STATE OF CONNECTICUT *v.* DIANA L. MOULTON
(SC 18632)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh
Harper and Vertefeuille, Js.*

*Argued September 18, 2012—officially released October 29, 2013*

*Mitchell S. Brody*, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Michelle Bredefeld*, deputy assistant state's attorney, for the appellant (state).

*Annacarina Jacob*, senior assistant public defender, for the appellee (defendant).

*Opinion*

PALMER, J. Following an incident in which the defendant, Diana L. Moulton, allegedly threatened a coworker during a telephone call, a jury found her guilty of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (3)[1] and harassment in the second degree in violation of General Statutes § 53a-183 (a) (3).[2] The trial court rendered judgment in accordance with the jury verdict, and the defendant appealed to the Appellate Court, which reversed the judgment of the trial court as to her conviction on both charges. See *State* v. *Moulton*, 120 Conn. App. 330, 353, 991 A.2d 728 (2010). With respect to the charge of breach of the peace in the second degree, the Appellate Court concluded that the defendant was entitled to a new trial because the trial court improperly failed to instruct the jury that it could find the defendant guilty only if it determined that the defendant's offending speech was a real or true threat not entitled to protection under the first amendment to the United States constitution.[3] See id., 340, 344, 351. With respect to the charge of harassment in the second degree, the Appellate Court concluded that the defendant was entitled to a judgment of acquittal on the ground of evidentiary insufficiency because the state conceded that its case was predicated entirely on the defendant's speech; see id., 351–53; and, under controlling case law, § 53a-183 (a) (3), the telephone harassment statute, bars conduct relating to the actual making of the call only and not speech of any kind, even speech lacking first amendment protection. See id., 337–38.

We granted the state's petition for certification, limited to the following two issues: First, "[d]id the Appellate Court properly determine that . . . § 53a-183 (a) (3), harassment in the second degree, proscribes only the physical conduct involved in making a telephone call but not the verbal content thereof? If not, was the lack of an instruction on the definition of a 'true threat' harmless beyond a reasonable doubt?" *State* v. *Moulton*, 297 Conn. 916, 996 A.2d 278 (2010). Second, "[d]id the Appellate Court properly determine that the lack of an instruction on the definition of a 'true threat,' for purposes of proof of breach of the peace in the second degree under . . . § 53a-181 (a) (3), was not harmless error beyond a reasonable doubt?"[4] Id. With respect to the second certified question, we agree with the Appellate Court that the defendant is entitled to a new trial on the charge of breach of the peace in the second degree because the jury instructions were inadequate to ensure that the defendant was not convicted on the basis of constitutionally protected speech. With respect to the first certified question, although the Appellate Court properly followed controlling precedent in concluding that the telephone harassment statute bars conduct only, we now are persuaded that the statute also

applies to offending speech not protected by the first amendment. In light of that prior precedent, however, we further conclude that the defendant, at the time she engaged in the conduct that resulted in her prosecution under § 53a-183 (a) (3), did not have fair notice, as principles of due process require, that she could be subjected to punishment under that statute for the verbal content of the telephone call. Accordingly, we conclude that the charge of harassment in the second degree must be dismissed. We therefore affirm the judgment of the Appellate Court except insofar as it ordered a judgment of acquittal, rather than a dismissal, of the charge of harassment in the second degree.

The opinion of the Appellate Court sets forth certain of the facts that the jury reasonably could have found. "On [Saturday] February 4, 2006, the defendant placed a telephone call to the Salem Turnpike [branch of the United States] post office in Norwich. The defendant, a letter carrier, working out of the Salem Turnpike branch, was on leave from her job at that time. Deborah Magnant, the [branch] supervisor of customer service, answered the telephone. Magnant recognized the caller's voice, and the caller identified herself as the defendant. Magnant testified that she had spoken with the caller over the telephone at least two other times [in] the previous four to five weeks and recognized the voice to be [the defendant's] but had never met her. The defendant asked to speak to David Ravenelle, the postmaster, but Magnant told her that he was not working that day. The defendant then asked to whom she was speaking, and Magnant identified herself. The defendant said: 'Oh, I know you. I have talked to you before.'

"At that point, the defendant started talking about when she would be returning to work, '[a]nd then she said something about the shootings.' Specifically, she said: '[T]he shootings, you know, the shootings in California. I know why she did that. They are doing the same thing to me that they did to her, and I could do that, too.' The defendant was referring to an incident that took place approximately five days prior when a postal employee in California shot and killed several postal workers inside the postal facility where [the employee] worked.

"Magnant testified that the defendant's tone of voice was angry and agitated and that the statement about the shootings caused her alarm, so she began taking notes of the conversation. Magnant stated that the defendant continued to talk, 'just sharing whatever was on her mind.' She discussed her post-traumatic stress disorder and when she would be returning to work. She also asked for her union steward. The defendant seemed to be upset that she was out of work and talked about how her direct supervisor and the prior postmaster harassed and bullied her and how her supervisor was incompetent. The defendant also mentioned other

postal employees by name. The call ended after the defendant told Magnant that she would be calling back on Monday, when she could speak to Ravenelle, and Magnant assured her that she would make sure that Ravenelle knew she would be calling.

"Magnant notified Ravenelle about the telephone call as soon as he arrived at work Monday morning, at approximately 6 a.m. Ravenelle contacted his supervisors and the postal inspection service, which acts as an internal police force for the postal service. Magnant spoke with postal inspectors that morning, who asked for her notes of the conversation and instructed her to call the local police. She contacted the police and filed an official [complaint] at that point." *State* v. *Moulton*, supra, 120 Conn. App. 332–34. Thereafter, the defendant was arrested and charged with breach of the peace in the second degree and harassment in the second degree. After a jury found the defendant guilty of both charges, the trial court imposed a total effective sentence of nine months imprisonment, execution suspended, and two years probation.

