San Diego Law Review

Volume 22 | Issue 2 Article 10

5-1-1985

Is There an Overbreadth Doctrine

Lawrence A. Alexander

Essays

Is There An Overbreadth Doctrine?

LAWRENCE A. ALEXANDER*

Courts and commentators frequently refer to a doctrine called "first amendment overbreadth." Yet, there is very little agreement on what the doctrine means and what justifies its adoption. In the article the author discusses various ways a statute can be overbroad and why overbreadth might be of concern. He then proposes a formulation of the first amendment overbreadth doctrine that responds to that concern.

INTRODUCTION

Supreme Court opinions and reams of scholarly commentary proclaim the existence of a doctrine called "first amendment overbreadth."[1] All who proclaim its existence seem to agree on at least three of its features:[2]

> (1) The doctrine is unique to the free speech area; (2) the doctrine, when properly invoked, results in the invalidation of entire statutes and administrative rules, or at least substantial portions of them, not just invalidation of particular unconstitutional applications of the statutes and rules; and (3) the doctrine permits anyone whose conduct falls within the statute or rule,

* Professor of Law, University of San Diego School of Law. B.A. 1965, Williams College; LL.B. 1968, Yale University.

1. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973); J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 867-71 (2d ed. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 710-18 (1978); Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1031 (1983); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

2. *See, e.g.*, L. TRIBE, *supra* note 1, at 710-16.

or at least that portion that will be invalidated under (2), to invoke the doctrine, even though their conduct is in some sense not constitutionally privileged with respect to the statute or rule.

There have been some attempts to explain and justify the overbreadth doctrine,[3] as well as some attempts to discredit it.[4] The most notable fact about the doctrine, however, is that what it is and what justifies it remain the subjects of controversy and confusion.

The controversy and confusion surrounding overbreadth are understandable. There are actually three possible renditions of the overbreadth doctrine. One is far too sweeping to be acceptable, and in any event has not been accepted by the Supreme Court. One is so unexceptional and commonplace that it cannot be deemed a special doctrine, and surely not a first amendment doctrine. Finally, one holds out some prospect for a special first amendment doctrine, but it is subject to some serious objections.

CONSTITUTIONAL LIMITS

Before discussing the three possible renditions of overbreadth, I want to lay some groundwork by considering the ordinary relation between the sweep of a statute and its constitutionality. Every statute is of course limited by the Constitution. Therefore, every statute can be viewed as though it included not only its express language, but also all of the constitutional doctrines that act as limitations on statutes.

Sometimes, of course, constitutional limitations will be surplusage because the statute, literally construed, does not have any applications that violate the Constitution. Other times, however, a literal

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3. *See, e.g.*, L. TRIBE, *supra* note 1; Redish, *supra* note 1; Note, *supra* note 1. Martin Redish's recent exploration of first amendment overbreadth merits special comment at this point because I shall not be dealing with Redish's analysis at any point in the text, despite Redish's stature as a first amendment theorist. My reason for omitting discussion of Redish is simple: Redish is labeling as "overbreadth" a defect in laws that is wholly different from the defects that make first amendment overbreadth a unique doctrine. Basically, Redish interprets overbreadth as the defect of not pursuing the least restrictive alternative, with the result that a law with such a defect impinges more on activities of first amendment concern than is necessary to accomplish the state's legitimate objectives. Redish, *supra* note 1, at 1035-37. The question of overbreadth is, for Redish, whether the state's justification for proscribing or burdening certain otherwise first-amendment-protected conduct is a sufficient justification. If not, the law is invalid.

For me, overbreadth analysis does not deal with the state's substantive interests in the scope of its laws, but with the state's *drafting* interests. For me, the overbreadth question is the question of when a law that concededly has unconstitutional (hence, unjustifiable) applications (if applied according to its terms) may be left on the books and validly applied to less constitutionally-favored conduct. The relevant state interests for overbreadth are those interests that relate to drafting laws in certain terms rather than others, not the interests that might support the constitutionality of *all* applications of those laws according to the terms chosen. Redish's analysis concerns the latter kinds of state interests; mine concerns the former kinds of state interests.

