this way, in front of my family." She added, "Physical pain you can stand, but how can you bear the emotional pain?"<sup>65</sup> Such testimonies should be taken into account by courts ruling on the permissibility of Neo-nazi marches in towns inhabited by Holocaust survivors.

The extensive literature on trauma reveals that the apparently psychological symptoms experienced by trauma survivors with post-traumatic stress disorder are no more under the survivors' control than are symptoms that are traditionally considered to be physical. In general, the study of PTSD shows the mind-body distinction to be a false (or, at any rate, grossly exaggerated) dichotomy.

It is interesting to note that it follows from the above discussion that the

62. Dorsen gave this response in the discussion of a paper he presented at New York University in 1988 or 1989 to the New York Group of the Society for Philosophy and Public Affairs. On the view he expressed, just as beauty is in the eye of the beholder, injury is in the psyche of the reader, viewer, or listener. A more defensible view of the "appropriate" response of hate-speech victims is offered by Kent Greenawalt: "As with direct personal threats, it is doubtful whether 'courageous citizens' should be expected to swallow such abuse without deep hurt, and it is also doubtful whether being the victim of such abuse contributes to one's hardiness in ways that count positively for a democratic society." Kent Greenawalt, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 301 (1989).

63. Might it be that the practice of self-mutilation, surprisingly common in victims of abuse, comes from a desire to make one's inner pain visible and palpable? An interesting question to explore is, How does the physical pain, of, say, cutting oneself, make the psychic pain more bearable?

64. Lawrence Langer, *HOLOCAUST TESTIMONIES: THE RUINS OF MEMORY*, 53 (1991).

65. *Id.* at 102.

maximalist view ultimately reduces to the minimalist view, for if, as I have argued maximalists assume, any hurt caused by speech is under the control of the listener, then the listener *cannot* be harmed by the speech. Because one cannot be harmed by that to which one consented, and it is, on the maximalist view, within one's power to avoid the hurt caused by the speech, the fact that one endures it indicates consent and, thus, the absence of harm.

## VI.

I have been arguing that psychic injuries are not always under the control of the injured party, even if they are belief-mediated. Now I would like to criticize the view that *physical* injuries are *not* belief-mediated. Some mental and physical injuries are belief-mediated and some are not, and those that *are* belief-mediated are not, by virtue of that characteristic, any more under the control of the injured person than those that are not.

The fact that speech is both context-dependent and open to multiple interpretations ("one man's vulgarity is another's lyric"<sup>66</sup>) does not distinguish it from other forms of action.<sup>67</sup> The same human action (if it is indeed an action—that is, intentional—and not merely an involuntary event) may be described in any number of different ways (*e.g.*, moving one's hand, signing a check, buying a car), and the context in which the action occurs, and the description under which the agent performs the action, are relevant to our interpretation of it. And it makes no sense to ask "What is *the* one right description of the action?" (just as, in Nelson Goodman's example, it makes no sense to ask "What is *the* way the world is?" any more than it would make sense to ask "What is *the* food for human beings?")<sup>68</sup> But in order for a bit of behavior to count as an action, there must be at least one correct description of it according to which it was intended by an agent.

To understand the harmfulness of certain criminal acts, we need to know how to describe them. We need to know their meaning for the victims and (in most cases) the perpetrators. Why do we think rape is such a bad thing (bearing in mind that some people like "rough sex" and we don't consider that, within limits anyway, to be a bad thing if both participants enjoy it)? The wrongness of rape cannot be captured by a purely physical description of the event (that is, one that does not mention the mental states of the perpetrator and/or the victim). Nor can a purely physical description of the event in question capture the wrongness of a murder or the wrongness of a mugger receiving money from someone (the former event, described in

66. *Cohen v. California*, 403 U.S. 15, at 25.

67. Larry Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U. L. Rev. (1984), note that speech "does not denote any particular set of phenomena. Everything, including all human activities, can 'express' or 'communicate' and an audience can derive meaning from all sorts of human and natural events," at 1322.

68. Nelson Goodman, *WAYS OF WORLDMAKING* (1978).

physical terms, could be a case of assisted-suicide, the latter could be an instance of philanthropy). The wrongness of such criminal acts consists in the lack of consent of the person forced to act or to submit to another's action. The harm of such acts is directly related to what makes them wrongful: Someone's will is being violated. And whether that person's will is being violated is not (or not always, anyway) something that can be determined from a purely physical description of the event. It is the psychological state of the victim (lack of consent) and that of the perpetrator (except in strict liability-type cases) that determine the wrongness of the action.