The defendant appealed from the judgment of conviction to the Appellate Court, which agreed with the defendant that she was entitled to reversal of her conviction on both charges. See id., 353. With respect to the harassment charge, the Appellate Court concluded that the trial court improperly had permitted the jury to consider the content of the defendant's telephone call as determinative of whether the call was harassing in violation of the statute. See id., 336–38. Relying on controlling precedent; see, e.g., *State* v. *Bell*, 55 Conn. App. 475, 480–81, 739 A.2d 714, cert. denied, 252 Conn. 908, 743 A.2d 619 (1999); see also *State* v. *Murphy*, 254 Conn. 561, 568–69, 757 A.2d 1125 (2000) (concluding that § 53a-183 [a] [2], which prohibits, inter alia, mailings made with intent "to harass, annoy or alarm" and "in a manner likely to cause annoyance or alarm," applies only to conduct, not speech [internal quotation marks omitted]); the Appellate Court explained that, for purposes of the telephone harassment statute, "it is the physical act of placing the call and causing a ringing at the receiving end . . . that constitutes the actus reus of the crime"; *State* v. *Moulton*, supra, 120 Conn. App. 337; and any language that ensues in the subsequent telephone conversation may be considered only as circumstantial evidence of the defendant's intent in making the call.[5] Id. The Appellate Court also concluded that the evidence was insufficient to establish "that the defendant's telephone call, alone or in conjunction with the defendant's words, conveyed a serious intention to harass the victim";[6] id., 352; thereby entitling the defendant to a judgment of acquittal on that charge.[7] See id., 353. With respect to the breach of the peace charge, the Appellate Court concluded that a new trial was necessary because the trial court improperly had failed to instruct the jury that it could

not find the defendant guilty on the basis of her speech unless that speech constituted a real or true threat to which the protection of the first amendment does not apply; see id., 344; and, further, that the instructional impropriety was not harmless. See id.

On appeal to this court, the state claims that the Appellate Court misconstrued the telephone harassment statute as proscribing only the conduct involved in making a telephone call and not the verbal content of the call. Although acknowledging that its evidence in the present case was based entirely on the defendant's speech, the state maintains that the plain language of § 53a-183 (a) (3) contains no indication that such speech, if truly threatening,[8] and therefore beyond the protections afforded under the first amendment, cannot itself provide the basis for a conviction under § 53a-183 (a) (3). The state further contends that the prior case law on which the Appellate Court relied to reach its contrary conclusion improperly interpreted § 53a-183 (a) (3) as barring only harassing conduct and not speech and, therefore, that we should overrule that precedent. The state concedes that, if we agree that § 53a-183 (a) (3) applies equally to threatening speech as well as to conduct, then the defendant was entitled to a jury instruction designed to ensure that she could be convicted only for a true threat and not on the basis of constitutionally protected speech, such as hyperbole, jest or puffery. See, e.g., *State* v. *Cook*, 287 Conn. 237, 250, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). The state asserts, however, that the trial court's failure to give such an instruction was harmless beyond a reasonable doubt because the evidence overwhelmingly established that the defendant's statements to Magnant constituted an unprotected true threat. The state makes the same argument with respect to the breach of the peace charge, claiming that, although it was improper for the trial court not to give a "true threat" instruction, that impropriety was harmless because there is no reasonable possibility that a properly instructed jury would have concluded that the defendant's threatening speech was entitled to first amendment protection.

We agree with the state that, contrary to prior interpretations of § 53a-183 (a) by this court, the Appellate Court and other courts, that statute prohibits not only harassing or alarming conduct, but offending speech, as well, that is not protected by the first amendment, including, in particular, true threats.[9] We also conclude, however, that, in light of those prior definitive interpretations of § 53a-183 (a), due process bars the prosecution of the defendant under the telephone harassment statute because she did not have fair notice prior to her conversation with Magnant that her speech was subject to the prohibition of that provision. See generally, e.g., *Bouie* v. *Columbia*, 378 U.S. 347, 352–55, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). Finally, we agree

with the Appellate Court that the defendant is entitled to a new trial on the breach of the peace charge because the state cannot establish beyond a reasonable doubt that the trial court's failure to instruct the jury that it could find the defendant guilty only upon determining that her statements constituted unprotected true threats was not harmless.

I

We begin by setting forth certain principles pertaining to the defendant's rights under the first amendment that are implicated in the present case. "The [f]irst [a]mendment, applicable to the [s]tates through the [f]ourteenth [a]mendment, provides that Congress shall make no law . . . abridging the freedom of speech. The hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the [f]irst [a]mendment ordinarily denies [the government] the power to prohibit dissemination of social, economic and political doctrine [that] a vast majority of its citizens believes to be false and fraught with evil consequence. . . . The [f]irst [a]mendment affords protection to symbolic or expressive conduct as well as to actual speech. . . .

"The protections afforded by the [f]irst [a]mendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution. . . . The [f]irst [a]mendment permits restrictions [on] the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .

"Thus, for example, a [s]tate may punish those words [that] by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . Furthermore, the constitutional guarantees of free speech and free press do not permit a [s]tate to forbid or proscribe advocacy of the use of force or of law violation except [when] such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . And the [f]irst [a]mendment also permits [the government] to ban a true threat. . . .

"True threats encompass those statements [in which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. . . . *Virginia* v. *Black*, 538 U.S. 343, 359–60, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

"The United States Court of Appeals for the Fifth Circuit has articulated the rationale underlying the removal of true threats from first amendment protection. The notion that some expression may be regulated consistent with the first amendment . . . starts with the already familiar proposition that expression has special value only in the context of dialogue: communication in which the participants seek to persuade, or are persuaded; communication [that] is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . . It is not plausible to uphold the right to use words as projectiles [when] no exchange of views is involved. . . . [*Shackelford*] v. *Shirley*, 948 F.2d 935, 938 (5th Cir. 1991), quoting L. Tribe, American Constitutional Law (2d Ed. 1988) § 12-8, pp. 836–37.

"That court further stated that, [a]s speech strays further from the values of persuasion, dialogue and free exchange of ideas the first amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to enact statutes that effectively neutralize verbal expression. [*Shackelford*] v. *Shirley*, supra, 948 F.2d 938. Finally, that court concluded that, as expansive as the first amendment's conception of social and political discourse may be, threats made with specific intent to injure and focused on a particular individual easily fall into that category of speech deserving no first amendment protection. Id. Thus, we must distinguish between true threats, which, because of their lack of communicative value, are not protected by the first amendment, and those statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected. See [e.g.] *Watts* v. *United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (statement that speaker would shoot president of United States made at political rally constituted protected political hyperbole).

