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The Absurdity of Criminalizing Encouraging Words

Eric Franklin Amarante

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Introduction

No one jaywalks in Seattle.[1] It's the damnedest thing. If you've never been to Seattle, you'll have to trust me—it's truly astonishing to see grown adults wait patiently for a "WALK" sign with nary a car in sight.

Although I lived in Seattle for a time, I grew up in Texas and knew how to cross a street. So back in 2010, when I crossed Third Avenue as the red "DON'T WALK" light stopped blinking, Sullivan, my Seattlelite friend, stayed behind. We spent a few dumb seconds standing on opposite curbs, staring at the empty street between us, and waiting for the light to change. I finally got impatient and said, "Dude, come on!" After a slight hesitation, he jogged across the street. Moments later, a cop on a bike rolled up and gave him a $70 ticket.

Do I bear any fault here? A decent argument could be made. If not for my encouragement, Sullivan would've followed the law, waited for the light to change, and been $70 richer. Had I inadvertently aided and abetted a minor traffic violation?

Now let's consider a different scenario. Imagine that you hired someone to clean your home. This person happens to be undocumented and lives in the United States in violation of immigration laws. One day, she tells you that she plans to go to her home country for a family obligation. You know that it might not only be very difficult for her to return, but also that crossing the border would

* Eric Franklin Amarante is an Associate Professor at the University of Tennessee College of Law.

[1] *See* Deborah Wang & Adwoa Gyimah-Brempong, *Why Don't Longtime Seattleites Jaywalk?*, NPR (July 4, 2019), https://tinyurl.com/mr36r54h.

constitute a separate, additional offense. So, you implore her not to leave the country, telling her, "Don't leave the country, you won't be able to get back in."[2]

Remaining in the United States without proper documentation is a civil violation, punishable by a $500 fine.[3] If your housekeeper takes your advice and stays in the United States, do you bear any fault? Similar to my aiding and abetting Sullivan's jaywalking, it feels like you might have aided and abetted a civil violation of our country's immigration laws.

However intuitive this logic may be, thanks to the First Amendment's protection of speech, most speech cannot be prohibited by the government. There are, of course, exceptions, but this simple understanding of our freedom of speech rights is a good place to start. And it suggests that neither "don't leave the country, you won't be able to get back in," nor "dude, cross the street," should be punishable. After all, these are only words, and the First Amendment prohibits the government from making my words illegal.

But we've decided that some words are so harmful that they ought to be punishable. For example, words that incite illegal acts, words that defame, words that defraud, "fighting words," and obscene speech are not protected by the First Amendment.[4] Of particular interest to this article is the "speech integral to criminal conduct" exception. This exception allows the government to criminalize speech that is tantamount to the prohibited conduct. In other words, this exception reaches speech that serves as "a mechanism or instrumentality in the commission of a separate unlawful act."[5] This is why the government can criminalize, for example, conspiracy to commit a crime and requests for illegal material, even if there is no act other than speaking.

So would I bear liability for hollering "dude, come on!" to Sullivan? Thankfully, no. Even though the jaywalking would not likely have occurred without my speech, my speech was not "integral" to

[2] These facts closely track *United States v. Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012).

[3] 8 U.S.C. § 1324d(a)(2).

[4] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Brandenburg v. Ohio 395 U.S. 444, 447 (1969); Miller v. California 413 U.S. 15, 18–19, 21 (1973).

[5] People v. Relerford, 104 N.E.3d 341, 352 (Ill. 2017).

Sullivan's act. At worst, I was merely advocating for illegal conduct, something that the First Amendment protects. For similar reasons, one might assume that uttering "don't leave the country, you won't be able to get back in" is merely advocacy of illegal activity, and not speech that is "integral" to criminal conduct.

But now imagine that a court concludes that my words ("dude, come on") were deemed to be not only integral to jaywalking, but also a felony. Because jaywalking is a civil violation, Sullivan would only owe $70 for failing to respect a traffic light, but I would get up to ten years in jail for encouraging his illegality.

With only slightly less absurdity, this is the effect of a little-used subsection of the Immigration Reform and Control Act ("IRCA"). Although it is only a civil violation for a noncitizen to stay in the United States without proper documentation,[6] IRCA makes it a felony for anyone to "encourage[] or induce[]" a noncitizen to, among other things, "reside in the United States" (I will call this the "Encouragement Provision").[7] Thus, under the Encouragement Provision, the person who commits the prohibited act (i.e., staying in the United States without documentation) is subject to a civil penalty, while the person who encourages the act is a felon.

There are two major problems here. The first is that the Encouragement Provision, on its face, covers an unduly large amount of speech. It doesn't take a great imagination to conjure scenarios in which speech would be impermissibly restricted by a law that criminalizes mere encouragement. And indeed, litigants and critics have argued that the plain language of the Encouragement Provision prohibits large swaths of constitutionally protected speech, including legal advice, political advocacy, and intimate discussions among family members.[8] As such, these critics argue that the Encouragement Provision is facially invalid because of

[6] *See* Arizona v. United States, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

[7] 8 U.S.C. § 1324(a)(1)(A)(iv).

