THREADING THE NEEDLE FOR A WORTHY CAUSE: ENFORCING THE CONSTITUTIONAL RIGHT TO PRIVACY THROUGH PRIOR RESTRAINT OF PRIVATE IMAGES

ARTICLE

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INTRODUCTION

IT IS NO REVELATION THAT ONCE SOMETHING HAS BEEN PUBLISHED ON THE WEB, no one has control over its dissemination. The Internet and smartphone revolutions have provided an unprecedented capacity to capture and share images,[1] essentially without limitation.[2] An initial publication on social media can go viral in just hours.[3] The first observers and redistributors of the publication will be those related to the publisher.[4] After that, the link to the publication

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1 When the word *image* is mentioned in this article, it refers to both standard picture and video.

2 Todd Leopold, *In Today's Warp-Speed World, Online Missteps Spread Faster than Ever*, CNN (March 6, 2012), https://edition.cnn.com/2012/03/06/tech/social-media/misinformation-social-media/index.html ("There always been a desire to gather and disseminate news . . . but never until now has it been global and instantaneous.")

3 Feng Wang *et al.*, *Characterizing Information Diffusion in Online Social Networks with Linear Diffusive Model*, 2013 IEEE 33RD INTERNATIONAL CONFERENCE ON DISTRIBUTED COMPUTING SYSTEMS 309 (2013), http://www.public.asu.edu/~hwang49/publications/OSN2013.pdf.

4 *Id.*

might be spotted by armies of software robots called *spiders*[5] or *web crawlers*[6] that prowl through the Internet copying a different URL every few seconds.[7] Then "crawler indexes the web pages for use by the search engines"[8] like Google. If the publication becomes popular, search engines make additional copies, "local repository [...] replicas [...] generally referred to as a cache," to speed up the process of displaying the publication to a web user.[9] Cache copies will survive even after the original publication is removed; sometimes for months or even years.[10] For example, Internet archivists —like the Wayback Machine— scan and make copies of websites for posterity's sake.[11]

In sum, the Internet is a decentralized and inexhaustible copy-making machine. Private and public reproduction is unlimited and —for most purposes— untraceable and unstoppable. Worldwide distribution can be achieved in seconds and perpetually. These features, when applied mischievously to the publication of private images, result in a perverse transformation of Warhol's aphorism,[12] where anyone in the present can become infamous for life due to a fifteen-minute video.

The main purpose of this article is to provide a means to avoid the unnecessary shaming of persons due to the publication of private images, taken with or without their consent, while they were protected under a reasonable expectation of privacy. Here we are interested, not in the content of the images, but on the facts and the context surrounding the creation of the image to determine whether a reasonable expectation of privacy is legally sustained.

Due to the increasing discussions regarding *revenge porn*, it may seem that *private images* only refer to those portraying nudity or sexual conduct, but we do not intend to use such a narrow interpretation of privacy. Privacy refers to that which excludes others, and belongs to the individual, or a particular group or

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5 *Spider*, MCGRAW-HILL DICTIONARY OF SCIENTIFIC & TECHNICAL TERMS, 6E. (2003), http://encyclopedia2.thefreedictionary.com/spider (last visited June 16, 2018).

6 *Web Crawler*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/web%20crawler (last visited June 16, 2018).

7 Younès Hafri & Chabane Djeraba, *High performance crawling system*, ASSOCIATION FOR COMPUTING MACHINERY 299 (2004), http://delivery.acm.org/10.1145/1030000/1026760/p299-hafri.pdf?ip=136.145.239.186&id=1026760&acc=ACTIVE%20SERVICE&key=A22B68ED33E964A4%2E32E215ABB380A551%2E4D4702B0C3E38B35%2E4D4702B0C3E38B35&__acm__=1529188337_73014969eeaa5446bfe6fc4bcaaa1ae0.

8 *System, method and service for ranking search results using a modular scoring system*, GOOGLE PATENTS, https://patents.google.com/patent/US7257577B2/ (last visited June 16, 2018).

9 *High performance object cache*, GOOGLE PATENTS, https://patents.google.com/patent/US6128623A/ (last visited June 16, 2018).

10 *Gathering enriched web server activity data of cached web content*, GOOGLE PATENTS, https://patents.google.com/patent/US7216149B1/ (June 16, 2018).

11 *About the Internet Archive,* INTERNET ARCHIVE, https://archive.org/about/ (last visited June 16, 2018).

12 Phoebe Hoban, *Has It Been 15 Minutes Yet?*, THE N.Y. TIMES (Sept. 16, 2001) (" [Warhol] coined perhaps the century's most misquoted quotation – 'In the future everybody will be world-famous for 15 minutes.' ").

class.[13] It can also be associated with the intimate or what belongs to one's deepest nature.[14] One can think of different contents, not related to sexuality and nudity, that an individual might wish to keep private. An individual might want to analyze his or her own public speaking or acting techniques by self-taping a practice and reviewing the tape;[15] someone else might use the camera as a personal therapist;[16] a terminal patient might want to leave a private video to his relatives to be disclosed only after his death. These are just a few examples of how non-sexual private images can play an important role in an individual's life.