4. *See* Monaghan, *Overbreadth*, 1981 S. CT. REV. 1.

construction of a statute will violate the Constitution in some imaginable cases.

For example, suppose California's trespass statute expressly refers only to entering onto another's property without the latter's consent. Nonetheless, we know that California's trespass statute cannot constitutionally be applied, though it is literally applicable, to a trespass that occurs in Arizona,[5] or to a trespass by a leafletting Jehovah's Witness on the streets of a company town.[6]

What follows from this fact? Nothing of any significance. Of course, if California were to apply its trespass law to the Arizona trespass or the company town trespass, the courts would strike down those applications. We might explain the courts' actions by invoking the Constitution as an external limit on the application of laws. Alternatively, we might explain the courts' actions by indulging the fiction that the legislature always intends to incorporate the Constitution into each of its laws. In either case, the result is the same: applications of the law that violate constitutional limits are struck down.

But more importantly, the trespass law remains on the books and validly applicable in all those situations where its application would not violate the Constitution. For the person subject to the law, therefore, it is as though a statute that reads "do not do x" actually means "do not do x, except when the Constitution prevents the legislature from prohibiting x."

DEFINING OVERBREADTH

This is the ordinary relation between the sweep of a statute and its constitutionality. Now, what about first amendment overbreadth? What is it, and what justifies it?

Facial Overbreadth

The first possibility is that first amendment overbreadth is an exception to the ordinary situation outlined above for cases where statutes applied according to their terms violate constitutional protections of free speech in some circumstances. Thus, where the literal application of the statute conflicts with the statute construed as limited by free speech doctrines, the statute is invalid *in toto* and cannot

5. States have no constitutionally valid penal authority over acts committed in other states.

6. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

be applied to any conduct. The rationale for total invalidation of such a statute might be that a person cannot be presumed to have notice of constitutional doctrines related to speech and thus will be "chilled" — deterred from privileged speech — by an overbroad statute.

Such an overbreadth doctrine would be a suffocating restraint on legislation. If any conceivable literal application of the statute would violate a first amendment doctrine, the entire statute would be void. Ordinary trespass statutes would be void.[7] So would laws that prohibit defamation without reference to lines drawn by the Supreme Court to mark off areas of first amendment privilege.[8] Because the first amendment has implications for almost any type of statute, and because much of first amendment doctrine is quite fact-sensitive, the overbreadth doctrine considered here would put practically all legislation at risk.

Of course, one escape from this dilemma would be for the legislature to append to each and every statute a proviso that the statute should be construed as limited by the first amendment. If such a proviso is an effective remedy for overbreadth, then the overbreadth doctrine really has no bite at all. No legislature would ever omit such a proviso if it considered it; because the Constitution necessarily limits the application of any statute, adding the proviso is costless as far as the legislature is concerned.

Therefore, the overbreadth doctrine here considered has either too much or too little bite. In any event, the Supreme Court surely does not subscribe to it. The Court has not declared statutes like the ordinary trespass statute invalid merely because they have applications that run afoul of the first amendment. Nor has it invalidated statutes that regulate the content of speech, such as the defamation laws, merely because applied literally, they violate the first amendment in a range of cases. The defamation cases, which struck down applications of defamation laws, but not the laws themselves, are also counter-examples to limitations of the overbreadth doctrine to laws that regulate content, or that are "substantially overbroad." Defamation laws possess both attributes.[9]

A Constitutionally Illegitimate Predicate for Governmental Regulation

A second possible rendition of first amendment overbreadth is suggested by the Supreme Court's labeling such laws as those

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7. *See id.*

8. *See* New York Times v. Sullivan, 376 U.S. 254 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967).

9. *See* L. TRIBE, *supra* note 1, at 714-15.

proscribing picketing void for overbreadth.[10] Here it is necessary to digress a moment and discuss what makes conduct constitutionally privileged.

