BEACH, J., concurring. I agree with and join parts II and III of the majority opinion.[1] I write separately because I disagree with portions of the majority's analysis in part I, which discusses whether General Statutes § 53a-183 (a) (3), the harassment in the second degree statute, is unconstitutional as applied.

The majority holds—and I agree—that the evidence was insufficient to sustain a conviction of harassment in the second degree in violation of § 53a-183 (a) (3), as that statute has been construed by our courts and by the federal courts. Section 53a-183 (a) (3), proscribes not speech but, rather, the conduct of making a telephone call.[2] It is the physical act of placing the call that constitutes the actus reus of the crime; it is not the threatening or otherwise abusive language that is criminalized. The case law clearly states that the narrow construction regarding the proscribed conduct eliminates unconstitutional overbreadth because speech, protected or otherwise, is not proscribed. "The asserted overbreadth of the Connecticut statute is circumscribed by the elements of the offense it proscribes. To run afoul of the statute, a telephone call must be made not merely to communicate, but 'with intent to harass, annoy or alarm' and 'in a manner likely to cause annoyance or alarm.' Whether speech actually occurs is irrelevant, since the statute proscribes conduct, whether or not a conversation actually ensues." *Gormley* v. *Director, Connecticut State Dept. of Probation*, 632 F.2d 938, 942 (2d Cir.), cert. denied, 449 U.S. 1023, 101 S. Ct. 591, 66 L. Ed. 2d 485 (1980).

Because the evidence was insufficient, I would not undertake the analysis that the majority undertakes in part I as to whether the statute is unconstitutional as applied. A narrowing instruction is constitutionally required in situations in which words themselves are subject to punishment; as the majority notes in part II B, there is no such requirement when it is the intrusive telephone call itself that is the subject of prosecution.[3] In this instance, however, words are not punished, though they may provide circumstantial evidence of intent. There is not, then, an overbreadth problem that would allow, absent judicial narrowing, application to constitutionally protected activity. I do not believe, then, that the statute is unconstitutional as applied; rather, it is simply inapplicable to punish speech at all.

Because the conviction was premised on the application of the statute to speech, I join the majority in reversing the conviction for harassment in the second degree and remanding the case with direction to render judgment of not guilty on that charge and reversing the conviction of breach of the peace in the second degree and remanding the case for a new trial on that charge.

I respectfully concur.

[1] As to the conviction of breach of the peace in the second degree under General Statutes § 53a-181 (a) (3), the majority holds that because it is language that was the subject of punishment in this case, a "true threat" instruction must be given in order to avoid the possible criminalization of speech protected by the first amendment. I agree with the majority's reasoning and holding on that score.

[2] There, of course, has to be an accompanying intent to annoy, harass or alarm, and the call has to be made in a manner likely to cause annoyance or alarm.

[3] It nonetheless may be advisable for a trial court to define carefully the intent element and the manner in which the call must be made in order to be punishable.