Of course, nudity and sexuality can also be part of an individual's privacy concerns. In many cases, although it need not be the case, nudity and sexual images can bring the most damage to an individual's dignity or self-perception. We will not devote any significant time in this article to the discussion of how such revelations deeply affect many victims. More than can be said here has been said elsewhere.[17] We are more concerned with how a societal balance can be achieved where we minimize the personal loss without compromising significant societal interests, like the right of free speech and of the press.

In essence, the goal is not to create a society where private images cannot be published; instead, the goal is to create one where private images of private figures cannot be published without their consent. It remains the individual's right, at least as it pertains to a private figure,[18] to decide whether to share or to not share private images. It is an issue of balancing personal freedom with societal needs.

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13 Merriam-Webster defines *Privacy* as "the quality or state of being apart from company or observation; freedom from unauthorized intrusion." *Privacy,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/privacy (last visited June 16, 2018). On the other hand, *Private* is defined as "intended for or restricted to the use of a particular person, group, or class; . . . restricted to the individual or arising independently of others; . . . withdrawn from company or observation; not known or intended to be known publicly." *Private*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/private (last visited June 16, 2018).

14 Merriam-Webster defines "Intimate" as "belonging to or characterizing one's deepest nature; . . . of a very personal of private nature." *Intimate,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/intimate (last visited June 16, 2018).

15 *See for example*, Dennis W. Moore et al.*, Self-recording with Goal Setting: A self-management programme for the classroom*, 21 EDUCATIONAL PSYCHOLOGY 255 (2011).

16 Ray Woodcock, *Self-Therapy with a Voice Recorder*, SOCIAL WORK INTERVENTIONS (June 28, 2014), https://swinterventions.wordpress.com/2014/06/28/dvr/.

17 Kate Conger, *For Survivors of Domestic Violence, Revenge Porn is the Awful New Norm*, GIZMODO (February 6, 2018), https://gizmodo.com/for-survivors-of-domestic-violence-revenge-porn-is-the-1822573385. *See also*, the Puerto Rico Criminal Code articles 167-176, related to the violation of the Right to Privacy. CÓD. PEN. PR art. 167-176, 33 LPRA §§5233-5242 (2010 & Supl. 2017). See also tort case law regarding disclosure of private matters: Melvin v. Reid, 112 Cal. App. 285 (Cal. Ct. App. 1931); Daily Times Democrat v. Graham, 162 So.2d 474 (Ala. 1964).

18 In *New York Times v. Sullivan*, the federal Supreme Court ruled that, different to a private individual, a public official cannot recover damages in a defamation case for alleged acts related to his public office unless the publisher is shown to have acted with real malice or reckless disregard in the publication of the false information. New York Times v. Sullivan, 376 U.S. 254 (1964). In *AP v. Walker*, the Sullivan standard was extended to "public figures;" that is persons who are not public officials but that are intimately related to the resolution of public issues, or that, due to their fame, are able to

The remedy proposed is legislation addressing the prior restraint of private images depicting private figures, in the form of a judicial order (injunction).[19] Some might argue such remedy currently exists in the present state of the law,[20] and they might be right. But the following discussion hopes to demonstrate the monumental task that is presented to courts when attempting to balance, without legislative guidance, the right to privacy against the right of free speech and of the press. We do not dare calculate the amount of these types of injunctions that have survived scrutiny, but we can risk arguing that —if we were talking in baseball terms— courts would not make the majors with the current batting average.[21]

The evident short comings of current remedies, mostly due to the pervasiveness of the publication of private images of private figures against their will, shall be addressed briefly below.[22] The proposed remedy is not perfect and will not prevent publication in cases where the victim is unaware of the existence of the private image or when a defendant would rather face the consequences of violating the injunction order rather than follow it. Additional problems could arise when a defendant opts to disclose the private image through a third party or in anonymity.[23] These are important issues, but we believe a significant amount of defendants —already subject to the Court's watchful eye as they partake in the injunction process— will think twice about publishing private images of private parties.

I. HISTORY OF THE RIGHT TO PRIVACY

Some legal sources trace the emergence of the right to privacy to 1888, when the Honorable Thomas Cooley characterized it as the right "to be let alone."[24] This

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influence the development of events of interest to society in general. *Associated Press v. Walker*, 389 U.S. 28 (1967).

19 Hereinafter, we will use the term *injunction* in the most general sense, defining it as "[a] court order commanding or preventing an action." *Injunction*, BLACK'S LAW DICTIONARY 904 (Bryan A. Garner, ed., 10th ed. 2014). We understand that *ex parte* temporary restraining orders, preliminary injunctions and permanent injunctions have all very different procedural requirements and consequences. We will partially address the procedural aspects of the order for prior restraint without necessarily categorizing it under any of the previous legal terms. For a comprehensive discussion on the differences and consequences of these figures, see Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

20 Because the rules dealing with injunctions (for example, Rule 65 of the Rules of Federal procedure and analogous Rule 57 of the Puerto Rico Rules of Civil Procedure) are procedural and not substantive, they do not specify nor limit the types of cases in which an injunction can be sought.

21 Refer to section VII of this article, which discusses limiting the courts' discretion and cites several cases where injunctions have been held to be overbroad.

22 *See generally* Conger, *supra* note 17.

23 John Villasenor, *What You Need to Know about the Third Party Doctrine*, THE ATLANTIC (Dec. 30, 2013), https://www.theatlantic.com/technology/archive/2013/12/what-you-need-to-know-about-the-third-party-doctrine/282721/.