"In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . Although a threat must be distinguished from what is constitutionally protected speech . . . this is not a case involving statements with a political message. A true threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence . . . is unprotected by the first amendment. . . . *United States* v. *Orozco-Santillan*, 903 F.2d 1262, 1265–66 (9th Cir. 1990) (applying 18 U.S.C. § 115, which prohibits [inter alia, threats] to assault federal law enforcement officer). Moreover, [a]lleged threats

should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. Id., 1265." (Internal quotation marks omitted.) *State* v. *DeLoreto*, 265 Conn. 145, 153–56, 827 A.2d 671 (2003). With these principles in mind, we turn to the merits of the state's claims.

II

We first address the state's contention that the Appellate Court incorrectly concluded that § 53a-181 (a) (3) proscribes only physical conduct, that is, the making of the telephone call, and does not concern the actual verbal content of the call. In reaching this conclusion, the Appellate Court followed an unbroken line of definitive and, ultimately, controlling precedent. Because neither we nor the Appellate Court writes on a clean slate, we commence our review of this issue with a discussion of that precedent.

A

The first published appellate case to address the issue of whether the prohibition of § 53a-183 (a) (3) encompasses harassing speech was *State* v. *Anonymous (1978-4)*, 34 Conn. Supp. 689, 389 A.2d 1270 (1977) (*Anonymous*). On appeal to the Appellate Session of the Superior Court from her conviction for violating § 53a-183 (a) (3),[10] the defendant in *Anonymous* contended, inter alia, that the language of that statute was constitutionally overbroad without a judicial gloss limiting its application to unprotected fighting words.[11] Id., 695. The court rejected the defendant's claim, concluding that no clarifying gloss was necessary because § 53a-183 (a) (3) does not proscribe speech but, rather, the placing of the telephone call. Id., 696. The court concluded: "The overbreadth principle is not violated by the unrestricted scope of the messages [that] the statute may ban because it is the manner and means employed to communicate them [that are] the subject of the prohibition rather than [the] content [of the messages]. The statute is not flawed because a recital on the telephone of the most sublime prayer with the intention and effect of harassing the listener would fall within its ban as readily as the most scurrilous epithet. The prohibition is against purposeful harassment by means of a device readily susceptible to abuse as a constant trespasser upon our privacy." Id.

This court denied the petition for certification to appeal filed by the defendant in *Anonymous*; see *State* v. *Gormley*, 174 Conn. 803, 382 A.2d 1332 (1978); and the defendant subsequently filed a petition for a writ of habeas corpus in the United States District Court, again alleging that the harassment statute was overbroad. See *Gormley* v. *Director, Connecticut State Dept. of Probation*, 632 F.2d 938, 941 (2d Cir.), cert. denied, 449 U.S. 1023, 101 S. Ct. 591, 66 L. Ed. 2d 485 (1980). After the District Court denied the habeas peti-

tion, the defendant raised a similar claim on appeal to the Second Circuit Court of Appeals. See id. That court also rejected the defendant's claim, concluding, in reliance on *State* v. *Anonymous (1978-4)*, supra, 34 Conn. Supp. 696, that § 53a-183 (a) (3) regulates conduct rather than mere speech. *Gormley* v. *Director, Connecticut State Dept. of Probation*, supra, 941–42. The Second Circuit specifically concluded that "the [telephone harassment] statute regulates *conduct*, not mere speech. What is proscribed is the making of a telephone call, with the requisite intent and in the specified manner." (Emphasis in original.) Id. The court further explained, however, that the state trial court properly had instructed the jury that it was entitled to consider the language used during the course of the telephone call, but solely for the purpose of determining whether the state had established the element of intent. Id., 943. This instruction, the court concluded, did not improperly focus the jurors' attention on the content of the telephone call, thereby avoiding constitutional infirmity.[12] See id.

Thereafter, in *State* v. *Bell*, supra, 55 Conn. App. 475, the Appellate Court considered a claim by the defendant, Frank Bell, challenging his conviction under § 53a-183 (a) (3) on the ground that the telephone calls on which the state's case was based constituted protected speech.[13] Id., 476. Relying on *Anonymous* and *Gormley*, the Appellate Court rejected Bell's claim that the statute impermissibly "prevent[ed] him from speaking out on matters of public concern," explaining, instead, that the provision "merely prohibits purposeful harassment by use of the telephone and does not involve first amendment concerns." Id., 481. In support of this conclusion, the Appellate Court noted that § 53a-183 (a) (3) "proscribes conduct, not the content of the telephone calls." Id.

Approximately one year after the Appellate Court decided *Bell*, this court, in *State* v. *Murphy*, supra, 254 Conn. 561, considered a substantially similar claim under subdivision (2) of § 53a-183 (a),[14] which prohibits mailings and other written communications in terms materially identical to those of § 53a-183 (a) (3). The defendant in that case, Thomas J. Murphy III, claimed that his conviction of harassment in the second degree by use of the mail violated his free speech rights because the state's case against him was predicated on the content of certain letters that he had sent to his former girlfriend rather than his actual conduct in mailing the letters.[15] Id., 567. Murphy also raised the closely related claim that the trial court improperly had failed to instruct the jury that it could find him guilty only on the basis of his conduct and not the content of his speech. Id., 572–73. After considering the analysis of the courts in *Anonymous*, *Gormley* and *Bell*, this court concluded that there was no first amendment violation because § 53a-183 (a) (2) simply does not purport to

regulate speech. See id., 568, 574. This court explained, rather, that the statute "proscribes harassing conduct via mail and does not seek to regulate the content of communications made by mail." Id., 568; see also id., 574 ("§ 53a-183 [a] [2] prohibits conduct, not speech"). This court also concluded that a fact finder may, without violating a defendant's first amendment rights, consider speech for the limited purpose of determining whether the defendant intended the mailing to harass, annoy or alarm.[16] Id., 569. Although, as we have indicated, *Murphy* involved a charge of harassment by use of the mail in violation of § 53a-183 (a) (2), and the present case, like *Bell*, *Gormley* and *Anonymous*, involves a charge of harassment by use of a telephone in violation of § 53a-183 (a) (3), in all other material respects, the language of the latter provision is identical to the language of the former. Consequently, the scope of the two statutory subdivisions with respect to speech also is identical. Thus, *Murphy*, like *Bell*, constituted controlling precedent for purposes of the Appellate Court's analysis and resolution of the present case.