[8] *See* United States v. Sineneng-Smith, 910 F.3d 461, 483–84 (2018) (noting that the statute's prohibition reaches "a loving grandmother who urges her grandson to over stay his visa, by telling him 'I encourage you to stay'" and a speaker at a rally who says, "I encourage all you folks out there without legal status to stay in the U.S.!"), *rev'd*, 140 S. Ct. 1575 (2020).

overbreadth.[9] The second problem is that if the Encouragement Provision makes it a felony to encourage someone to commit a civil violation (i.e., staying in the United States without documentation), it would be an outlier in the "speech integral to criminal conduct" exception's jurisprudence. Since *Giboney v. Empire Storage & Ice Co.*,[10] the leading case on the "speech integral to criminal conduct" exception, the Supreme Court has never punished the solicitation of a civilly punishable act as a crime.[11] If the Encouragement Provision were to be upheld, it would be the first time.

In *United States v. Hansen*, the Supreme Court had a chance to assess the constitutionality of the Encouragement Provision and mostly blew it.[12] In *Hansen*, the Court ultimately dismissed the overbreadth challenge with a tortured and strained statutory interpretation, and the expansion of the "speech integral to criminal conduct" exception was mostly ignored.[13] Along the way, the court left the Encouragement Provision intact, established a difficult precedent for future overbreadth challenges, and for the first time, blessed a criminal punishment for speech integral to a civil violation.

This article proceeds in four parts. Part I discusses the facts of *Hansen*, briefly describing the scam that precipitated Mr. Hansen's conviction under the Encouragement Provision. Part II examines the Supreme Court's holding in *Hansen*, highlighting the unorthodox statutory interpretation that led the court to dismiss the overbreadth challenge. Part III discusses an issue that the Supreme Court left largely unaddressed: the expansion of the "speech integral to criminal conduct" exception to permit legislatures to apply *criminal* penalties to speech that is integral to *civil* violations. Part III also briefly considers the future of overbreadth challenges after *Hansen*, and part IV is a conclusion.

[9] Eric Franklin Amarante, *Criminalizing Immigrant Entrepreneurs (and Their Lawyers)*, 61 B.C. L. Rev. 1323, 1341 (2020).

[10] 336 U.S. 490 (1949).

[11] For a fulsome discussion of the "speech integral to criminal conduct" exception, see Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981 (2016).

[12] 143 S. Ct. 1932 (2023).

[13] *See id.* at 1946–48.

I. Helaman Hansen: A Would-be Free Speech Anti-Hero

We have crafted the contours of our freedom of speech rights largely by defending a gaggle of assholes.[14] Helaman Hansen, the defendant in *Hansen*, would fit right in. Hansen was arrested for scamming millions of dollars out of hundreds of undocumented people with a fraudulent promise of U.S. citizenship. In a depressingly common scheme, Hansen offered a path to citizenship through adult adoption—something that doesn't exist unless you were adopted as a child[15]—and urged his clients to overstay visas and remain in the United States. In the process, he amassed almost $2 million from over 450 noncitizens. In addition to fraud, Hansen was convicted of unlawfully encouraging or inducing illegal immigration under the Encouragement Provision. Hansen challenged this part of the conviction, arguing that the Encouragement Provision was an unconstitutionally overbroad restriction of speech.[16]

Hansen's timing was impeccable. Around the same time, the Ninth Circuit heard the case of *United States v. Sineneng-Smith*.[17] In that case, Evelyn Sineneng-Smith promised legal permanent residence to noncitizens through a long-defunct labor certification program. In other words, like Hansen, Sineneng-Smith conned numerous families out of large sums of money with the false promise of citizenship. Unlike Hansen, Sineneng-Smith did not challenge the constitutionality of the Encouragement Provision. Undaunted, the Ninth Circuit struck down the Encouragement Provision as unconstitutionally overbroad, despite Sineneng-Smith's failure to raise this claim. More specifically, the Ninth Circuit held that the Encouragement Provision criminalized not only conduct, but also speech; that it could not be saved by established exceptions to the First Amendment (holding that the speech criminalized by the Encouragement Provision was neither incitement nor aiding and abetting); and that there was a real danger that the Encouragement Provision would capture protected speech.[18]

[14] *See, e.g.*, Hustler Mag. v. Falwell, 485 U.S. 46 (1988); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

[15] *See Adult Adoptees and U.S. Citizenship*, U.S. Citizenship and Immigr. Servs., https://tinyurl.com/5bb9shrc (last visited Aug. 30, 2023).

[16] *See Hansen*, 143 S. Ct. at 1938.

[17] 910 F.3d 461 (2018), *rev'd*, 140 S. Ct. 1575 (2020).

[18] *See id.* at 482, 485.

Good news for Hansen? Well, not so fast. This proved to be a short-lived victory, as the Supreme Court quickly vacated *Sineneng-Smith*, chiding the Ninth Circuit for raising the overbreadth issue in the absence of presentation by the parties.[19] Turns out, courts are not supposed to raise constitutional issues willy-nilly. Or in the words of Justice Ruth Bader Ginsburg, courts "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties."[20] Thus, *Sineneng-Smith* was vacated. But recall that Hansen's case was waiting to be heard and his appeal raised the overbreadth issue. Thus, with no sallying required, the Ninth Circuit had another chance to assess the constitutionality of the Encouragement Provision. This is how the Ninth Circuit, for the second time, struck down the Encouragement Provision as facially overbroad.[21]

So this time, really good news for Hansen? Again, not so fast. The Supreme Court ultimately disagreed with the Ninth Circuit again, upheld the Encouragement Provision, and robbed Hansen of his well-earned spot in the infamous canon of First Amendment ne'er-do-wells. Along the way, the Court made future overbreadth challenges very difficult and rather thoughtlessly expanded the First Amendment's "speech integral to criminal conduct" exception.