24 THOMAS C. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2nd ed. 1888).

right to be let alone was further elaborated in the seminal article *The Right to Privacy* by Samuel D. Warren and Louis D. Brandeis.[25] Forty years after publishing the article, Justice Brandeis, in the dissenting opinion of *Olmstead v. United States*, traced this right to privacy to the Fourth Amendment of the Federal Constitution.[26] It then took thirty-seven years for the Supreme Court to make Brandeis' dissent the law in *Griswold v. Connecticut* where the Court declared the right to privacy and held that a law which banned the use of contraceptives by married couples was unconstitutional.[27]

Currently, the right to privacy has been identified in different but related scenarios: "the right over one's personal information; autonomy; physical space; and property."[28] These categories frequently overlap, making the development of a strict doctrinal framework almost impossible. The problem is compounded by the generally accepted notion that the right to privacy under the federal Constitution only exists against the Government.[29]

Congress has elected not to draft a special law interpreting limits of the right to privacy. However, Congress and the courts have protected the right to privacy through specific legislation or common law causes of action including: (1) the *Video Voyeurism Prevention Act*,[30] which makes it a crime to intentionally "capture an image of a private area of an individual without their consent," when the capturing party "knowingly does so under circumstances in which the individual has a reasonable expectation of privacy" (criminal law); (2) intentional infliction of emotional distress through revelation of private facts, representation of facts under false light, publicity given to private facts, and intrusion upon seclusion[31] (tort law);[32] (3) *Privacy Act*,[33] prohibiting disclosure of information held by a govern-

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25 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

26 Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

27 Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring). The Court had already previously affirmed the unwritten rights to teach one's child a foreign language, to send one's children to private schools, to procreate, to resist certain invasions of the body, and to travel abroad. *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964) (regarding the right to travel); Rochin v. California, 342 U.S. 165 (1952) (regarding the resistance of certain invasions of the body); Skinner v. Oklahoma, 316 U.S. 535 (1942) (regarding right to procreate); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (sending a child to private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (teaching a child a foreign language).

28 Maayan Y. Vodovis, *Look Over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet,* 40 HOFSTRA L. REV. 811, 814 (2012) (citation omitted).

29 Anderson v. Suiters, 499 F.3d 1228, 1232 (10th Cir. 2007) ("To survive as a claim arising under the federal constitution . . . [a] right to privacy claim must allege that the media defendants were state actors.").

30 18 U.S.C. § 1801 (2012).

31 Video Voyeurism Prevention Act, 18 U.S.C. §1801 (2012).

32 Restatement (Second) of Torts §§ 652A–652I (1977).

33 5 U.S.C. § 552(a) (2012 & Supp. III 2015).

mental agency, unless it is requested by the individual to whom the records pertain (administrative law); (4) *Right to Financial Privacy Act*,[34] prohibiting disclosure of financial information by financial institutions to government (consumer law); *Defend Trade Secrets Act*,[35] prohibiting disclosure of another's trade secrets under certain conditions; (5) *Copyright Act*,[36] prohibiting the publication of an unpublished work without the authors consent (intellectual property), and (6) *Health Insurance Portability and Accountability Act*,[37] prohibiting disclosure of health information except in limited circumstances (health law), among several others.

II. PRIVACY RIGHT V. THE FIRST AMENDMENT

What happens when the constitutional right to privacy collides with another constitutional right related to information, particularly the First Amendment right to free speech? Where the Supreme Court has found conflict between the right to privacy and another information-related right, like the right to free speech or free press, disclosure of the information has won over privacy.[38] Some reasons that make the First Amendment a formidable foe for the privacy right is that it has a much older and well-known lineage in legal history.

The rights of free speech and press have been fought for since the European nobility fought with the king's arbitrary and totalitarian control.[39] They became even more important with the rise of the printing press in the fifteenth century, which allowed easier dissemination of information through written publication.[40] Also, these rights were expressly recognized in the Bill of Rights.[41] These historic and cultural events have created a realm of invincibility of the First Amendment.

On the other hand, the "right to privacy" is a relatively new concept, triggered by the rise of media mediums like photography and film, and more recently telecommunications and computer processing. This is evident in the fact that the "right of privacy" is not expressly recognized in the Constitution or Bill of Rights, rather it is coded in its penumbras.[42]

III. PRIOR RESTRAINTS AND THE RIGHT TO PRIVACY

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34 12 U.S.C. § 3403 (2012).

35 18 U.S.C. § 1832 (2012).

36 17 U.S.C. § 101 (2012).

37 42 U.S.C. § 201 (2012).

38 Bartnicki v. Vopper, 532 U.S. 514, 534, (2001) ("In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance.")

39 William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982).

40 *Id*. at 247.

41 *See generally*, New York Times Co. v. United States, 403 U.S. 713 (1971).

42 Griswold v. Connecticut, 381 U.S. 479, 484 (1964).

In the era of the Internet, where reproduction and distribution of images are inexpensive (or even free), the most efficient enforcement of the privacy right is, in most cases, an *ex ante* prohibition on the publication of the private information. However, the Supreme Court has adamantly stated that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[43] Rotunda and Nowak state that prior constraint is "[a]ny governmental order that restricts or prohibits speech prior to its publication".[44]

Generally, two types of prior restraints are recognized: pre-publishing licensing programs and court orders.[45] The term "pre-publishing" refers to administrative schemes where the law requires the Government or government actor to approve (grant a license) before a publication can occur. This type of prior restraint is, in our view, the worst type, and has influenced deeply the Supreme Court decisions on prior restraint.[46] On the other hand, court orders can include: temporary restraining orders or injunctions and judicial protective or *gag* orders.