What does all this have to do with speech? It illustrates that the fact that the meanings of speech acts are multiple and context-dependent does not show that any harm caused by them must be "in the mind of the beholder" and thus under the control of the victim. The view that speech is always open to interpretation whereas a hit on the head is a hit on the head yields an overly simplistic—and wrong—account of the difference between verbal and physical assaults. For, in reality, *both* verbal and physical assaults take place in an interpretive context and cause harm, to a large extent, according to how they are experienced. Granted, the victim of a verbal assault must typically grasp the significance of the assault in order to be directly injured by it. But this is also the case for very many physical acts that "count" as assaults under some descriptions and not under others. A nonverbal action (even a violent one, such as cutting someone with a knife) doesn't "mean" anything in itself (and cannot be described as "criminal" or "wrong") outside of a context of interpretation. (It could be a case of a surgeon performing an operation to save someone's life). To interpret an action, we need to know the context in which it occurs (including the agent's intentions, the "language" of gestures and of physical contact, the history and contemporary meanings of various kinds of actions).

Here are two examples of actions that take on very different meanings in different contexts:

(1) Cigarette smoking. (Compare lighting up in a health food restaurant in Berkeley or on a no-smoking flight with lighting up in a French cafe. Your action says very different things—about you and about your attitude to those around you—in those different contexts.)<sup>69</sup>

(2) Or take spitting—an act I didn't give much thought to until recently, when an enormous controversy erupted in the world of baseball (in the summer of 1996) after Roberto Alomar, of the Baltimore Orioles, spit in the face of an umpire, John Hirschbeck, after being tossed out of the game for disputing a called third strike. Now, no one but the most medically misinformed alarmist thinks that unwilling facial contact with human saliva poses any threat of grave physical injury. And everyone knows baseball players spit

69. This example comes from Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 904–68 (1996).

all the time—in the dugout and on the field. It's not OK for pitchers to spit on the ball, but this prohibition was not imposed out of concern for the ball. It's not OK for players to spit on other players because of the demeaning expressive content of the act, and it's *really* not OK for players to spit on umpires, as the expressive content of this act not only degrades the umpire but shows disrespect for the entire sport. It seems to be, for baseball fans, what flag-burning is for many veterans and other patriots.

My point here is just that physical actions, like verbal assaults, must be viewed in context in order to determine what harm, if any, results from them. To assess the costs of assaultive speech, we not only need to listen to victims' accounts of just what those costs are, but we also must be aware of the historical and present context in which the assaults occur so that we are not committed to accepting all victims' testimonies at face value.<sup>70</sup>

I think that those who suppose that it is possible to draw an important distinction between physical and psychological injury, according to which only the former is harmful, misunderstand the nature of both. In the long term, the more serious injury that results from a criminal physical assault like rape or a racist hate crime is psychological.<sup>71</sup> In fact, it doesn't even make sense to make a distinction between psychological and physical injury in such a case because the effects are largely physiological, such as anxiety, insomnia and other symptoms of post-traumatic stress disorder. These symptoms straddle the mind-body divide.

My response to dualism in free-speech theory is not the reductionist or eliminative materialist's denial of the mental, but rather the acknowledgment of the physiological effects of verbal assaults, along with the acceptance of the view that the physical aspects of agents *qua* agents are irreducibly mental—that is, they cannot be characterized without reference to minds and meanings. One need not go as far as Nelson Goodman and hold that everything, from subatomic particles to the stars, is the product of human symbol-making activity<sup>72</sup> in order to observe that the world of physical *actions*, at least insofar as it falls under the purview of the law, is saturated with meaning and thus “mind.” This does not mean that our actions and the effects on us of others' actions are, to that extent, under our control. Because the meanings that inform them are *social* constructs, to the degree that they are suffused with meaning, they are *beyond* our control.

70. The first-person accounts presented by critical race theorists of the effects of racist hate speech have the potential to change dramatically our understanding of the harm of such speech, just as the testimonies of victims of rape, battering, and sexual harassment have, only recently, altered society's assessment of the harms of such forms of victimization. At the same time, as Martha Minow has pointed out (in *Surviving Victim Talk*, 40 *UCLA L. REV.* 1411–45 (1993)), victim talk tends to spawn more victim talk, sometimes on the part of the victimizers, and not all claims to victimization are on a par.

71. See Brison, Herman, Janoff-Bulman, *supra* note 27, as well as Robert Elias, *THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY, AND HUMAN RIGHTS* (1986).