II. Strong Medicine, Weak Statutory Interpretation

A. The Overbreadth Doctrine, Generally

The overbreadth doctrine is used to invalidate statutes that restrict a substantial amount of constitutionally protected speech. Needless to say, invalidating a statute passed by a democratically elected legislature is a big deal, and it should make courts uncomfortable.[22] For this reason, the Supreme Court has called the overbreadth doctrine

[19] United States v. Sineneng-Smith, 140 S. Ct. 1575, 1578 (2020).

[20] *Id.* at 1579 (quoting United States v. Samuels, 808 F. 2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring)).

[21] United States v. Hansen, 25 F. 4th 1103, 1106 (9th Cir. 2022), *rev'd*, 143 S. Ct. 1932 (2023).

[22] *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1097 (2017) (noting that interpreting statutes "might seem to invade the legislature's authority, denying it the power to express its will as it pleases").

"strong medicine" that should not be "casually employed."[23] But of course, sometimes strong medicine is appropriate. After all, chemotherapy sucks, but it is preferable to cancer.[24] If the overbreadth doctrine is chemotherapy, the cancer is an impermissibly broad statute's tendency to chill speech. "Chilling" speech, or deterring people from engaging in constitutionally protected speech from fear of prosecution, is the evil targeted by the overbreadth doctrine. As noted by Justice Antonin Scalia, "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas."[25]

In other words, we have two potential harms here that must be balanced. On the one hand, we value speech and do not want poorly drafted statutes to limit what we can say. On the other hand, criminal laws aim to prohibit some sort of harmful activity, and striking down a law for overbreadth effectively overrules the actions of a democratically elected legislature. Therein lies the tension; we do not want to chill speech, but we also do not want the judiciary to invalidate laws for fear of unlikely—or even limited—chilling. The overbreadth analysis attempts to strike an appropriate balance between these two competing desires.

There are two prongs to an overbreadth analysis: First, a court determines what the statute says; second, the court weighs whether the statute, properly construed, "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep."[26] The first step involves basic statutory interpretation. Once the court has determined what the statute says (or more precisely, what type of speech is prohibited), the second step requires the court to weigh the amount of protected speech prohibited by the challenged statute against the amount of speech properly restricted. If the amount of protected speech is substantial, "not only in an absolute sense, but

[23] L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999) (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)).

[24] *See* Friends of Georges, Inc. v. Mulroy, 2023 U.S. Dist. LEXIS 96766, at 97–98 ("The Court understands that the overbreadth doctrine is strong medicine. But a debilitated patient should not forgo medicine on account of its strength.").

[25] United States v. Williams, 553 U.S. 285, 292 (2008).

[26] *Hansen*, 143 S. Ct. at 1939 (citing Williams, 553 U.S. at 292) (internal quotation marks omitted).

also relative to the statute's plainly legitimate sweep," then the statute should be held invalid.[27]

B. The Hansen Court's Interpretative Odyssey

As noted above, the first step in the overbreadth analysis is for the court to interpret the statute to determine what speech the statute prohibits. Here, the Encouragement Provision makes it a crime to "encourage" and "induce" undocumented people to stay in the United States. Statutory interpretation normally—and intuitively, I might add—starts by reading the text. One would expect a court to begin its analysis by determining the meaning of the words used in the statute, but the *Hansen* court took a different approach. Rather than determining what "encourage" or "induce" might mean, the Court launched its analysis with an exploration of the meaning of "solicitation and facilitation."[28]

This is a curious approach, as neither "solicitation" nor "facilitation" appears in the Encouragement Provision. Undaunted, the seven-Justice majority (with Justice Amy Coney Barrett writing for the Court) launched into a discussion of the meaning of these words—words that, again, are not in the statute at issue. The majority pointed out that "encourage" and "induce" are often used to define "solicit" and "facilitate," which leads the majority to conclude that the definitions are interchangeable.[29] Needless to say, as Justice Ketanji Brown Jackson noted in dissent (with some well-earned snark), this is not "how dictionary definitions tend to work" and "the fact that a word is used to help define another word does not necessarily mean that the former is synonymous with the latter or incorporates all of its connotations."[30] To illustrate, Jackson pointed out that "the word 'furniture' might be used in the definition of a 'chair,' but not all pieces of furniture are chairs, nor do all pieces of furniture have four legs or other common chair-like characteristics."[31]

To justify this novel interpretive approach, the majority traced the history of the various antecedents of the Encouragement Provision,

[27] *Williams*, 553 U.S. at 292.

[28] *Hansen*, 143 S. Ct. at 1940.

[29] *Id.* at 1940–41.

[30] *Id.* at 1955 (Jackson, J., dissenting).

[31] *Id.*

going as far back as 1885 and following the thread to analyze amendments enacted in 1903, 1907, 1917, and 1952. In early iterations of the Encouragement Provision, the statute used the words "assist" and "solicit."[32] This might have justified the majority's decision to explore the meanings of the words "solicitation" and "facilitation," if not for the fact that "assist" and "solicit" were deleted by Congress in 1952.[33] It is such an obvious point that it seems absurd to state, but statutory interpretation normally assumes deletions are intentional. As such, courts are admonished to "presume differences in language . . . convey differences in meaning."[34] But instead of giving these deletions any meaning—i.e., instead of assuming that the legislature intentionally deleted "assist" and "solicit"—the majority concluded that the deletions were not meant to change the statute's meaning. Without any evidence, the majority concluded that the deletions were a product of congressional attempts to streamline the statute.[35]

Justice Jackson questioned this historical analysis. First, she noted that the history of the statute strongly evinces a trend of expanding, rather than narrowing, the statute's reach. As support, Jackson pointed out that in 1952, Congress "*deleted* the statute's references to solicitation and assistance—leaving 'encourages' and 'induces' to stand alone."[36] Jackson noted that in 1986, Congress "removed the *mens rea* requirement relating to the encouragement or inducement element;" and "made it a crime to encourage or induce an unauthorized noncitizen not merely to *enter* the United States, but also to encourage or induce such a person to 'reside' here unlawfully."[37] Jackson argued that taken in total, these changes strongly indicate a desire to expand the reach of the Encouragement Provision.[38] This history flies in the face of the majority's adoption of a narrowing interpretation.[39]

[32] *Id.* at 1943–44 (majority op.).