Some people have argued that criminal laws enacted to punish certain kinds of speech result in self-prior restraint and, therefore, cannot be ignored in this discussion.[47] However, for the reasons explained further on in this article, we focus solely on the use of injunction as a form of prior restraint of private images.

IV. The Federal Experience with Injunctions and Other Forms of Prior Restraint

In one of the earliest cases of prior restraint through injunction, the Supreme Court declared unconstitutional a Minnesota law that allowed a court to stop publication of a newspaper if the judge found the material to be "obscene, lewd, and lascivious" or "malicious, scandalous, and defamatory".[48] The Court held that the statute infringed upon the freedom of the press guaranteed by the Fourteenth Amendment.[49] The Court's decision forcefully stated that "[t]he fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."[50] But even then, the Court expressly mentioned some recognized exceptions where prior restraint might be allowed:

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43 Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976).

44 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.16(h) (5th ed. 2013).

45 Redish, *supra* note 19, at 57 (1984).

46 *See generally*, Mayton, *supra* note 39, at 250-51.

47 *Id.* at 263.

48 Near v. Minnesota, 283 U.S. 697, 727-28 (1931).

49 *Id.* at 723. Arguably, this case was not in strict terms a prior restraint case since the publications had occurred. However, the effect of the order was to perpetually enjoin defendants from publishing the type of material they were publishing. *See Id.* at 735 (Butler, J., dissenting).

50 *Id.* at 718.

(1) extreme situations of national security in time of war, for example, prohibiting the publication of the transportation or number and location of troops; (2) obscene publications; (3) incitements to acts of violence and the overthrow of government; and (4) the prohibition against fighting words.[51]

However, it is important to note the context of the *Near* decision, in which the Court was striking down a law that interfered with the right of the press to publish information regarding public officials. In this context, the Supreme Court has built an almost impenetrable fortress for prior restraint.[52] But the Court has also clearly pointed out that the holding in *Near* does not stand for the proposition that all injunctions that serve to achieve prior restraint are impermissible.[53]

The Supreme Court has recognized the validity of prior restraint in situations where the individual, attempting to publish information it obtained from the Government, lacks a constitutional right of access to said information.[54] Likewise, in *Seattle Times Co. v. Rhinehart*, the Supreme Court held as constitutional an order from a court prohibiting a newspaper from publishing information obtained by the newspaper from an individual through pre-trial discovery in a case where the individual sued the newspaper for defamation.[55]

The Supreme Court has also recognized the prior restraint of obscene material. In *Miller v. California*, the Court established a three-part test to determine legal obscenity. The first part assesses "whether the average person —applying contemporary community standards— would find that the work, taken as a whole, appeals to the prurient interest."[56] Subsequently, the second part evaluates "whether the work depicts or describes, in a patently offensive way, sexual conduct specially defined by the applicable state law;" whereas the third part determines "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[57] The opinion expressed —via *dictum*— that, under this test, "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law."[58] Later cases have held that nudity alone does not make a film obscene.[59]

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51 *Id.* at 716.

52 New York Times Co. v. United States, 403 U.S. 713, 715 (1971) (Black, J., concurring) (noting that "continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment").

53 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

54 ROTUNDA & NOWAK, *supra* note 44, § 20.16(i).

55 *Id.*; Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984).

56 Miller v. California, 413 U.S. 15, 24 (1973).

57 *Id.*

58 *Id.* at 27.

59 Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene under the *Miller* standards"); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811 (2000).

The *Miller* case, however, did not involve prior restraint, since *Miller* was being accused under a state criminal statute for conduct previously committed, which was mailing unsolicited sexually explicit materials. But understanding what may constitute obscenity might be relevant when determining how private images are protected today through prior restraint. Of course, as explained in the introduction, not all private images need to be of a sexual nature. However, under the *Miller* test, it is likely that a private video depicting sexual "ordinary acts" (whatever that may be) will not be considered obscene.

Likewise, in *Kingsley Books v. Brown*, the Supreme Court validated a New York statute authorizing action for injunction against the sale and distribution of written or printed matter of an indecent character, when the seller or distributor had a right to trial of issues within one day after joinder of issues and the decision was handed down within two days of conclusion of trial.[60]

In *New York v. Ferber*, the Court further upheld a statute "[that] made it a crime for a person [to] knowingly . . . promote sexual performances by children under the age of 16 by distributing material which depicts such performances, even [if] the materials themselves were not necessarily 'obscene' in the constitutional sense."[61] The most interesting part of the case is the rationale, which declares that the State has a compelling interest in protecting the physical and psychological well-being of minors. Also, the prohibition enacted, was closely related with this means in two ways: first, "the permanent record of the child's behavior and its circulation exacerbates the harm to the minor"; second, the distribution of the content "encourages the sexual exploitation of the children and the exploitation of the material."[62] Finally, the value in allowing such conduct was *de minimis*. The *Ferber* court argued that the same expression could be achieved by using older models, but who looked younger. The Court cautioned that the works proscribed in the *Ferber* case were limited to those that visually *depict* minors. As in *Miller*, *Ferber* is not a case of prior restraint, but it highlights the meets and bounds of protected expression and importance of weighing other societal values when confronted with the First Amendment.