This review of relevant, prior precedent reveals that the courts have deemed § 53a-183 (a) not to regulate speech in response to claims that the statute had been applied in violation of the first amendment because of a trial court's failure to instruct the jury that only certain, limited kinds of speech lawfully can be regulated. Indeed, Judge Beach expressly observed in the present case that "[t]he case law clearly states that the narrow construction regarding the proscribed conduct eliminates unconstitutional overbreadth because speech, protected or otherwise, is not proscribed." *State* v. *Moulton*, supra, 120 Conn. App. 354 (*Beach*, *J.*, concurring). In none of the foregoing cases, however, did the court undertake a true interpretative analysis of § 53a-183 (a) for the purpose of determining whether the legislature intended to prohibit the kind of speech that lawfully is subject to such regulation.[17] Because the state claims, contrary to prior precedent, that the telephone harassment statute does apply to unprotected speech—in particular, the kind of true threat that, the state contends, is exemplified by the speech of the defendant in the present case—we must consider that question.

The principles that guide our construction of a statute are well established. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of

such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Footnote omitted; internal quotation marks omitted.) *Picco* v. *Voluntown*, 295 Conn. 141, 147, 989 A.2d 593 (2010). Finally, the state's claim concerning the scope and meaning of § 53a-183 (a) (3) gives rise to a question of law over which our review is plenary. See, e.g., *Cruz* v. *Montanez*, 294 Conn. 357, 367, 984 A.2d 705 (2009).

A person violates § 53a-183 (a) (3) when, ''with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm.'' As we have explained, courts uniformly have concluded that it is the placing of the telephone call and the circumstances surrounding that act, such as the time of the call and the number of calls placed—rather than the content of the call—that may be considered in determining whether the call was made ''*in a manner* likely to cause annoyance or alarm.''[18] (Emphasis added.) General Statutes § 53a-183 (a) (3). The term ''manner,'' however, does not have so narrow a meaning. It is defined, rather, as ''the mode or method in which something is done or happens: a mode of procedure or way of acting . . . .''[19] Webster's Third New International Dictionary (2002). Thus, according to its ordinary meaning, the term ''manner'' refers broadly to the way in which one performs an act, which, for present purposes, is the act of making a telephone call. Certainly, the words that a person uses during the course of a telephone call, along with other aspects of the content of the call, including, for example, the caller's tone of voice, are no less integral to the determination of whether the call was made or conducted in such a way as to harass or alarm the recipient of the call than are the circumstances surrounding the physical placing of the call. Indeed, if the legislature had intended to limit the scope of § 53a-183 (a) (3) by excluding the caller's speech from its purview, it undoubtedly would have expressed that intent by using considerably more narrow or restrictive language than that denoted by the term ''manner.'' We therefore agree with the state that, for purposes of § 53a-183 (a) (3), the manner in which a call is made encompasses its content, and is not confined solely to the timing and placement of the call. This interpretation finds support in the fact that § 53a-183 (a) (3) expressly contemplates that a conversation may take place if the telephone is answered, for the statutory bar against making a telephone call in a manner likely to alarm or harass

applies equally "whether or not a conversation ensues . . . ." General Statutes § 53a-183 (a) (3).

In addition, construing § 53a-183 (a) (3) to include harassing or alarming speech is consistent with, and furthers, the intent of the legislature to prohibit "purposeful harassment by means of a device readily susceptible to abuse as a constant trespasser upon our privacy." *State* v. *Anonymous (1978-4)*, supra, 34 Conn. Supp. 696; see also *Gormley* v. *Director*, *Connecticut State Dept. of Probation*, supra, 632 F.2d 942 ("Harassing telephone calls are an unwarranted invasion of privacy. They appear to be on the increase. They are properly outlawed by federal and state statutes. . . . The evil against which [§ 53a-183 (a) (3)] is directed is both real and ugly."); *State* v. *Moulton*, supra, 120 Conn. App. 336 ("[t]he harassment statute was enacted for the purpose of thwarting the growing practice of using the telephone as a device to intrude [on] others' privacy in a tormenting manner"). Indeed, in enacting § 53a-183 (a), the legislature had a compelling interest in protecting this state's citizenry from the fear and abuse likely to result from the malicious misuse of the telephone by those with improper motives. *Gormley* v. *Director*, *Connecticut State Dept. of Probation*, supra, 941. Because the content of a telephone call may be harassing or alarming irrespective of when the call is made or how many such calls are placed, we see no reason why the legislature would have intended to foreclose consideration of the content of the call for purposes of the fact finder's determination of whether a call was made in a manner likely to harass or alarm, and there is nothing in the statutory language or the pertinent legislative history to suggest otherwise.[20] In fact, as the state aptly explains, construing § 53a-183 (a) (3) to preclude consideration of a call's content would frustrate the legislative purpose of broadly combatting the abusive use of the telephone.[21]

In the present case, the defendant made one telephone call to her place of employment during regular business hours, asked to speak with the postmaster, who was not available that day, and spoke instead with the branch supervisor of customer service. There was nothing harassing or alarming about the time of the call, the person to whom the call was made, the number of calls, or any of the other circumstances relative to the physical placing of the call and the ringing of the telephone at the post office. Indeed, because there was nothing harassing or alarming about the way in which the call was placed, the Appellate Court, in reliance on controlling precedent, concluded that the statute improperly had been applied to the defendant. See *State* v. *Moulton*, supra, 120 Conn. App. 335. What the defendant actually said during the call, however, apparently caused Magnant to be alarmed, and a jury reasonably could find that the defendant's statements constituted an unprotected true threat. In such circumstances, we

are unwilling to say that this call did not constitute a form of telephone harassment as a matter of law simply because the state's case against the defendant was predicated solely on the allegedly threatening statements that the defendant made to Magnant rather than on the mere "physical act of placing the call and causing a ringing at the receiving end . . . ." Id., 337. To conclude otherwise would require us to disregard both the language of the statute and the legislative objective of safeguarding the privacy rights of those targeted for harassment by the abusive or offensive use of the telephone.[22]

Finally, we recognize that our interpretation of § 53a-183 (a) (3) permitting a jury to consider the caller's speech in determining whether the call was alarming or harassing potentially gives rise to first amendment concerns. Such constitutional concerns, however, readily may be eliminated by limiting the reach of the statute to speech, like true threats, that is not protected by the first amendment. As both parties agree, this can be accomplished by an instruction informing the jury of the distinction between unprotected true threats, on the one hand, and the protected expression of beliefs or ideas, on the other.