The Constitution's individual rights provisions by and large do not protect specific conduct *per se*. The free exercise clause may be the exception. Within freedom of speech, constitutional limits on time, place, and manner restrictions, if such limits exist, would also be exceptions. Rather, the Constitution ordinarily limits the types of reasons that government may act upon in regulating conduct. For instance, "criticizing the government" is not protected conduct viewed in isolation from the various ways government might attempt to regulate "criticizing the government." "Criticizing the government" may be validly — constitutionally — regulated if the criticism is broadcast from a soundtruck at night, and the regulation proscribes the use of soundtrucks at night. "Criticizing the government" may be validly regulated if the criticism takes place on private property without the owner's consent, and the regulation proscribes trespass. But "criticizing the government" is not validly regulated if the regulation proscribes, or was motivated by a desire to proscribe, "criticizing the government."

Now when a statute contains a constitutionally illegitimate predicate of governmental action, the statute is void and cannot be applied. If for instance a statute proscribes "picketing," "mutilating the flag," or "demonstrations by blacks," the statute cannot be applied as is, nor can it be applied even if narrowed to "violent picketing," "burning the flag in public,"[11] or "disruptive demonstrations by blacks." *The narrowed statute still contains the illegitimate predicate for governmental action.*

Put differently, while violent picketing, burning the flag in public, and disruptive demonstrations by blacks are all activities that can be validly proscribed *under some statutes* — for example, statutes proscribing violence, public burnings, and disruptive demonstrations — violent *picketing*, burning of the *flag*, and disruptive demonstrations *by blacks* do not mark off legitimately regulatable subcategories of legitimately regulatable activity. They are therefore underinclusive with respect to legitimately regulatable activity. The government may ban all violence, but not just violence associated with picketing. The government may ban all public burnings, but not just those that involve the flag. And so forth.

10. *See* Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).
11. *See* Street v. New York, 394 U.S. 576 (1969).

When a statute contains a constitutionally illegitimate predicate for governmental regulation, the statute is "unconstitutionally overbroad" in the sense that the statute is totally void and cannot be saved by narrowing. It has no range of constitutional applications.

This version of overbreadth is clearly not unique to the first amendment. Indeed, it is commonplace throughout the domain of constitutional liberties, wherever the meaning of those liberties primarily consists in limits on the reasons government may act upon in regulating.

Moreover, it is misleading to label the doctrine one of overbreadth, since the overbreadth metaphor suggests the statute has a legitimate range of applications but has just exceeded that range. On this rendition of overbreadth, however, the statute has *no* legitimate range of application.

The Supreme Court recently has expressed recognition that a statute void *in toto* because of a constitutionally illegitimate predicate for regulation is not really "overbroad." In *Secretary of State v. Joseph H. Munson Company*,[12] the issue was whether a Maryland statute that banned charitable solicitation by organizations with high fundraising costs violated the first (fourteenth) amendment. In holding that the statute was void on its face, the majority, responding to the argument that the statute was not "substantially overbroad" and thus should be struck down only as applied,[13] distinguished the Maryland statute from those that had survived facial attacks because they were not substantially overbroad:

> Here there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits. While there no doubt are organizations that have high fundraising costs not due to protected First Amendment activity and that, therefore, should not be heard to complain that their activities are prohibited, this statute cannot distinguish those organizations from charities that have high costs due to protected First Amendment activities. The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications, it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, though restricting solicitation costs, will have done nothing to prevent fraud.
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> Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all

12. 104 S. Ct. 2839 (1984).
13. *See infra* text accompanying notes 26-27.