Another way to indirectly control speech is by regulation that is neutral to the type of speech, but instead controls the time, place, and manner in which the speech takes place in a public forum. For example, in a case regulating time, place and manner of speech, the Supreme Court upheld regulation directed at limiting the presence of essential personnel for a meet and confer in collective bargaining

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60 Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). *See also* Freedman v. State of Maryland, 380 U.S. 51, 59-60 (1965) (deciding, subsequently, that a local censorship board could legally revoke a book or motion-picture distributor's license for the sale or display of obscene materials when the accused party was granted a prompt hearing. The board likewise carries the burden to show the material is obscene. The board must also defer to court's decision regarding imposition of restraint and must refrain from the either finding obscenity without judicial determination or shall, alternatively, seek on its own behalf affirmation of its initial finding). *See also* ROTUNDA & NOWAK, *supra* note 44, § 20.61(c)(i); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968).

61 ROTUNDA & NOWAK, *supra* note 44, § 20.61(b)(ii) (footnote omitted) (*citing* New York v. Ferber, 458 U.S. 747 (1982)).

62 *Id*.

negotiations.[63] As the law excludes non-essential personnel, it allows prior restraint of their speech.

Another example of this type of regulation occurred in *Madsen v. Women's Health Centre, Inc.*, wherein the Supreme Court upheld the validity of an injunction that created a buffer zone between protestors on the side-walks and streets and the entrance to an abortion clinic.[64] The Court reasoned that the injunction did not burden the speech more than it was necessary, and that it was content-neutral.[65] It is illustrative that the Court considered as content-neutral an injunction that was directed—as all injunctions are—at specific parties exhibiting (or threatening to exhibit) the enjoined conduct. In fact, we agree with this reasoning since this part of the injunction did not regulate the content of the parties' expressions but rather the time, place, and manner.[66] The Court stressed this by arguing that the facts in this case showed that only anti-abortion protestors were manifesting in front of the clinic, thus the injunction was limited only to them.[67] In that regard, we understand that if pro-abortion demonstrators would have shown up, an identical injunction could be summoned against them.[68]

Finally, the Supreme Court has allowed restrictions in terms of time, place, and manner, based on the content of the speech in order to protect and preserve other rights. For example, the Supreme Court has used the right to vote as sufficient justification to prohibit the solicitation of votes and the display or distribution of campaign materials within a 100-feet buffer zone of entrances to polling booths.[69]

Some general insights can be gained from a varied array of cases which have been discussed so far and others not yet discussed.[70] First, as we have explained before, if the expression being regulated is related to government activity or of government officials, the First Amendment prohibition on prior restraint is almost

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63 Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984).

64 Madsen v. Women's Health Center, Inc., 512 U.S. 753, 770 (1994).

65 *Id.* at 763-64.

66 *Id.* at 775 (invalidating several other sections of the injunction).

67 *Id.* at 774 ("[b]ut it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic").

68 *See* Thomas v. Chicago Park Dist., 534 U.S. 316, 322 (2002) (wherein the Supreme Court has stated that it has never required a "content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*").

69 Burson v. Freeman, 504 U.S. 191 (1992) (in this case, some parts of the injunction were also upheld, and others invalidated).

70 For an example of prior restraint not yet discussed in this article, *see, e.g.*, Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 192 F.Supp.2d 321, 346 (D.N.J. 2002) (deciding that preliminary injunction prohibiting video clip compiler from compiling and posting clips of copyrighted videos was proper because the injunction prevented the use of the particular expression, and not of the ideas themselves). Other areas of potential interest regarding prior restraint, which are beyond the scope of this article, but may nonetheless may shed some light onto areas where some type of prior restraint is considered valid include regulation of campaign finance and political activity of government employees.

absolute. Second, when it comes to prior restraint, time is of the essence. Procedures that involve prior restraint are more likely to be valid where a quick disposition of the matter is guaranteed because it provides the Defendant with an opportunity to be heard and present evidence in his favor. Third, the disposition needs to be made by a court of law, not by administrative or legislative action. Fourth, the form of the expression matters. For example, books are more difficult to restrain prior to publication than movies. Fifth, the restraint must be related to a compelling state interest. Sixth, the restraint must be narrowly tailored to achieve this compelling state interest. Seventh, in the balancing of the compelling state interest *versus* the restraint of speech, the substance of the speech may be examined to determine if it is *de minimis*. Eighth, the origin of the information matters. In other words, if the creator of the information is the person being restrained, he or she has a more powerful argument for its use than if the origin is a third party. As discussed above, this is particularly true when the information is not newsworthy. Ninth, reasonable time, place, and manner restrictions on speech are permitted. Tenth, as long as the regulation of speech is content neutral, it is more likely to require less procedural safeguards and thus survive constitutional scrutiny.

Nonetheless, some issues we have not expressly addressed might concern readers. Most of the cases discussed in this section deal with the First Amendment, and not much with the right to privacy. One issue when reviewing conflicts between these two rights in the federal jurisdiction is that all right to privacy cases under the Federal Constitution, by definition, deal with public disputes wherein at least one party is a government actor. This is the case because the federal privacy right is not enforceable against private parties.[71] This fact almost ensures that cases which reach the Supreme Court will deal with state actors, which prevents prior restraint.