[33] *See id*. at 1943–44.

[34] *Id.* at 1958 (Jackson, J., dissenting) (citing BNSF R. Co. v. Loos, 139 S. Ct. 893, 902 (2019))

[35] *See id.* at 1944 (majority op.).

[36] *Id.* at 1956 (Jackson, J., dissenting) (emphasis in original).

[37] *Id.* at 1956–57 (emphasis in original).

[38] *See id*. at 1956 (noting that "[t]he history of the encouragement provision is a tale of expansion.").

[39] *See id.* at 1957–58 ("Tracing the history over time clearly establishes that Congress deleted the very narrowing terms that the majority now reads back into the statute.").

Not only does the history of the statute suggest a different interpretation, but also the subsection following the Encouragement Provision is perhaps more damning to the majority's interpretation. This subsection imposes criminal penalties on anyone who "aids or abets the commission" of certain acts.[40] But by interpreting "encourage" and "induce" to have the same legal effect as "facilitate" and "solicit" (the words often used in criminal statutes to capture aiding and abetting), the majority effectively added an aiding and abetting component to the Encouragement Provision. The only problem is that such a provision already existed in another section of the statute, casting doubt upon the majority's interpretation. In other words, "Congress knows how to create an aiding and abetting prohibition when it wants to" and "it did not do so in" the Encouragement Provision.[41]

Now, to be clear, I'm not suggesting the majority had forgotten how to interpret a statute. Indeed, the majority's interpretation, however unorthodox, was inspired by good intentions. Ultimately, the majority's interpretation was driven by the principle of constitutional avoidance.[42] Under this doctrine, if the Supreme Court has two interpretations of a statute—one unconstitutional and one constitutional—it ought to adopt the constitutional interpretation to avoid a conflict.[43] Following this logic, the majority reimagined the meaning of the Encouragement Provision in order to avoid its invalidation, thereby respecting the legislature's role in writing and enacting laws. But counterintuitively, by relying upon constitutional avoidance to reinterpret the Encouragement Provision, the majority's interpretive odyssey unceremoniously stepped all over Congress's role in drafting legislation. The majority's interpretation changed the plain meaning of the statute to such a degree that it usurped Congress's drafting role by effectively rewriting the Encouragement Provision. Although recognizing that the Court should "seek harmony" and not "manufacture conflict," Jackson emphasized that

[40] 8 U.S.C. § 1324(a)(1)(A)(v)(II).

[41] *Hansen*, 143 S. Ct. at 1956 (Jackson, J., dissenting).

[42] *See id.* 1946 (majority op.) ("When legislation and the Constitution brush up against each other, our task is to seek harmony, not to manufacture conflict.").

[43] Panama R.R. Co. v. Johnson, 264 U.S. 375, 390 (1924).

"this Court also has a duty to refrain from taking the legislative reins and revising the text of a statute."[44]

Thus, we have yet another tension between two competing dictates: constitutional avoidance and judicial usurpation of the legislature. Jackson argued that the majority gave the doctrine of constitutional avoidance too much weight and in the process mangled the ordinary principles of statutory interpretation. I agree with Jackson. After all, as Justice Samuel Alito has warned, constitutional avoidance "comes into play only when, after the application of *ordinary textual analysis*, the statute is found to be susceptible of more than one construction," and it should not be used to "rewrite a statute."[45] Here, the majority engaged in *extra*ordinary textual analysis and effectively rewrote the Encouragement Provision.

To be sure, it is appropriate for the Court to adopt a reasonable construction of a statute if that construction would render the statute constitutional.[46] But an unduly strained interpretation of a statute trespasses upon the legislative realm just as egregiously as the overbreadth doctrine's invalidation of a statute. Such an interpretation amounts to modification, which is "neither [the Supreme Court's] job nor [its] prerogative."[47] To make her point, Jackson highlighted the majority's argument that "solicitation and facilitation . . . require 'an *intent* to bring about a particular unlawful act.'"[48] Jackson explained that neither the text of the Encouragement Provision nor the ordinary meanings of "encourages or induces" (as opposed to "facilitate" and "solicit") require intent. One can encourage or induce someone to do something without intending to do so, something that I think everyone can sympathize with.[49] I spent years telling my sisters-in-law how great Knoxville was, but I was still surprised that they ended up becoming my neighbors.[50] But I digress. The important

[44] *Hansen*, 143 S. Ct. at 1954 (Jackson, J., dissenting).

[45] Jennings v. Rodriguez, 138 S. Ct. 830, 842, 843 (2018) (emphasis added).

[46] *See Williams*, 553 U.S. at 307 (Stevens, J., concurring).

[47] *Hansen*, 143 S. Ct. at 1952 (Jackson, J., dissenting).

[48] *Id.* at 1955 (quoting *id*. at 1940 (majority op.)). (emphasis in original).