72. See *supra* note 68.

## VII.

The dualist bias in the minimalist and maximalist views of free speech is inconsistent with other areas of the law, in which attributions of motives and intentions ("mental" states with content) are essential to the description of legal and illegal acts.<sup>73</sup> Some have argued (and the U.S. Supreme Court has agreed) that whereas hate speech cannot constitutionally be restricted, bias-motivated physical assaults, ones motivated by racism, for example, should be not only prohibited but also punished to an even greater extent than similar crimes not motivated by bias. But the only rationale given for enhanced penalties for bias-motivated assaults is that such assaults are more harmful, both to the individual who is directly victimized and to the community of which the victim is a member, than are non-bias-motivated assaults. And it is the *expressive* component of a bias crime that makes it more harmful, leading us to treat it as a more serious crime than we otherwise would.

In the case of hate-speech codes, however, the courts have paid insufficient attention to the serious costs of assaultive speech and to the threatening climate in which it occurs. They have also failed to recognize that the costs of allowing such speech are not equally distributed among us.<sup>74</sup> As Mari Matsuda has argued, allowing such speech imposes a psychic tax on those least able to pay.<sup>75</sup> Once these costs are acknowledged, the same rationale as is invoked to defend enhanced penalties for hate crimes can be used to defend restrictions on assaultive speech.<sup>76</sup>

Not all commentators have considered enhanced penalties for hate crimes to be defensible, however. Some have argued that whereas intent must be taken into account in determining the nature of the crime and the severity of the punishment, the agent's motive for committing the crime (e.g., racial bias) cannot be taken into account without infringing on the agent's right to free speech. To penalize someone for the possession of a particular motive, so the argument goes, is to penalize him for having a particular thought, which the government cannot justifiably do. However, as the agent's intent is also a thought, it seems that no principled distinction can be made between intent and motive along these lines. In any case, it is

73. See R. A. Duff, *INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* (1990).

74. See Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321-57 (1992), and Diana T. Meyers, *Rights in Collision: A Non-Punitive, Compensatory Remedy for Abusive Speech*, 14 LAW & PHIL. 203-43 (1995), for discussions of the unequal distribution of such costs and proposals for redistribution of the costs, including compensation for victims.

75. Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in *WORDS THAT WOUND*, *supra* note 20, at 48.

76. My position is that such laws should stand or fall together. I find it odd that, in striking down the Stanford hate-speech code, the court suggested that, as an alternative, "A penalty enhancement scheme along the lines of *Mitchell* might also be a means of eradicating racism and hate on campus without 'adding the First Amendment to the Fire'" (quoting Scalia in *R.A.V. v. St. Paul*), *Corry v. Leland Stanford Junior University*, Cal. Sup. Ct. at Santa Clara, case no. 740309, Feb. 27, 1995.



not the agent's mental state, but rather the greater harm to the victim that justifies the greater penalty.

## Conclusion

It should not come as a surprise that free-speech theory is vexed by the mind-body problem since speech seems to exist in a twilight realm between the mental and the physical, between thought and behavior. We can think in words (and other symbols) *and* we can perform actions with them and we can do both things simultaneously when we express our thoughts in speech.

Those opposed to restricting hate speech tend to assimilate freedom of speech to freedom of thought and liken hate-speech codes to Big Brother-type mind control. Thus, in overturning the University of Wisconsin hate-speech code, the district court noted that "the suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control."<sup>77</sup> And in arguing against hate-crime sentence enhancement laws, Martin Redish (who rightly sees them as on a par with hate-speech codes) asserts that "[a]s dangerous and offensive as I find any expression of bigotry, I fear much more any attempt by government to control the minds of its citizens."<sup>78</sup>

In contrast, those in favor of restrictions tend to assimilate freedom of speech to freedom of action and liken restrictions on discriminatory harassment and assaultive speech to laws against discrimination and hate crimes. Drafters of hate-speech codes have made it clear that they are targeting "discrimination and discriminatory harassment,"<sup>79</sup> "expressive behavior... [that, among other things, creates] an intimidating, hostile or demeaning environment...."<sup>80</sup> In arguing for the Stanford code prohibiting discriminatory harassment, Charles Lawrence cites "the inseparability of racist speech and discriminatory conduct,"<sup>81</sup> arguing that "Racism is both 100 percent speech and 100 percent conduct."<sup>82</sup>

It is plausible to suppose that freedom of thought is dependent on freedom of speech in the sense that if people are strictly forbidden, in all contexts, to speak (or hear or read) a language in which they are fluent,

77. *UWM Post v. Board of Regents of U. of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991), note 9, at 1174.

78. *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, CRIM. JUST. ETHICS 39 (Summer/Fall 1992).

79. The policy ruled unconstitutional in *Doe v. University of Michigan* was called the Policy on Discrimination and Discriminatory Harassment of Students in the University Environment. 721 F. Supp. 852 (E.D. Mich. 1989), at 853.