> its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.[14]

In a footnote, the Court went on to say that the dissent's efforts to limit the scope of the statute were misguided:

> The dissenters appear to overlook the fact that "overbreadth" is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional. . . . "Overbreadth" has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest. . . .
> It was on the basis of the latter failing that the Court in *Schaumburg* [*Village of Schaumburg v. Citizens for Better Environment*. 444 U.S. 620 (1980)] struck down the Village ordinance as unconstitutional. Whether that challenge should be called "overbreadth" or simply a "facial" challenge, the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in all its applications falls short of constitutional demands. The dissenters' efforts to chip away at the possibly impermissible applications of the statute do nothing to address the failing that the *Schaumburg* Court found dispositive - that a percentage limitation on fundraising unnecessarily restricts protected First Amendment activity.[15]

It is significant that the dissent, although it quarreled, probably justifiably, with the majority's contention that the costs of fundraising were a constitutionally illegitimate predicate for regulation, did not dispute the majority's characterization of statutes with such illegitimate predicates as facially void.

The Harvard Rendition

The final rendition of first amendment overbreadth is the Harvard Note[16] - Larry Tribe[17] ("Harvard") rendition: the first amendment's substantive doctrines as unconstitutionally vague implied limits on statutory language. According to the Harvard rendition of overbreadth, the Supreme Court has come up with two types of doctrines in the area of free speech. One type of doctrine, exemplified by the *New York Times v. Sullivan* test for permissible regulation of defamation — knowledge of falsity or knowing disregard of truth or falsity — lends itself to a relatively clear, bright line test for constitutionality. If we take a law that proscribes defamation and apply it according to its terms, some of the applications — those that violate

14. 104 S. Ct. at 2852-53.
15. *Id.* at 2852 n.13.
16. *See* Note, *supra* note 1.
17. *See* L. TRIBE, *supra* note 1.

the *Sullivan* test — will be unconstitutional. If we graft the *Sullivan* test onto the law, so that we have a law that proscribes defamation, except where the *Sullivan* test is violated, we have a statute that is both narrowed to only constitutional applications *and is clear.*

Other first amendment doctrines do not translate into clear, bright-line tests. If those doctrines are grafted onto laws that, when applied literally, have some unconstitutional applications, they succeed in narrowing the laws only by introducing a degree of vagueness that, because it might deter some constitutionally protected speech, is unconstitutional itself. In other words, the Supreme Court's own first amendment tests, or at least some of them, if tacked onto statutes as limitations, render the statutes unconstitutionally vague.

On the Harvard rendition of overbreadth, where — and only where — a statute has some (literal) applications that violate the first amendment, and the test for those violations is vague,the statute is unconstitutionally overbroad and must be narrowed (without rendering it overly vague).

The Harvard rendition of overbreadth has been forcefully attacked by Henry Monaghan on three grounds: (1) the Harvard rendition results in a difference in treatment of statutes that are functionally equivalent; (2) the Harvard rendition represents a disguised attack on some of the Supreme Court's determinations of what speech is constitutionally protected; and (3) the Harvard rendition rests on an illusory distinction between fact-sensitive and non-fact-sensitive rules of constitutional privilege.[18]

Monaghan voices his first criticism in the following passage:

> Sophisticated overbreadth theory is *not* empty. Emphasizing "determinative," advocates of this form of overbreadth methodology do not equate "determinative rules of privilege" with the judicially established categories delineating unprotected speech. Rather, effort is made to distinguish among the various unprotected categories.
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> The unprotected categories are, *ex hypothesi*, not unconstitutionally vague. Nevertheless, overbreadth theorists maintain that some of these categories involve a constellation of fact-dependent variables too numerous in range and too unpredictable in application to be regarded as sufficiently determinative for the purpose of slicing a statute to acceptable constitutional limits. Professor Tribe, for example, rejects the "fighting words" exception as a satisfactory constraining limitation; it is, he says, not "precise and focused enough to give advance warning of the exact reach of the statute punishing offensive speech, since decisions under the standard turn on the facts particular to the speaker, the audience, and their interaction." The result is curious: A statute prohibiting "fighting words" in the terms defined by the Supreme Court could be validly applied to any litigant, while a statute prohibiting some form of "offensive speech" but readily constrained by a court to reach identically defined "fighting words" could not be so applied, even prospectively.[19]

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18. Monaghan, *supra* note 4, at 19-21.
19. *Id.* at 19 (emphasis in original, footnotes omitted).