We therefore agree with the state that § 53a-183 (a) proscribes harassing and alarming speech as well as conduct.[23] We further conclude that, in order to ensure that a prosecution under that provision does not run afoul of the first amendment, the court must instruct the jury on the difference between protected and unprotected speech whenever the state relies on the content of a communication as substantive evidence of a violation of § 53a-183 (a).

B

In light of our decision to overrule prior precedent limiting the scope of § 53a-183 (a), we now must decide whether, as the defendant claims, constitutional principles of fair notice bar the state from retrying her under our more expansive construction of that provision. We agree with the defendant that the state lawfully cannot prosecute her under that provision as we have interpreted it today.[24] Moreover, because the state acknowledges that its case against the defendant is founded entirely on the content of her speech, the defendant is entitled to a dismissal of, rather than an acquittal on, the count alleging a violation of § 53a-183 (a) (3).

"There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of a statute [that] either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . Second . . . the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolv-

ing ambiguity in a criminal statute as to apply it only to conduct clearly covered. . . . Third, [t]here can be no doubt that a deprivation of the right of fair warning can result . . . also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. *Bouie* v. *Columbia*, supra, 378 U.S. 352. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal. *United States* v. *Lanier*, [520 U.S. 259, 267, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)]." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 722–23, 998 A.2d 1 (2010). The claim of the defendant in the present case implicates the third of these fair warning principles, which bars the retroactive application of a criminal statute that, because of an unforeseeable judicial interpretation, operates in the same manner as a prohibited ex post facto law.

As this court previously has stated, "[t]he [constitutional] ex post facto prohibition forbids . . . the [s]tates [from] enact[ing] any law [that] imposes a punishment for an act [that] was not punishable at the time it was committed . . . or imposes additional punishment to that then prescribed. . . . Through this prohibition, the [f]ramers sought to [ensure] that legislative [a]cts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. . . . [T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." (Citation omitted; internal quotation marks omitted.) *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 805, 950 A.2d 1220 (2008).

"We have recognized that the judicial construction of a statute can operate like an ex post facto law and thus violate a criminal defendant's right to fair warning as to what conduct is prohibited. See, e.g., *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 58–59 n.4, 951 A.2d 520 (2008). The United States Supreme Court has observed, [a]s the text of the [ex post facto] [c]lause makes clear, it is a limitation [on] the powers of the [l]egislature, and does not of its own force apply to the [j]udicial [b]ranch of government. . . . *Rogers* v. *Tennessee*, [532 U.S. 451, 456, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001)]. Nevertheless, limitations on ex post facto judicial decisonmaking are inherent in the notion of due process. Id. In *Bouie* v. *Columbia*, [supra, 378 U.S. 347], the United States Supreme Court observed: If a state legislature is barred by the [e]x [p]ost [f]acto [c]lause from passing such a law, it must follow that a [s]tate Supreme Court is barred by the [d]ue [p]rocess [c]lause from achieving precisely the same result by judicial construction. . . . If a judicial construction of a criminal statute is unexpected and indefensible by

reference to the law [that] had been expressed prior to the conduct [at] issue, it must not be give retroactive effect. . . . Id., 353–54; see also *State* v. *Hart*, 221 Conn. 595, 612–13 n.15, 605 A.2d 1366 (1992)." (Internal quotation marks omitted.) *State* v. *Courchesne*, supra, 296 Conn. 727–28, quoting *Washington* v. *Commissioner of Correction*, supra, 287 Conn. 805–806.

"[A] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction. . . . [Thus], when [a] court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. . . . In determining whether a judicial construction of a statute effectively operates as a prohibited ex post facto law, [t]he question . . . is whether [the] decision was so unforeseeable that [the defendant] had no fair warning that it might come out the way it did. . . . Put differently, [t]he key test in determining whether the due process clause precludes the retrospective application of a judicial decision . . . is whether the decision was sufficiently foreseeable . . . that the defendant had fair warning that the interpretation given the relevant statute by the court would be applied in his case." (Citations omitted; internal quotation marks omitted.) *State* v. *Courchesne*, supra, 296 Conn. 728–29.

Applying these principles to the present case, we conclude that the defendant did not have fair warning that she could be prosecuted for a violation of § 53a-183 (a) (3) solely on the basis of the content of her speech. On the contrary, as we have explained, this court, the Appellate Court, the Appellate Session of the Superior Court and the Second Circuit Court of Appeals all have concluded, in clear and definitive terms, that the content of a person's communications, in and of itself, could not subject him or her to prosecution under § 53a-183 (a) either for an alarming or harassing telephone call or for an alarming or harassing mailing. In such circumstances, the defendant reasonably could not have anticipated that she could be found to have violated § 53a-183 (a) (3) on the basis of the statements that she made to Magnant during their telephone conversation. Indeed, in light of the case law construing § 53a-183 (a) at the time that conversation occurred, the defendant was entitled to rely on controlling precedent holding that the content of a person's communications could not be used by the state as substantive evidence of that offense. Because the state concedes that its evidence against the defendant is comprised solely of her statements to Magnant, her retrial on that charge is prohibited by principles of fair notice, and, consequently, dismissal of the charge is required.[25]

III

Finally, we consider whether, as the state contends,

the trial court's failure to instruct the jury on the "true threat" doctrine was harmless for purposes of the charge of breach of the peace in the second degree. The defendant claims that she is entitled to a new trial on that charge because, in the absence of a jury instruction explaining that doctrine, there is an undue risk that she was convicted on the basis of speech protected by the first amendment. We agree with the defendant.