[49] *See id.* at 1955–56 ("By describing the attractions of my hometown, for instance, I might end up inducing a listener to move there, even if that was not my intent.").

[50] Jackie and Day, I'm kidding! I love that you live here.

point is that the majority's interpretation inserted a *mens rea* element into the Encouragement Provision.

In this manner, the majority decided that the ghosts of "assist" and "solicit" should inform its interpretation of "encourage" and "induce." These long-deleted words allowed the majority to suggest that the definitions of "encourage" and "induce" have "solicitation and facilitation" overtones because they "substantially overlap in meaning" with "assist" and "solicit."[51] These overtones helped the majority settle upon a narrow construction of the Encouragement Provision, one that "reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law."[52] In the process, the majority effectively rewrote the Encouragement Provision to apply only to a narrow category of speech.

C. The balancing act of the overbreadth analysis.

Once the statute's meaning has been determined, the second prong of overbreadth analysis charges the court with weighing the statute's unconstitutional applications against its lawful applications. If a statute negatively affects only an insignificant amount of constitutionally protected speech while simultaneously covering many unprotected activities, then the statute is properly drafted and an overbreadth challenge will fail. Ultimately, the question is whether the constitutional harm is minor when compared to the statute's constitutionally appropriate reach.

The majority approached this balancing test by first identifying the valid scope of the Encouragement Provision. To do so, the majority recited a list of prosecutions under the Encouragement Provision of nonexpressive conduct (i.e., conduct not protected by the First Amendment).[53] These included prosecutions for smuggling undocumented people into the United States, procuring counterfeit identification documents, and selling fake Social Security numbers.[54]

[51] *Hansen*, 143 S. Ct. at 1944.

[52] *Id*. at 1946.

[53] *Id*. at 1946

[54] *Id*. (citing United States v. Okatan, 728 F.3d 111, 113–14 (2nd Cir. 2013); United States v. Yoshida, 303 F.3d 1145, 1148–51 (9th Cir. 2002); Edwards v. Prime, Inc. 602 F.3d 1276, 1295–97 (11th Cir. 2010); United States v. Tracy, 456 F. App'x 267, 269–70 (4th Cir. 2011); and United States v. Castillo-Felix, 539 F.2d 9, 11 (9th Cir. 1976)).

Because these prosecutions targeted unexpressive acts and not speech, the First Amendment was not implicated.

The majority placed these examples on one end of the second prong's hypothetical scales before turning to identifying the protected expression prohibited by the Encouragement Provision. Although the majority was able to identify a number of permissible prosecutions, it chastised Hansen for failing "to identify a single prosecution for ostensibly protected expression in the 70 years since Congress enacted" the Encouragement Provision.[55]

Hansen failed because the majority was only willing to credit actual prosecutions, rather than assessing the potential chilling effect of the Encouragement Provision.[56] Recall that the core goal of overbreadth analysis is to identify statutes that might chill speech. In other words, we're not focused solely on speech for which a speaker was actually prosecuted, we're worried about speech that was never uttered out of fear of an unconstitutionally broad statute. If the majority had credited potential prosecutions (i.e., speech chilling), rather than just successful prosecutions, the balance would certainly have turned out differently. After all, Hansen and amici marshaled a number of examples of constitutionally protected speech that would be captured by the Encouragement Provision. This should not be a surprise since, according to the plain language of the statute, simply saying "I encourage you to stay in the United States" to an undocumented person would violate the statute. It is therefore not a stretch to imagine that the Encouragement Provision might prohibit an uncomfortably large amount of socially productive and constitutionally protected speech. Indeed, Hansen argued that the text of the Encouragement Provision would prohibit, among other acts, the following:

- A priest telling a noncitizen congregant who has overstayed her visa that the church will provide charitable assistance, which might have the effect of encouraging her to remain;
- A U.S. citizen telling her undocumented spouse that he is needed in the country to provide financial support for the family;

[55] *Hansen*, 143 S. Ct. at 1946–47.

[56] *See infra* notes 87–96 for a more traditional overbreadth analysis.

- A public safety official advising undocumented members of the community to shelter in place during a natural disaster;
- A coach advising an undocumented student athlete that if she travels with her team for an international competition she will likely not be able to return to the United States;
- A college counselor advising an undocumented student that they can obtain a private scholarship to pay for dormitory fees and other expenses to fund their life as a college student in the United States;
- A doctor providing medical advice to a noncitizen with a visa that will shortly expire that a particular medical treatment is more readily available in the United States than elsewhere, leading that noncitizen to overstay the visa to wait for treatment; [and]
- A lawyer providing advice to a client that overstaying his visa is not a bar to adjusting his status to that of a lawful permanent resident if he marries a U.S. citizen.[57]

The majority admitted that "[i]f the statute reaches the many examples that Hansen posits, its applications to protected speech might swamp its lawful applications, rendering it vulnerable to an overbreadth challenge."[58] However, the majority was able to reject assertions that the statute reaches an impermissible amount of constitutionally protected speech by narrowly defining the words "encourage" and "induce" to only include meanings consonant with how these words are commonly used in criminal law statutes (i.e., as criminal solicitation and facilitation). The majority concluded its overbreadth analysis by averring that "[t]o the extent [the Encouragement Provision] reaches *any* speech, it stretches no further than speech integral to unlawful conduct."[59]

III. Hansen's Potential Legacy

The majority's opinion, at a mercifully slim 20 pages, has the potential to have outsized influence on First Amendment jurisprudence. This is because the Court, for the first time, upheld criminal penalties for people who encourage others to commit a civil violation. This

[57] Brief for Respondent at 16–17, United States v. Hansen, 143 S. Ct 1932 (2023) (No. 22-179) [hereinafter Brief for ACLU].