Monaghan's first criticism appears to rest on a mistaken assumption, namely, that a statute that tracks the language of a constitutional test laid down by the Supreme Court (one that bans, say, "fighting words") is, on the Harvard rendition, okay, whereas a statute that is merely limited by such a test may not be. If the assumption were correct, the result would surely be anomalous, as Monaghan suggests. As I read the Harvard rendition, however, it treats overbroad statutes limited by vague constitutional tests and statutes stated in terms of those tests as on a par in terms of validity. The latter, while not technically "overbroad," are at least unconstitutionally vague.[20]

Monaghan's second criticism rejects the sharp distinction between rules of constitutional privilege on which the Harvard rendition relies:

> Attempts to draw lines between acceptable and unacceptable

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20. *Cf.* California Code of Civil Procedure § 527.7 (West Supp. 1985) (proscribing acts described in the precise terms of the constitutional test for illegal advocacy laid down in Brandenburg v. Ohio, 395 U.S. 444 (1969)).

Martin Redish makes the same assumption as Monaghan on this point, namely, that a law drafted in the language of a Supreme Court first amendment test would not be constitutionally infirm. Redish, *supra* note 1, at 1054-56. His reason is that the legislature, if it wishes to reach all uses of, say, "fighting words" or advocacy of criminal conduct that is unprivileged, can only do so by tracking the language of the Supreme Court tests. The point is well-taken, but it proves too much. If accepted it would render the overbreadth doctrine a nullity, since the Supreme Court's constitutional doctrines are legally implied parts of all laws in the sense that no law may be applied inconsistently with those doctrines. Moreover, Redish admits that overbreadth cannot be avoided by reading the Constitution into every law, though he inexplicably distinguishes doing so from appending more specific constitutional formulas to laws. *Id.* at 1056. I see no difference.

The source of Redish's ambivalence toward the inclusion of the Constitution as part of every law is perhaps the case he mentions in that connection, namely, Gooding v. Wilson, 405 U.S. 518 (1972). The Supreme Court in *Gooding* struck down as overbroad a Georgia law punishing offensive speech, implying that it would not have done so had the Georgia courts limited the law to "fighting words" as defined in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Redish accepts the implication and concludes that a law drafted in terms of Supreme Court speech tests will be upheld, no matter how fact-sensitive and thus incapable of mechanical application. Redish, *supra* note 1 at 1054-55. But the Court's implication in *Gooding* is nonsensical because the Georgia law could not validly be applied except in accordance with *Chaplinsky*. *Chaplinsky* is read into every law, because the Constitution is read into every law. If we assume that the Georgia courts in applying Georgia's laws will obey the Constitution as interpreted by the Supreme Court, then the fact that *Chaplinsky* had not officially been declared a limit on those laws by the Georgia courts is irrelevant. All it demonstrates is that the Georgia courts had not considered or correctly interpreted the constitutional requirements in previous decisions.

But what is the solution to the drafting problem Redish identifies? I believe it lies in recognizing that the harm of chilling effect of vague language, either statutory or constitutional, can sometimes be outweighed by the state interest in reaching all unprotected conduct, though sometimes it may not be. *See infra* text accompanying notes 30-34.

> constitutional privileges for purposes of allowing narrowing statutory constructions are fundamentally flawed. The defect inheres in the impossibility of drawing principled distinctions, for these purposes, among the various rules of First Amendment privilege. The entire effort posits a sharp contrast between two types of privilege rules: (a) privilege rules which are subject-matter specific and which "elevate a few factors to per se status," — for example, the actual malice rule of the defamation cases and the obscenity criteria; and (b) other First Amendment privilege standards which assertedly focus in an *ad hoc* manner on a combination of a much larger set of variables, some outside the actor's control — for example, the "fighting words" and Brandenburg incitement standards which, *inter alia*, focus "on the propensity of defined conduct to bring about concrete harms. . . ." This distinction between the two types of privileges seems to me to rest, in part, on a distortion of the substantive content of the "acceptable" privileges, and, in part, on a thinly disguised rejection of the constitutional adequacy of the disfavored privileges.[21]

Monaghan's second criticism is essentially an *ad hominem*, namely, that the distinction between those constitutional tests acceptable for limiting overbroad statutes and those unacceptable appears to rest more on the constitutional merits of the tests than, as the Harvard rendition claims, on their vague, fact-sensitive versus clear, *per se* rule qualities.