We note, preliminarily, that the state concedes that such an instruction was constitutionally required. As this court explained in *State* v. *DeLoreto*, supra, 265 Conn. 145, unless a judicial gloss is placed on § 53a-181 (a) (3) requiring proof that the allegedly threatening conduct at issue constituted a true threat, the statute would be overbroad because it could be applied to punish expressive conduct protected by the first amendment. See id., 166. Furthermore, in accordance with the purpose underlying this judicial gloss, a defendant whose alleged threats form the basis of a prosecution under any provision of our Penal Code, including § 53a-181 (a) (3), is "entitled to an instruction that he could be convicted as charged only if his statements . . . constituted a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole." *State* v. *Cook*, supra, 287 Conn. 250. The issue in the present case, therefore, is not whether such an instruction was required but, rather, whether the court's failure to so instruct the jury was harmless error.

"It is well established that a defect in a jury charge [that] raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *State* v. *Fields*, 302 Conn. 236, 245–46, 24 A.3d 1243 (2011). "[I]n *Neder* [v. *United States*, 527 U.S. 1, 15–17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)], the United States Supreme Court enunciated [the] . . . test to use in determining whether an omitted element of a charge harmed the accused. A jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same [in the absence of] the error . . . ." (Internal quotation marks omitted.) *State* v. *Brown*, 299 Conn. 640, 661, 11 A.3d 663 (2011).

Viewing the evidence in the light most favorable to the defendant, as we must when seeking to ascertain

whether an instructional impropriety of this nature was harmless, we cannot conclude either that the defendant failed to contest the state's claim that her statements constituted a true threat or that the state's evidence on that issue was overwhelming. On the contrary, the primary issue in the case was whether the defendant's statements did, in fact, constitute a serious expression of an intent to commit an act of violence. Moreover, although the jury reasonably could have found that the defendant's comments met that constitutional threshold, the jury also could have concluded that the comments, albeit ill-advised and inappropriate, represented the troubled musings of a distraught employee rather than a true or legitimate threat.[26] We therefore agree with the Appellate Court that, if "the jury [had] been instructed properly, it is reasonably possible that it would have found that a reasonable person in the defendant's position would not have foreseen that her statements would be interpreted as a serious expression of an intent to harm but, rather, as mere banter, jest or exaggeration." *State* v. *Moulton*, supra, 120 Conn. App. 344. In sum, the issue was one for the jury, properly instructed, to decide. We conclude, therefore, that the trial court's failure to instruct the jury on the true threat doctrine was not harmless beyond a reasonable doubt.[27]

The judgment of the Appellate Court is affirmed insofar as that court reversed the trial court's judgment and ordered a new trial on the charge of breach of the peace in the second degree; the form of the judgment of the Appellate Court is improper insofar as that court directed the trial court to render judgment of not guilty on the charge of harassment in the second degree, and the case is remanded to the Appellate Court with direction to remand the case to the trial court with direction to render judgment dismissing the charge of harassment in the second degree.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (3) threatens to commit any crime against another person or such other person's property . . . ."

[2] General Statutes § 53a-183 (a) provides: "A person is guilty of harassment in the second degree when: (1) By telephone, he addresses another in or uses indecent or obscene language; or (2) with intent to harass, annoy or alarm another person, he communicates with a person by telegraph or mail, by electronically transmitting a facsimile through connection with a telephone network, by computer network, as defined in section 53a-250, or by any other form of written communication, in a manner likely to cause annoyance or alarm; or (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

[3] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The first amendment prohibition against laws abridging the freedom of speech is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. E.g., 44

*Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 489 n.1, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

[4] As we explain more fully hereinafter, a "true threat" is "a serious expression of an intent to commit an act of unlawful violence against another"; *State* v. *Cook*, 287 Conn. 237, 239, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008); and is not protected by the first amendment. Id., 247.

[5] The Appellate Court further explained that "the making of the telephone call refers only to the ringing of the telephone and the frequency with which the defendant makes the call." *State* v. *Moulton*, supra, 120 Conn. App. 338.

[6] The Appellate Court reasoned that, although "[t]he jury could have used the defendant's speech to infer that she intended for the single telephone call to be harassing . . . [n]either the defendant's complaints nor her reference to the California shootings . . . show[s] that she thought that the ringing of her telephone call would disrupt the person responsible for answering telephones at the post office. She did not admit that she knew something that would make this otherwise innocuous call harassing . . . for example, that she knew that she was calling a private line at the post office and that the person on the other end would be significantly disrupted by the ringing. Nothing the defendant said shed light on how she thought the ringing of her telephone call would affect the recipient. This conclusion does not mean that [the court] consider[s] the defendant's words referencing the shooting in California to be insignificant but, rather, that these words do not support a finding that the defendant intended for her telephone call and the ringing it caused to be harassing." *State* v. *Moulton*, supra, 120 Conn. App. 352–53.

[7] Judge McDonald disagreed with the majority's conclusion that the defendant was entitled to a judgment of acquittal on the harassment charge. In particular, despite the prior precedent concerning the scope of § 53a-183 (a) (3), Judge McDonald disagreed that the jury was barred from considering the content of the defendant's telephone call with Magnant for purposes of determining whether the call constituted harassment prohibited by the statute. See *State* v. *Moulton*, supra, 120 Conn. App. 355–57 (*McDonald, J.*, concurring in part and dissenting in part). Judge McDonald also concluded that the evidence adduced by the state was sufficient to support a conviction under § 53a-183 (a) (3) because, in his view, the jury reasonably could have concluded that the defendant had threatened the victim with the requisite intent to do so. Id., 357 (*McDonald, J.*, concurring in part and dissenting in part). Judge McDonald nevertheless concluded that the defendant was entitled to a new trial on the harassment charge because the trial court had failed to instruct the jury that it could find the defendant guilty only if it determined that her speech constituted a threat unprotected by the first amendment. Id., 358 (*McDonald, J.*, concurring in part and dissenting in part).