[58] *Hansen*, 143 S. Ct. at 1942.

[59] *Id.* at 1947.

represents an unprecedented expansion of the "speech integral to criminal conduct" exception, an exception that desperately needed limiting. Additionally, this case has the potential to significantly curtail the ability of overbreadth challenges to address the problem of chilling free speech. The balance of this section discusses each of these potential legacies.

A. Criminal Speech Integral to Uncivil Conduct

Curiously, the majority failed to address one of Hansen's more novel arguments—the fact that the Encouragement Provision makes it a *crime* to encourage someone to commit a *civil* violation. Calling this argument the "mismatch" theory, the majority summed up Hansen's argument in the following manner:

> Congress can impose criminal penalties on speech that solicits or facilitates a criminal violation and civil penalties on speech that solicits or facilitates a civil violation—but it cannot impose criminal penalties on speech that solicits or facilitates a civil violation.[60]

The majority dismissed this theory by saying "[w]e need not address this novel theory, because even if Hansen is right, his overbreadth challenge fails."[61] This suggests that the failure of Hansen's overbreadth challenge renders the "mismatch" argument moot. However, the majority was a bit too quick to dismiss this argument. As ably argued by Professor Eugene Volokh, this is not merely a question of overbreadth, but it is rather a question of the proper application of the "speech integral to criminal conduct" exception to the First Amendment.[62]

The "speech integral to criminal conduct" exception is "long familiar to the bar," and represents "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[63] This is, perhaps, an overstatement,[64] but we certainly have a substantial body

[60] *Id.* at 1948 (citing Brief of Amicus Curiae Professor Eugene Volokh in Support of Respondent at 5–7, United States v. Hansen, 143 S. Ct 1932 (2023) (No. 22-179) [hereinafter Volokh Brief]).

[61] *Id.*

[62] *See generally* Volokh Brief.

[63] United States v. Stevens, 559 U.S. 460, 468–69 (2010) (quoting *Chaplinsky*, 315 U.S. 568).

[64] *See* Volokh, *supra* note 11.

of caselaw to help us understand the exception. Perhaps the most common example of the "speech integral to criminal conduct" exception is the fact that the government is permitted to criminalize speech that solicits crimes. In *Giboney*, the Court noted that "[i]t rarely has been suggested that the constitutional freedom for speech . . . extends . . . to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[65]

Under this exception, it is constitutionally permissible for a law to criminalize an offer to sell heroin, but a law that criminalizes nonspecific encouragement to do the same (e.g., "You should really get into selling heroin, it's a grand old time!") would be unconstitutional. Similarly, a statute that criminalizes the pandering of child pornography is constitutional because it does not prohibit "abstract advocacy" of child pornography (which would be unconstitutional), but instead only criminalizes "the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer."[66] For this reason, the government cannot prohibit someone from saying, "I encourage you to obtain child pornography," because such a statement, however horrific, is mere advocacy; the speech is not, in other words, integral to a crime.[67]

This is how the "speech integral to criminal conduct" exception permits restrictions on someone using words or speech to cause illegal activity.[68] As summarized by Volokh, the exception stands for the following proposition:

> When speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct (illegal conduct other than the prohibited speech itself)—such as murder, fights, restraints of trade, child sexual abuse, discriminatory refusal to hire, and the like—this opens the door to possible restrictions on such speech.[69]

Thus, if you speak in a manner that causes a criminal act, you may be held criminally liable. Similarly, if you speak in a manner

[65] *Giboney*, 336 U.S. at 498.

[66] *Williams*, 553 U.S. at 300.

[67] *See id*.

[68] Volokh, *supra* note 11, at 1015 ("[T]he legal system may prohibit you from causing illegal conduct, even causing it through speech.").

[69] *Id*. at 986–87.

that results in a civil violation, you may be liable for civil penalties.[70] However, what this exception has never done, until *Hansen*, is make it a *crime* to speak in a way that gives rise to a *civil* violation.

As Jackson noted, the 1986 revision to the Encouragement Provision "made it a crime to encourage or induce a noncitizen not just to 'come to' or 'enter' the United States, but also to 'reside' in this country."[71] The problem is that it is not a crime for an undocumented person to reside in the United States; it is a civil violation.[72] But under the majority's interpretation of the Encouragement Provision, a person who encourages someone to commit a civil violation may earn a felony. In more concrete terms, the person whose actions violated the statute (i.e., the undocumented person remaining in the U.S.) may receive a $500 fine, while the person who encouraged the violation may be imprisoned up to ten years.[73] Absurdly, the punishment for encouraging someone to commit a prohibited activity is punished far more severely than the punishment for actually doing the prohibited activity. As Volokh argues, the justification for the "speech integral to criminal conduct" exception is that in order to punish speech, the "speech should be legally tantamount to the crime to which is it integral."[74] To do otherwise would be to "unmoor the exception from its rationale," with the absurd result of criminalizing speech integral to noncriminal conduct.[75] This is precisely what the *Hansen* court held.

Although the Court claimed not to address the issue, its silence on the matter rings loudly. By failing to credit Hansen's so-called mismatch theory, it upheld a statute that imposes criminal liability upon someone who encourages another to engage in activity that amounts to a civil violation. It is difficult to argue that this is anything other than an unprecedented expansion of the "speech integral to criminal conduct" exception. Before *Hansen*, we could point to no precedent

[70] *See* Int'l Brotherhood of Elec. Workers v. NLRB, 341 U.S. 694 (1951).