Taking the Harvard rendition at its word, however, brings us to Monaghan's third criticism, namely, that no first amendment privilege rule can escape being fact-sensitive:

> Most important, however, the asserted distinction between the two types of privilege rules cannot bear the weight placed on it. Admitting that certain kinds of harm justify some content-based regulation, the categorization approach seeks to identify those harms "at wholesale in advance, outside the context of specific cases." This avoids the danger of distortion brought about by the pull of specific facts and particular litigants. But the categories having been established, *ex ante*, the problem of application occurs. At that stage, *no* privilege rule is or can be completely independent of the underlying factual circumstances to which it is applied, nor is there any reason to suppose that any adjudication under one set of privilege rules is materially more immune from the risk of speech-punishing mistake than under other privilege rules. The system of privilege rules, real or imagined, varies only in degree of adjudicative predictability. No subset of these rules can be identified, *ex ante*, for purposes of distinguishing in a principled way between those privilege rules which can tolerably be utilized for statute narrowing and those which cannot. Once state court power to apply separability doctrine to statutes which touch expression is acknowledged in any form, no coherent limitation on that power can be developed.[22]

Here again, Monaghan seems to have missed the mark. If the *per se* lines drawn by the "acceptable" (for limiting overbroad statues) first amendment tests really do mark the boundary of constitutional freedom of speech — or if, as is more likely, they are deliberately tailored by the Supreme Court to protect an area broader than is in fact constitutionally valued[23] — there really is no need to attend to

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21. Monaghan, *supra* note 4, at 19-20 (footnotes omitted).
22. *Id.* at 20-21 (emphasis in original, footnotes omitted).
23. *See* Bevier, *The First Amendment and Political Speech: An Inquiry Into the*

the facts in any case beyond those facts identified as relevant by the first amendment tests.[24]

One reason why Monaghan's attack on the Harvard rendition of overbreadth fails perhaps is that Monaghan's paradigm of an overbroad statute is a statute that contains a constitutionally illegitimate predicate of governmental action, the second possible meaning of overbreadth that I discussed.[25] Such a statute, as I pointed out, has no legitimate range of applications. The Harvard rendition assumes that there *are* statutes whose terms suggest proper predicates of governmental action but whose sweep is merely too broad. And, indeed, there are such statutes. A law proscribing all defamation is based on a legitimate interest in protecting reputations, one that is merely outweighed by speech concerns in a range of cases. A narrowed defamation law is not underinclusive with respect to its legitimate governmental objectives in the way a narrowed flag mutilation law ("flag burning in public") or a narrowed anti-picketing law ("violent picketing") is with respect to any legitimate predicate (the danger of fire or violence).

There *are* problems with the Harvard rendition of overbreadth, however, even if not the problems Monaghan identifies. The most fundamental problem is that the doctrine appears to put at risk too many statutes that we intuitively want upheld. For example, the line marking off those applications of ordinary trespass laws that are constitutional from those that violate the first amendment is certainly vague in the sense relevant to the Harvard rendition of overbreadth. Yet, the Supreme Court is not about to void ordinary trespass laws on overbreadth grounds, nor would we want it to do so.

The Harvard rendition invokes a limiting doctrine at this point. Overbreadth must be "substantial."[26] Any statute can have a small "chilling effect" on speech activities, no matter how carefully drawn. Only those statutes that threaten to deter a substantial amount of

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Substance and Limits of Principle, 30 STAN. L. REV. 299, 322-31 (1978); Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685 (1978).