The absence of confrontations between private parties also makes it less important to differentiate between the right of free speech and that of a free press. Although there is no legal difference between the scope of the rights of free speech and the right to free press, technical distinctions do apply. For example, the right a party may have to reproduce images of a public official is, by definition, not an exercise of his own right to express his own opinion (free speech) but is more related to the right to a free press. These differences, in the context of how the federal government achieves prior restraint, is not very important because, as we said before, most issues that have the Government as an actor will involve some type of public or newsworthy issue which will prevent prior restraint altogether.

However, as will be discussed below, private-against-private matters arise in other constitutional contexts, creating a more leveled playing field where prior restraint can have a more significant role in the balancing of these two rights.

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71 Anderson v. Suiters, 499 F.3d 1228, 1232 (10th Cir. 2007).

V. THE EXPANSION OF THE RIGHT TO PRIVACY IN STATE CONSTITUTIONS

The Constitution of the State of California and that of the Commonwealth of Puerto Rico both recognize the right to privacy as a self-executing right enforceable against government and private parties.[72] In California, the right to privacy was developed by constitutional case law, albeit briefly, in 1931.[73] The constitutional case law was abandoned later on, nevertheless, it resurrected through constitutional amendment in 1974.[74] In contrast, the Commonwealth of Puerto Rico's Constitution came to life in 1952. The drafters, aware of the development of the right to privacy in the federal case law, expressly included this right in the Commonwealth's Constitution.[75]

The Supreme Court of California has used the state constitutional privacy clause in private matters to strike down state laws restricting abortion funding, to limit discovery in civil litigation of confidential financial information, and to limit discovery of the sexual history and practices of the plaintiff in sexual harassment suits, among other things.[76] Whereas in Puerto Rico, the Supreme Court has relied on the privacy clause in private matters to require physical restrictions to protect third parties from loud religious expression,[77] prohibit the exhibition of an image of a dead husband and father as part of a political campaign,[78] and to enjoin the use of polygraph in the workplace for a woodworker.[79]

"In many of these rulings, the Supreme Court of California [and its equivalent in Puerto Rico] ha[ve] indicated that the scope of the protection granted by the state constitution's explicitly enumerated privacy right is sometimes greater than the scope of the United States Constitution's enumerated right of privacy."[80] The Court of California has also said that "[a]s proponents of the amendment [in California] explained, the ability to 'control circulation of personal information' is 'essential to social relationships and personal freedom.'"[81] Similarly, in Puerto Rico,

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72 P.R. CONST. art. II, § 8; CAL. CONST. art. I, § 1. *See also* López Tristani v. Maldonado, 168 P.R. Dec. 838, 849–50 (2006); Hill v. National Collegiate Athletic Ass'n., 865 P.2d 633, 641 (Cal. 1994); Porten v. Univ. of San Francisco, 134 Cal. Rptr. 839, 842 (Cal. Ct. App. 1976); III IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 26.07[2] (2nd ed. 2016).

73 Melvin v. Reid, 297 P. 91, 93 (Cal. Ct. App. 1931). For a more in-depth discussion of this topic, see J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 328–29 (1992).

74 Kelso, *supra* note 73, at 330 n.15.

75 3 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE 1939-41 (1952); CONVENCIÓN CONSTITUYENTE DE PUERTO RICO, INFORME DE LA COMISIÓN DE CARTA DE DERECHOS 3185 (1951).

76 Kelso, *supra* note 73.

77 Sucesión Victoria v. Iglesia Pentecostal, 102 P.R. Dec. 20, 29 (1974).

78 Colón v. Romero Barceló, 112 P.R. Dec. 573 (1982).

79 Arroyo v. Rattan Specialties, Inc., 117 P.R. Dec. 35 (1986).

80 Kelso, *supra* note 73, at 329 (*citing* Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 784 (Cal. 1981)); *see also*, Rullan v. Fas Alzamora, 166 P.R. Dec. 742, 771 (2006).

81 Doe v. Beard, 63 F. Supp.3d 1159, 1168 (C.D. Cal. 2014).

the Supreme Court has asserted that the privacy right is an essential part of individual dignity.[82] Both Courts have also recognized that injunctions are a valid procedural tool for the vindication of the right to privacy.[83]

However, even though the states may grant more rights to its citizens than the Federal Constitution, those broader state rights cannot abridge the federal constitutional rights of freedom of speech and of press which are binding on the states through the Fourteenth Amendment.[84] Therefore, state courts cannot override federal case law regarding First Amendment rights in benefit of the state constitutional privacy right.

VI. WHY INJUNCTIONS?

Most of the time, injunctions are dangerous because they can impose censorship without legislative and public debate.[85] However, this is not the case when the authority for the injunction is based on a narrowly tailored restriction created by legislation which sets out the limits and factors to be taken into consideration when issuing the injunction. Under these circumstances, injunctions are better suited than legislative or administrative censors because they can be narrowly tailored to provide a specific relief.[86]

Most modern prior restraint cases regarding obscene speech and materials have come in the form of injunctions.[87] Injunctions tend to have a strong dissuasive effect because "[c]ourts treat violations of prior restraint orders more serious[ly] than deliberate refusals to [follow a statute]."[88] For example, a statute that prohibits free speech can be attacked by the offender, and, if it is declared unconstitutional, no penalty can be attached to the offender.[89] On the other hand, the law on injunction estops an offender of the injunction from attacking the legality of the injunction order.[90] However, in our view, it is doubtful that an ordinary offender of the law knows or makes these defense calculations before publishing allegedly prohibited speech.