[71] *Hansen*, 143 S. Ct. at 1959 (Jackson, J., dissenting).

[72] *See id.* at 1947–48 (majority op.) ("[R]esiding in the United States without lawful status is subject to the hefty penalty of removal, but it generally does not carry a criminal sentence.").

[73] 8 U.S.C. §§ 1324(a)(1)(B); (a)(2).

[74] Volokh Brief at 1–2.

[75] *Id.* at 8.

that upheld criminal sanctions for the encouragement of a civil violation. That is no longer the case.

The consequences of this expansion could be quite profound. As Prof. Volokh argues, we are now left with "an exception with no discernable boundaries."[76] An expansive "speech integral to criminal conduct" exception would not be limited to violent conduct or even serious criminal conduct. Instead, it would provide the government with the freedom to bar any speech that it views as merely harmful. This could "potentially open the door to the government punishing any behavior that seems in some way connected to some behavior that is criminal, or civilly actionable, or just dangerous."[77] Prior to *Hansen*, the Supreme Court had upheld the "speech integral to criminal conduct" exception because it reached "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[78] After Hansen, the court can no longer make this claim. Under *Hansen*, the "speech integral to criminal conduct" exception may now impose criminal punishments on those who encourage, but do not commit, a civil violation. Such a result is not only facially absurd, but is also a dangerous incursion into our First Amendment rights.

B. The End of Overbreadth Challenges

In addition to expanding the "speech integral to criminal conduct" exception, the majority's opinion will render future overbreadth challenges very difficult. The majority dismissively ended its opinion by saying that "as-applied challenges can take it from here."[79] This blithe aside completely misses the point of the overbreadth doctrine, which is "to keep overly broad statutes off the books in order to avoid chilling constitutionally protected speech."[80] The goal of the overbreadth doctrine is to avoid the tendency of poorly drafted

[76] *Id.*

[77] *Id.* at 11.

[78] *Stevens*, 559 U.S. at 468–69 (quoting *Chaplinsky*, 315 U.S. at 571–72).

[79] *Hansen*, 143 S. Ct. at 1948.

[80] *Id.* at 1953 (Jackson, J., dissenting) ("[T]he majority undermines the goal of the overbreadth doctrine, which aims to keep overly broad statutes off the books in order to avoid chilling constitutionally protected speech.").

laws to chill speech, something a case-by-case approach can never do. As Jackson noted, the whole point of the overbreadth doctrine is to avoid the need to rely upon "those hardy enough to risk criminal prosecution to determine the proper scope of regulation."[81] Tallying up the number of impermissible successful prosecutions is nonsensical if one is concerned about "whether speech is being chilled by a facially overbroad statute" because "[t]he number of people who have not exercised their right to speak out of fear of prosecution is, quite frankly, unknowable."[82] The overbreadth doctrine doesn't force us to make "vindication of freedom of expression await the outcome of protracted litigation"[83] and it permits someone "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[84]

Here, the majority dismissed hypothetical applications of the Encouragement Provision as "fanciful." The problem is that such hypotheticals are often the bread and butter of overbreadth analysis, serving as the means of determining the second prong of the overbreadth doctrine—i.e., whether "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'"[85] As the Sixth Circuit has noted, "[a]lthough '[l]itigation by hypothetical' generally is frowned upon, if not barred . . . , it is sometimes *required* in free-speech cases."[86] How else can one assess the *potential* sweep of a statute—with an eye toward its *potential* to chill speech—without considering hypothetical applications?

Two Supreme Court cases, *United States v. Stevens* and *United States v. Williams*, illustrate the Court's willingness to consider hypothetical applications in overbreadth analyses. In *Stevens*, the Court considered the potential reach of a statute criminalizing "the commercial creation, sale, or possession of certain depictions of animal

[81] *Id.* at 1961 (quoting Dombrowski v. Pfister, 380 U.S. 479, 487 (1965)).

[82] *Id.* at 1963.

[83] *Dombrowski*, 380 U.S. at 487.

[84] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[85] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n. 6 (2008) (quoting *Ferber*, 458 U.S. at 770).

[86] Connection Distrib. Co. v. Holder, 557 F. 3d 321, 335 (6th Cir. 2009).

cruelty."[87] In an attempt to determine whether "a substantial number of its applications are unconstitutional," the majority considered a number of hypothetical prosecutions in which otherwise legal activities might be captured by the statute's definition of "animal cruelty," including whether the statute would reach hunting, slaughtering livestock, amputating cow tails, and cockfighting. All such activities, to varying degrees, involve harm to animals and were legal in some or all states at the time of the *Stevens* decision.[88] Notably, the *Stevens* Court did not shy away from considering such hypotheticals, however fanciful, despite the fact that the government had not attempted to prosecute such activities under the challenged statute.

In *Williams*, the Court considered a statute that criminalized the possession and distribution of material pandered as child pornography. In its overbreadth analysis, the *Williams* Court engaged in a similar examination of hypothetical applications, albeit with some palpable annoyance.[89] Writing for the *Williams* majority, Justice Scalia bemoaned "the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals."[90] But he nonetheless considered whether the statute would capture a person offering nonpornographic photographs of minors, mainstream movies depicting underage intercourse, a good Samaritan turning offending material over to authorities, and a documentary film about war crimes depicting the rape of children.[91] Despite his clear distaste at having to wrestle with such hypotheticals, Scalia considered and dismissed each example as either inapplicable, implausible, or in the case of the documentary, a minor unconstitutional application.[92] In other words, the *Williams* court held its nose and considered the hypothetical reach of the statute in question. The *Hansen* majority, on the other hand, dismissed the proffered hypotheticals because none of the hypotheticals had been prosecuted.