[8] We note that certain categories of speech and expression other than threats also fall outside the protection of the first amendment. Among these "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem," are "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those [that] by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Footnote omitted.) *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

[9] We note that this court previously has determined that, in the absence of a judicial gloss, a statutory prohibition against " 'annoying' " conduct is unconstitutionally vague because it is otherwise "difficult" to discern the kind of conduct that is contemplated by that term. *State* v. *Indrisano*, 228 Conn. 795, 815–16, 818, 640 A.2d 986 (1994) (concluding that term "annoys," as used in disorderly conduct statute, General Statutes § 53a-182 [a] [2], is unconstitutionally vague without judicial gloss because that term gives rise to unascertainable standard); see also *State* v. *LaFontaine*, 128 Conn. App. 546, 553–54, 16 A.3d 1281 (2011) (explaining that judicial gloss is required to save § 53a-183 [a] [3] from unconstitutional vagueness).

[10] We note that the language of the version of § 53a-183 (a) (3) applicable to the defendant in *Anonymous* was identical to the version applicable in the present case.

[11] In *Anonymous*, the defendant verbally harassed the victim in a restaurant parking lot, shouting from her car window that the victim "was a 'tramp,' that her mother was a whore and had gone to bed with the defendant's husband, and that the defendant was 'going to get' the [victim] this time." *State* v. *Anonymous (1978-4)*, supra, 34 Conn. Supp. 691. Later that evening,

the defendant telephoned the victim at her place of work and repeated the same accusations and threats. Id. This telephone call provided the basis for the defendant's conviction under § 53a-183 (a) (3).

[12] In a separate concurrence, Judge Walter R. Mansfield agreed with the result but noted that the majority opinion left room for greater clarification concerning the need for first amendment protections: "I concur on the limited ground that the . . . telephone harassment statute . . . if narrowly construed by the Connecticut Supreme Court to apply only to speechless calls or to obscene or threatening calls of the type involved . . . may be upheld if so construed. Unfortunately since [defense counsel] took no exception to the trial judge's charge to the jury, the judge was never afforded the opportunity to so construe the statute and instruct the jury in terms of the narrower construction. However, I believe the Connecticut Supreme Court should be afforded the opportunity to construe the statute so that it will not penalize the exercise of [f]irst [a]mendment free speech rights. If it were not so construed, the statute would clearly be void for overbreadth." (Footnote omitted.) *Gormley* v. *Director, Connecticut State Dept. of Probation*, supra, 632 F.2d 943–44 (Mansfield, J., concurring).

[13] The evidence established that Bell had been in a troubled relationship with his girlfriend, who also was the mother of two of his children. See *State* v. *Bell*, supra, 55 Conn. App. 477. As their relationship deteriorated, and against Bell's wishes, the girlfriend enrolled the children in a family preservation program. Id. Bell began to call the program's office repeatedly and, over a period of about five months, made approximately forty-five telephone calls to various employees of the program. Id. Most of these calls were recorded voice mail messages in which Bell was critical of program employees in terms that caused those employees to feel threatened both for themselves and their families. Id.

[14] See footnote 2 of this opinion.

[15] Murphy, who previously had been convicted of assaulting the victim, his former girlfriend, repeatedly attempted to contact her by telephone and mail when he was incarcerated for his alleged sexual assault of the victim, which occurred while he was on probation for the assault conviction, despite the existence of a protective order prohibiting such contact. *State* v. *Murphy*, supra, 254 Conn. 564–65. Some of the letters that the defendant mailed to the victim contained language that reasonably might have been considered alarming or offensive. Id., 565.

[16] Explaining why Murphy's first amendment rights were not violated, this court observed that, "[a]t no time did the prosecutor imply that [Murphy] should be convicted [on the basis of] the content of his communications; rather, the prosecutor argued only that those communications were evidence of the defendant's intent to harass, annoy or alarm." *State* v. *Murphy*, supra, 254 Conn. 570. This limited use of a defendant's speech has been deemed not to violate the first amendment. E.g., *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993) ("[t]he [f]irst [a]mendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent").

[17] We note that, in each of the foregoing cases in which the scope of § 53a-183 (a) was an issue, the reviewing court resolved the case in favor of the state, upon concluding that the statute does not bar speech, because the state had not sought a conviction on the basis of the content of the communications. See, e.g., *State* v. *Murphy*, supra, 254 Conn. 570 ("[a]t no time did the prosecutor imply that the defendant should be convicted [on the basis of] the content of his communications"). Consequently, prior to the decision of the Appellate Court in the present case, no appellate tribunal of which we are aware had been required to decide a case, like the present one, in which the state prosecuted a defendant under § 53a-183 (a) on the basis of the defendant's speech.

[18] Thus, as the Appellate Court explained, "[t]he use of the telephone to make repeated or unwelcome calls to a person's residence or personal [tele]phone, usually at night or in the early hours of the morning, is commonly the basis for [a] conviction under § 53a-183 (a) (3). See, e.g., *State* v. *Therrien*, 117 Conn. App. [256, 258–60], 978 A.2d 556 (initial conviction for harassment based on defendant's threatening calls to victim's [cell phone]), cert. denied, 294 Conn. 913, 983 A.2d 275 (2009); *State* v. *Lemay*, 105 Conn. App. [486, 487–89], 938 A.2d 611 (affirming defendant's conviction for harassment [when] he repeatedly [and] anonymously called victim and made banging noises), cert. denied, 286 Conn. 915, 945 A.2d 978 (2008); *State* v. *Bell*, supra, 55 Conn. App. [476–78 (affirming defendant's conviction of second degree harassment, which was based on forty-five threatening telephone calls)];

*State* v. *Marsala*, 43 Conn. App. [527, 529], 684 A.2d 1199 (1996) (affirming defendant's conviction for harassment based on more than twenty-five telephone calls . . . made to victim during early morning hours), cert. denied, 239 Conn. 957, 688 A.2d 329 (1997); *State* v. *Marsala*, 1 Conn. App. [647, 648–49, 652], 474 A.2d 488 (1984) (affirming defendant's conviction for harassment [when] he made threatening calls to victim at her home, at night, and broke victim's window)." *State* v. *Moulton*, supra, 120 Conn. App. 339 n.6; see also id., 355 (*McDonald*, *J.*, concurring in part and dissenting in part) ("[h]istorically, the use of the telephone to make repeated, unwelcome, speechless calls during the early morning hours has ordinarily been a basis for prosecution under § 53a-183 [a] [3]").