The main effect of the injunction is that the potential offender is confronted with governmental institutional authority and all of its intimidation influence before he risks the deed. It is this *ex ante* confrontation with the power of government through its court system, which warns a potential offender of the possible

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82 López Tristani v. Maldonado, 168 P.R. Dec. 838, 849–50 (2006).

83 *Id.* at 850; *see also* Evans v. Evans, 76 Ca. Rptr.3d 859, 869-70 (Cal. Ct. App. 2008).

84 De Jonge v. State of Oregon, 299 U.S. 353, 360 (1937).

85 *See* ROTUNDA & NOWAK, *supra* nota 44, § 20.47(f)(iii).

86 *Id.*

87 *Id.* §20.16(b).

88 *Id.* §20.16(e).

89 *Id.; see also* Howard O. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 286-87 (1982).

90 ROTUNDA & NOWAK, *supra* nota 44, § 20.16(e); *see generally*, Walker v. Birmingham, 388 U.S. 307 (1967).

consequences of ilicit conduct. It is still true that a certain defendant may prefer to pay the price for violating the injunction than follow it. But, as we foreshadowed above, we believe a significant number of defendants will not take those risks in the interest of avoiding potential punishment for criminal contempt.[91]

Criminal law offers a similar coercive effect, because violation of a criminal statute may result in a punishment including prison time.[92] But the legal presumption that everyone knows the law is far from the truth. It seems to us that people are more likely to obey a court order directed against them than sections of the criminal code which they most likely ignore, and which they may or may not know whether the proscribed offense fits the conduct of their deed.

Privacy torts are another form of coercion. The remedy provided to a plaintiff by tort statutes or causes of action are economic, in the form of damages.[93] As stated above, violation of a criminal statute or of an injunction may subject the violator to punishment of imprisonment. In contrast, torts will only present a threat of economic punishment, in the form of the damages that would have to be paid to the plaintiff if the complaint succeeds. Therefore, to the extent an individual values more his/her personal freedom, than his/her money, he/she will be less deterred by torts than by criminal law or an injunction. This is particularly true when the defendant has little or no economic resources with which to pay a monetary judgement in a tort action.

We clarify that we therefore propose injunctions as an added remedy to the previous ones, not as a replacement. The importance of the injunction remedy in the context of private images is that it adds another level of protection for the potential victim, by coercively notifying a defendant about the consequences of dissemination of the private images.

Also, the injunction can have the function of mitigating any publication by including orders based on copyright claims (if applicable) which demand the takedown of the private images.[94] It also has the dissuasive effect of generating a legal record that establishes that the defendant is not authorized to publish the images. This legal record can then be used to put third parties on notice of their potential liability if they publish or fail to take down the specific images addressed in the order.[95] Further, if the defendant published the images before the injunction

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91 Criminal contempt is defined as "[a]n act that obstructs justice or attacks the integrity of the court. A criminal-contempt proceeding is punitive in nature. The purpose of criminal-contempt proceedings is to punish repeated or aggravated failure to comply with a court order." *Contempt*, BLACK'S LAW DICTIONARY (10th ed. 2014).

92 See CÓD. PEN. PR art. 167-176, 33 LPRA §§5233-5242 (2010 & Supl. 2017).

93 A tort is defined as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages." *Torts*, BLACK'S LAW DICTIONARY (10th ed. 2014).

94 17 U.S.C. § 512 (2012).

95 This issue is complex and requires further consideration that is outside of the scope of this article; but, for example, the order can be submitted with a Digital Millennium Copyright Act (D.M.C.A.) takedown notice based on copyrights, to prevent a counter takedown response from the publishing party. It may also be used more informally to simply warn a third party, which could be a social media user that shared the content, a website webmaster or another, that the publisher does not have the right to publish the images and that liability for them may arise if they ignore the notice. Of course,

hearing or has violated the injunction, the Court can hand down an order to the defendant to takedown the published content, reducing the amount of time the images are available online and therefore their possible reproduction. Therefore, the speedy process of an injunction accelerates the potential mitigating remedies a victim can obtain, which can be granted when appropriate, once the court has obtained jurisdiction.

Permanent injunctions thus have four essential requirements. Generally, a plaintiff must show:

> [That] (1) [they] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[96]

These requirements ensure that prior restraint through injunction might not be granted lightly.

VII. DELIMITING THE COURT'S DISCRETION IN PROTECTION OF THE FIRST AMENDMENT

Similar to the Supreme Court of the United States, California courts have held that the constitutional rights to freedom of speech and of the press trump the constitutional right to privacy when public issues are involved.[97] However, the California courts have expressly recognized that courts have the power to enjoin speech and conduct, for example, specifically prohibiting persons from disclosing specified private information under narrowly drawn circumstances.[98] The necessary balancing test which determines whether to enjoin speech takes into account whether:

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third parties in foreign jurisdictions may have little incentive to pay attention to such notifications since their liability is probably unknown and the possibility of enforcing any process against them is most likely null. Google, among others internet service providers, has recently implemented a takedown policy for the publication of private images. *See Remove unwanted and explicit, personal images from Google*, GOOGLE, https://support.google.com/websearch/answer/6302812?hl=en (last visited June 16, 2018).