The majority's argument—which relied on the fact that a protected activity has not yet been prosecuted—is both incorrect and

[87] *Stevens*, 559 U.S. at 464.

[88] *See id.* at 475–77.

[89] *Williams*, 553 U.S. at 301.

[90] *Id.*

[91] *Id.* at 301–02.

[92] *Id.*

irrelevant. It is incorrect because there has been at least one prosecution of the Encouragement Provision. In *United States v. Henderson*, an employer of an undocumented house cleaner was prosecuted for repeatedly encouraging the noncitizen to remain in the United States, saying "if you leave, they won't let you back" and "you can't leave, don't leave."[93] The Massachusetts district court, with great reluctance, agreed that such facts supported a conviction under the Encouragement Provision.[94]

Perhaps more importantly, the majority's argument that the Encouragement Provision has not been used to prosecute "ostensibly protected expression" is completely irrelevant. When weighing the constitutionality of a statute under the overbreadth doctrine, we should not be forced to wait for the government to act in an unconstitutional manner. This is because "the First Amendment . . . does not leave us at the mercy of *noblesse oblige*." [95] A track record of inoffensive use does nothing to stem the chilling effect of a statute that, on its face, prohibits significant amounts of protected speech.[96]

To be sure, we should jealously protect the separation of powers, and whenever one branch of the government takes an action to invalidate the actions of another branch, we should raise our guard. It is therefore appropriate to refer to the overbreadth doctrine as "strong medicine" and to use it sparingly. But that does not mean that the doctrine should be cast aside. As the *Stevens* Court noted, "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."[97] To determine this, we need to know the costs—not just the prosecutions, but the tendency of a statute to chill speech. On the other hand, some restrictions on speech are clearly important. For this reason, we have determined that certain restrictions on speech are justified, and one way for us to determine if a speech restriction strikes the appropriate balance is the overbreadth doctrine, which

[93] United States v. Henderson, 857 F. Supp. 2d 191, 196 (D. Mass. 2012).

[94] *See id.* at 193–94 (noting that the court was "puzzled" by the "stern, solemn, and implacable sanctimony of the government" in maintaining a prosecution of such "pedestrian" conduct).

[95] *Stevens*, 559 U.S. at 480.

[96] *See id.* ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

[97] *Id.* at 470.

"seeks to balance the 'harmful effects' of 'invalidating a law that in some of its applications is perfectly constitutional' against the possibility that 'the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech.'"[98] The doctrine does not, in fact, encourage parties to conjure up "fanciful hypotheticals," but it does require an examination of "real-world conduct" that would be captured by the statute at issue.[99]

Rather than striking down the law and requiring Congress to write a provision that would not offend the constitution, the majority left the Encouragement Provision intact. Thus, anyone seeking guidance from the statute "will see only its broad, speech-chilling language."[100] One wonders if the court will require future overbreadth challenges to provide examples of actual prosecutions, rather than potential prosecutions. If so, it will be very difficult for future overbreadth challenges to succeed.

IV. Conclusion

The *Hansen* opinion has two potentially troubling consequences: the expansion of the "speech integral to criminal conduct" exception to the First Amendment and leaving the Encouragement Provision's facially broad language intact. With respect to the first consequence, the majority dramatically expanded the potential reach of the "speech integral to criminal conduct" exception to the First Amendment by allowing speech that results in a civil violation to be punished as a crime. Regardless of the wisdom of this expansion, the failure for the majority to address the issue in any detail is deeply troubling. Those critics who have called for the Supreme Court to properly cabin the exception in a thoughtful manner are no doubt sorely disappointed in the majority's willingness to completely ignore the problem.[101] Only time will tell if legislatures take advantage of this newfound flexibility to criminalize speech that incites civil violations. I don't think I'm alone in hoping that legislatures do not take this opportunity to criminalize large swaths of speech.

[98] *Id.* at 484–85. (quoting *Williams*, 553 U.S. at 292).

[99] *Id.* at 485.

[100] *Hansen*, 143 S. Ct. at 1961 (Jackson, J., dissenting).

[101] *See generally* Volokh, *supra* note 11.

In terms of the second consequence, with a near absurdist approach to statutory interpretation, the majority successfully saved the Encouragement Provision from invalidation. Despite my misgivings, the instinct to protect congressional acts from judicial invalidation is certainly a good one. However, the Court struck the wrong balance between respecting the realm of congressional action, on the one hand, and protecting our freedom of speech, on the other. By upholding a narrow interpretation of the Encouragement Provision, the majority has left a statute on the books that, on its face, reaches a significant amount of protected speech. We will never know the amount of speech that will never be uttered for fear of criminal prosecution.[102] Further, the Court's approach disincentivizes Congress to draft laws that do not, on their face, tread upon constitutional rights. As Jackson noted in closing her dissent, "at the end of the day, [the fears of amici] reflect a determination to view enacted statutes as serious business, and essentially, to take Congress at its word. The Court should have done the same."[103] I couldn't have said it better.

* * *

[102] *See Hansen*, 143 S. Ct. at 1962 (Jackson, J., dissenting) (noting that even if one were to consult the majority's decision, there are a number of "known unknowns of the majority's course [that] portend further chill").

[103] *Id.* at 1964.