[19] Under General Statutes § 1-1 (a), "[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . ." We look to the dictionary definition of a term to ascertain its commonly approved usage. E.g., *Stone-Krete Construction, Inc.* v. *Eder*, 280 Conn. 672, 678, 911 A.2d 300 (2006).

[20] The sparse legislative history pertaining to § 53a-183 (a) provides no guidance with respect to the issue presented by this appeal.

[21] This is especially true in view of the plain language of § 53a-183 (a) (3), which clearly indicates that its proscription applies even to one telephone call. Although it is not impossible for a single telephone call to be harassing or alarming based solely on the circumstances surrounding the physical placing of the call, it is far more likely that a lone telephone call will be found to be harassing or alarming on the basis of the offensive or abusive content of the call.

[22] We acknowledge that, under the doctrine of legislative acquiescence, legislative cognizance of the courts' prior interpretation of § 53a-183 (a) would be presumed, and the failure of the legislature to enact corrective legislation would constitute evidence of its agreement with that interpretation. See, e.g., *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 440, 54 A.3d 1005 (2012). We are not persuaded however, that the doctrine applies to prior judicial constructions of § 53a-183 (a) for the following reasons. First, it seems highly unlikely that the legislature would disturb a constitutionally limiting construction that the courts have given a statute, particularly in the absence of substantial countervailing interests. Interests of such magnitude clearly were not implicated in those previous cases, given that the courts' decisions did not invalidate the defendants' respective convictions, and violations of the statute constitute a class C misdemeanor. Second, if the legislature had engaged in a substantive review of the statute in light of the first amendment concerns raised in those cases, it seems likely that it would have made some modification to subdivision (1) of subsection (a), which, read literally, criminalizes any use of "indecent or obscene language" over the telephone. General Statutes § 53a-183 (a) (1).

[23] In overruling prior precedent to the contrary, we are mindful that "[t]his court [often] has . . . acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law. . . . The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency." (Citation omitted; internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 519, 949 A.2d 1092 (2008). Nevertheless, "[s]tare decisis in not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." (Internal quotation marks omitted.) *Payne* v. *Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). Consequently, "[n]one of the foregoing [considerations] . . . necessarily constitutes an insurmountable barrier to a court's reconsideration of its prior precedent. With respect to the doctrine of stare decisis, we repeatedly have observed that [t]he value of adhering to [past] precedent is not an end in and of itself . . . if the precedent reflects substantive injustice. [Because] [c]onsistency must also serve a justice related end . . . [c]onsistency obtains its value best when it promotes a just decision. . . . [E]xperience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better. . . . Indeed, [i]f law is to have current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. . . . [Thus] [t]his court . . . has recognized many times that there are exceptions to the rule of stare decisis. . . . In accordance with these principles, we have not hesitated to revisit and overrule our prior holdings, including prior

holdings applicable to criminal matters . . . once we are convinced that they were incorrect and unjust." (Citations omitted; internal quotation marks omitted.) *State* v. *Salamon*, supra, 520–21. For the reasons set forth previously, and with due regard of the importance of stare decisis, we are persuaded that prior cases construing § 53a-183 (a) were wrongly decided and should be overruled.

[24] As we previously indicated, the Appellate Court concluded that the defendant was entitled to a judgment of acquittal under § 53a-183 (a) (3) because, under the Appellate Court's construction of that provision, the state's evidence was insufficient to prove that the defendant placed the telephone call with the requisite intent to harass or alarm. See *State* v. *Moulton*, supra, 120 Conn. App. 339, 352–53. For the reasons set forth previously, we disagree with the Appellate Court's construction of § 53a-183 (a) (3), and, therefore, we need not consider the sufficiency of the evidence under the Appellate Court's statutory interpretation. Nevertheless, as we explain hereinafter, the state is prohibited from retrying the defendant under § 53a-183 (a) (3). Consequently, the defendant is entitled to a dismissal of that charge.

[25] The state claims that, because our interpretation of § 53a-183 (a) is predicated on the use of ordinary tools of statutory construction, the defendant was on notice that we might overrule prior precedent and adopt a more expansive interpretation of that provision. See *State* v. *Courchesne*, supra, 296 Conn. 726 ("because this court routinely relies on settled principles of statutory interpretation to ascertain the meaning of an ambiguous statute, our reasoned application of those ordinary tools of construction no doubt will result in an interpretation of the statute at issue that is both foreseeable and defensible for purposes of due process"). The flaw in the state's argument is that prior case law construing § 53a-183 (a) as not implicating speech did not admit of any ambiguity in the relevant statutory language or otherwise raise any question about the provision's scope. In light of the unequivocal nature of the prior case law concerning the limited scope of § 53a-183 (a), we do not believe that it was foreseeable, for fair notice purposes, that this court would reverse course and adopt an interpretation of that provision completely at odds with that prior precedent.

[26] This is particularly true in view of the fact that the defendant couched her alleged threat in conditional terms, stating that she " 'could' " engage in violent conduct similar to that which had occurred several days earlier in California, and that she would be calling back in a few days. Although we certainly do not suggest that the defendant's comments were not sufficiently direct or immediate to represent a true threat as a matter of law, we cannot say that the jury necessarily would have found that those comments constituted such a threat if it had been instructed on the difference between unprotected true threats and protected hyperbole, bluster or puffery. See *State* v. *Cook*, supra, 287 Conn. 250. Indeed, the fact that Magnant took no immediate action following the defendant's telephone call and waited until Ravenelle's arrival at work on Monday morning to discuss the matter with him would be relevant evidence as to whether the comment was perceived as a real or true threat.

[27] The state contends that, under *Neder* v. *United States*, supra, 527 U.S. 1, a jury instruction that omits an element of the offense can be harmless beyond a reasonable doubt, even if the defendant actually contested that omitted element, unless the defendant "raised evidence sufficient to support a contrary finding . . . ." Id., 19. We need not decide whether the state's reading of *Neder* is correct because, even if it is, the state cannot demonstrate that the improper jury instruction was harmless under the standard that it posits. As we have explained, a properly instructed jury reasonably could have found that the state's evidence did not establish beyond a reasonable doubt that the defendant's statements constituted a true threat.