24. Of course, one can legitimately argue that the Supreme Court has never fashioned a rule of constitutional privilege in the first amendment that is so bright-line that it can be safely used as limiting language of an otherwise overbroad law. Tribe (but not the Harvard Note) assumes that *New York Times v. Sullivan* states such a rule — *see* L. TRIBE, *supra* note 1, at 714-15; Note, *supra* note 1, at 884-87 — but that is questionable given the extremely fact-sensitive nature of the inquiry into the plaintiff's status as a public figure. *See* J. NOWAK, *et al*, *supra* note 1, at 948-52.

25. *See* Monaghan, *supra* note 4, at 11-12.

26. *See* L. TRIBE, *supra* note 1, at 712-13; Note, *supra* note 1, at 859.

protected speech activity should be invalidated for overbreadth.

This limitation, which the Supreme Court has adopted,[27] does not clearly save trespass laws. There may be many instances of first-amendment-protected trespassing that are deterred by ordinary trespass laws plus the lack of *per se* rule of first amendment privilege.

A second possible limitation on overbreadth is one invoked by the Supreme Court and by commentators: the overbroad statute must be one that deals primarily with expressive activities.[28] Thus, a statute that proscribes offensive speech is subject to overbreadth analysis, whereas a trespass statute, because it regulates activity that is primarily non-expressive,[29] is not subject to overbreadth analysis.

There are two problems with this limitation. First, some statutes that are substantially overbroad and limited by a fact-sensitive constitutional test, and yet are not obviously deserving of the meat-axe of overbreadth invalidation, *do* regulate activity that is primarily expressive. Laws dealing with revelations of sensitive government information, or laws dealing with insubordination by government employees, might be examples.

Second, limiting overbreadth analysis to laws that primarily regulate expression is either duplicative of the "substantiality" limitation or else is essentially *ad hoc*. If a law is substantially overbroad and thus potentially chills protected speech, why should it matter that most of those regulated will not be engaged in speech?

A Proposal

I suggest reformulating the overbreadth doctrine to make clear why an ordinary trespass law is not a problem. The concern of the overbreadth doctrine is chilling effect on protected activities. But the harm of chilling effect can be outweighed by government's interests in formulating laws in ways that create a chilling effect. For example, "conduct unbecoming an officer" is a phrase sufficiently vague to cover and deter speech.[30] And the constitutional test for when the military may penalize its officers' speech is undoubtedly not a bright-line test. But the government's (military's) interest in deterring all conduct on the unprotected side of that line may justify a law that chills protected speech, even though by hypothesis that speech may

27. *See* New York v. Ferber, 458 U.S. 747, 769-74 (1982); Young v. American Mini Theaters, Inc., 427 U.S. 50, 59-61 (1976); Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973).

28. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 614-17 (1973); J. Nowak, *et al*, *supra* note 1, at 870-71; Note, *supra* note 1, at 918-21. *But see* Redish, *supra* note 1, at 1058-64.

29. *But see* Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U.L. Rev. 1319 (1983).

30. *See* Parker v. Levy, 417 U.S. 733, 755-61 (1974); Arnett v. Kennedy, 416 U.S. 134, 160-64 (1974).

not be directly proscribed.

Thus, since the focus of the overbreadth doctrine is *unjustified* chilling effect on protected speech, I suggest the following (non-bright-line) formulation of that doctrine:

> A law is unconstitutionally overbroad if (1) an ordinary person to whom the law will be applied, aware of the language of the law and of the relevant constitutional tests,[31] and contemplating engaging in constitutionally protected expression, is likely erroneously to believe (in a significant number of cases)[32] that if he engages in that expression, the government will

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31. One might attack both my formulation and the Harvard rendition of overbreadth on the ground that both approaches employ a contrary-to-fact presumption of knowledge of Supreme Court constitutional doctrine. If one is concerned with the actual chilling effect of statutes, then one must take people as they are; and people typically are ignorant of the Supreme Court's elaboration of the first amendment.

A limited response to this attack might be that many and perhaps most potential violators of overbroad statutes seek legal advice before taking action, and lawyers, if not their clients, should be presumed to know Supreme Court doctrine.