80. Excerpted from the UW Rule, *UWM Post v. Board of Regents of U. of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991), at 1165 (my emphasis).

81. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in Matsuda et al., *supra* note 20, at 61.

82. *Id.* at 62.

they will presumably come to have more difficulty thinking in it than if they continued to converse in it. However, if assaultive speech is prohibited only in those contexts in which it is assaultive, no such atrophy of thoughts will occur. For even if some things cannot be said (with impunity) in certain contexts, it does not follow that they cannot be said in others. Baseball players are not prevented from practicing batting because of laws or customs prohibiting batting practice in restaurants, homes, and other places where it might be hazardous. And laws against perjury in the courtroom have not made lying unthinkable.

In any case, critics of restrictions on hate speech often point out how useless such restrictions are in changing the hearts and minds of bigots, which indicates that at least some opponents of such codes are not worried about the threat of mind-control. It should be noted that such codes do not address the hearts and minds of bigots, but, rather, their behavior, verbal and otherwise.<sup>83</sup>

I have been arguing against mind-body dualism in free-speech theory, but I should point out that even on a Cartesian model, speech is neither wholly mental nor wholly physical, but resides in a realm as metaphysically mysterious as that of the pineal gland on Descartes' account.<sup>84</sup> I have argued against the acceptance of an extreme form of dualism *in free-speech theory*; such arguments are intended to complement the more sweeping objections to dualism that philosophers of mind have given us. Philosophers who, *qua* philosophers of mind, reject mind-body dualism while they, *qua* philosophers of law, accept it should, I would argue, get their theories in line with one another. But I am not arguing that one has grounds for rejecting the kind of dualism found in standard free-speech theory *only if* one rejects dualism generally. I take myself to have given grounds for rejecting dualism in free-speech theory that even a die-hard Cartesian dualist could find persuasive.<sup>85</sup> For according to Cartesian dualism, mind and body interact causally and that is all one needs to assume to grant that speech can, via its (mentally processed) content, cause physical damage, just as physical assaults can cause psychic injury.

Standard free-speech theory, however, presupposes a more extreme *non-*

83. Likewise, efforts to eliminate discrimination in the workplace are focusing more on practices of hiring and promotion and less on "diversity training." As Edward N. Gadsden, a black man who is Texaco's director of diversity puts it: "I am not in the business of attitudinal change. We need to establish a culture that specifies the behaviors you will exhibit." The strategy being adopted by managers is increasingly becoming that of making "even prejudiced people promote talented women and members of minorities whether they like them or not." Claudia H. Deutsch, *Just Shut Up and Hire*, N.Y. TIMES, December 1, 1996, "The Week in Review," at 4.

84. The pineal gland was considered by Descartes to be the place in the brain where body and mind interacted. As the mind, according to Descartes, does not exist in space, however, this is a mysterious meeting place indeed.

85. However, the fact that speech involves social norms and communication with others does undercut the individualism of a Cartesian account of language as expressing a person's private, inner thoughts.

*interactionist* form of dualism. The distinction between speech-caused harms and harms caused by nonspeech conduct is based on a false dichotomy between psychic and physical injury, which is, in turn, based on a metaphysical view of the relation between mind and body rejected by all contemporary philosophers of mind. Worse than leaving the defense of the right to free speech hostage to empirical fortune, standard First Amendment jurisprudence rests the right to free speech on a metaphysical mistake.

One might object that the mind-body problem taken as a metaphysical issue does not bear on the normative issues raised in discussions of harmful speech. According to this objection, to believe that the speech/conduct dichotomy presupposes metaphysical dualism is to confuse a normative claim with an ontological one. However, this objection misses the point. As I have shown, the distinction made in the legal literature between *speech-caused harms* and *harms caused by nonspeech conduct* is based on a false dichotomy between *psychic* and *physical* injury. It is assumed, on the view I have criticized, that harms *caused by speech* are exclusively *psychic*, that is, mental harms, whereas harms *caused by physical assault* are largely, if not entirely, physical. This assumption presupposes not only that speech acts solely on the mind (unlike physical contact, which affects the body), but also that psychic harms do not themselves cause physical harms and that physical harms do not lead to psychic harms. This latter assumption makes sense only if one holds that mind and body are distinct and do not interact with one another.

I have been arguing that all speech is conduct, involving an agent, and all conduct, being intentional action, is expressive (of the motivating intention); that 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. For these (and other) reasons, I think the attempt to assimilate freedom of speech to freedom of thought and thus distinguish it from other varieties of freedom fails.