A more general response is just to cite to the basic principles of Anglo-American jurisprudence, principles that presume not only knowledge of statutory law, but knowledge of decisional law — both common law and constitutional — as well. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 388-89 (2d ed. 1960); Evans v. United States, 349 F.2d 653 (5th Cir. 1965); Jenkins v. State, 23 Md. 529, 194 A.2d 618 (1963). There are some recognized exceptions to the presumption — *see* J. HALL, *supra*, at 389-92; W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 365 (1972); Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960); Lambert v. California, 355 U.S. 225 (1957) — but these exceptions do not negate the presumption of knowledge of Supreme Court decisions.

Recently, Professor Meir Dan-Cohen has taken a fresh look at the legal system's posture towards both ignorance of the law and vagueness of the law through the conceptual prism of "acoustic separation." Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Acoustic separation refers to the phenomenon of having legal norms addressed to officials ("decisional rules") that are different from those addressed to primary actors ("conduct rules") with respect to the same conduct. If Supreme Court first amendment doctrine is not in fact accessible to those persons the chilling effect on whom is the concern of overbreadth analysis, then the legal presumption of knowledge of Supreme Court doctrine combined with literally overbroad status will chill expression even if Supreme Court doctrine is stated in the form of clear, *per se* rules. An overbroad statute functions like a vague statute if the person contemplating violating it knows only that his conduct *might* be constitutionally privileged (because he has no meaningful access to Supreme Court decisions). And as Dan-Cohen points out, judicial decisions do not cure the "no notice" vice of vagueness (as opposed to the "no control of arbitrary decisions" vice) if those decisions are inaccessible to — acoustically separated from — the persons who are regulated by the vague statute. *Id.* at 658-62.

Thus, when it is not realistic to assume that those regulated by overbroad statutes would have access (through legal advice) to Supreme Court elaborations of the first amendment, my formulation of the overbreadth doctrine should omit reference to awareness of "relevant constitutional tests," even if those tests meet the Harvard rendition's criteria for bright-line tests, and despite the normal legal presumption of knowledge of judicial decisions.

32. Actually, any chilling effect on ordinary persons should be treated as significant. The fewer the likely number of persons deterred, the less weighty need be the government's interest in the choice of language that produces the chilling effect. *See*

penalize him under the law; and (2) the government's legitimate interests in the formulation of the law, as opposed to alternative formulations that are less likely to deter protected expression, are not weighty enough to justify the heightened probability of such deterrence.

This formulation combines the sins of overbreadth and vagueness into a general sin of "chilling effect caused by the language of the law."[33] The formulation invites attention to the two material concerns of this area, namely, whether and to what extent protected expression will be chilled by the words of the law, and whether such chilling effect is a fair price to pay for the interests served by those words as opposed to other words. A focus on protected expression also requires an assessment of whether a vague, fact-sensitive constitutional test really is designed to distinguish constitutionally valued expression from other expression, or whether instead it is deliberately drawn wide of the ambit of the constitutionally valued expression. If the latter, then the fact that expression chilled by the test is deterred is of no concern unless the expression chilled is also constitutionally valued.[34]

Redish, *supra* note 1, at 1065-66.

33. A focus on chilling effect rather than "overbreadth" might have aided the justices' analysis in the recent case of Regan v. Time, Inc. 104 S. Ct. 3262 (1984). The issue there was whether sections of the federal anti-counterfeiting laws that prohibit the photographing or the making of other likenesses of money were void for first amendment overbreadth. Specifically at issue were sections that permitted the printing or publishing of such otherwise proscribed illustrations for certain worthy purposes, subject to restrictions regarding color and size. Although the justices argued at length over whether limiting the permissive exceptions to publications and to specific purposes rendered the law unconstitutionally overbroad, no one seemed to notice that eliminating the contested limitations entirely, thus leaving fewer illustrations of money proscribed, and thus completely eliminating the overbreadth, would still leave the magazine subject to the statute for failure to comply with the color and size restrictions.

34. *See supra* authorities cited in note 23.