96 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

97 *See* Ass'n for Los Angeles Deputy Sheriffs v. Los Angeles Times Commc'ns LLC, 191 Cal. Rptr.3d 564 (Cal. Ct. App. 2015). In this case, the California Court of Appeals confirmed the trial court's denial of injunction requested by the union representing county sheriffs against the Los Angeles Times newspaper to enjoin publication of news article derived from information in deputy sheriffs' confidential background investigation files. The trial court denied first an *ex parte* temporary restraining order, and then the injunction based on plaintiff's failure to put forth admissible evidence of "confidential documents" obtained by the Los Angeles Times, and reasoning that, the injunction would be a prior restraint on speech.

98 *See* Wilson v. Superior Court, 532 P.2d 116, 122 (Cal. 1975) (internal citations omitted); Evans v. Evans, 76 Ca. Rptr.3d 859, 869-70 (Cal. Ct. App. 2008).

> [T]he person is a public or private figure, the scope of the prior restraint, the nature of the private information, whether the information is of legitimate public concern, the extent of the potential harm if the information is disclosed, and the strength of the private and governmental interest in preventing publication of the information. [99]

The task for courts is certainly complex, and guidance and limitations of discretion is required. One way to curtail discretion is by regulating the type of medium in which the expression is made instead of the substance of the expression.

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99 Evans v. Evans, 76 Cal. Rptr.3d 859, 869 (Cal. Ct. App. 2008) (where the plaintiff, an officer of the law, attempted to prevent publication of private identifiable information by his ex-spouse). In *Ass'n for Los Angeles Deputy Sheriffs*, the California Appeals Court discussed the test for a claim for invasion of privacy which violates article I, section 1 of the California Constitution requires the following:

> (1) [T]he claimant must possess a legally protected privacy interest; (2) the claimant's expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. If the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests.

Ass'n for Los Angeles Deputy Sheriffs, 191 cal. Rptr.3d, at 574.

In *Gilbert v. Nat'l Enquirer, Inc.*, the California Court of Appeals reversed an injunction granted to prevent dissemination of allegedly private information of a famous actress, Melissa Gilbert, in the possession of her former husband. Gilbert v. Nat'l Enquirer, Inc., 51 Cal.Rptr.2d 91 (Cal. App. 2d Dist. 1996). The Court stated that Gilbert's publicist's efforts to capture media attention using articles revealing Gilbert's personal relationships, marriage, divorce and remarriage heightened the public interest in the actress's personal activities. The Court held that:

> [A]s a matter of law, that Gilbert's right to privacy does not outweigh Brinkman's right to express his uncensored opinion about her use of drugs and alcohol and her sexual relationships, or the Enquirer's right to publish that information, subject, of course, to possible civil liability for the abuse of those rights.

Id. at 99.

The California courts have also held that prior restraint of defamatory expressions is unconstitutional. *See* Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 352 (Cal. 2007). However, injunction after the expression has been made (and proven false) is legal. *Id.* at 348. Regarding whether the information is of legitimate public concern, the California Supreme Court has stated that:

> Courts balancing these interests in cases similar to this have recognized that, when a person is involuntarily involved in a newsworthy incident, not all aspects of the person's life, and not everything the person says or does, is thereby rendered newsworthy. . . . This principle is illustrated in the decisions holding that, while a particular event was newsworthy, identification of the plaintiff as the person involved, or use of the plaintiff's identifiable image, added nothing of significance to the story and was therefore an unnecessary invasion of privacy.

Shulman v. Group W Prods., Inc., 955 P.2d 469, 484 (Cal. 1998).

In the case of *Shulman,* the Court stated that:

> Automobile accidents are by their nature of interest to that great portion of the public that travels frequently by automobile. The rescue and medical treatment of accident victims is also of legitimate concern to much of the public, involving as it does a critical service that any member of the public may someday need.

Id. at 488.

For example, it has been stated that "[t]he presumption against enjoining publication of books is very high, and it is unlikely that the Court would approve of a licensing scheme that would allow prior restraint of books on grounds of obscenity."[100] We agree, and add that, at least one reason for this may be the fact that books can be purely or partly fiction, except in cases where the writer is describing facts perceived by himself. Even when the writer is describing facts perceived as plainly as possible, the expression is necessarily original and from the mind of the author. On the other hand, compared to the use of language to describe an event, the capturing of a non-acted, non-scripted "real event" through technological means, as in cinema, implies that the later will most likely lack creativity, input, and ideas, since most of the substance will be the mere capture of light through a lens. We recognize that "cinematography" is an art in itself, and do not imply to the contrary here. However, we contend that, under the circumstances in which private images tend to be recorded (alone or with a limited extent of company, for personal pleasure, and without the help of professional cinematographers) the private images will in most cases be of limited artistic value. When weighed with other factors (invasion of privacy, lack of political or social discourse, etc.), the interest in protecting such images seems to rise. This, of course, will be the task of the court: to evaluate facts and arguments brought by the parties, under the guidance of the elements provided by the law in order to determine the most "fair" outcome.

The limitations placed upon the authority to grant injunctions to images follows from the previous discussion. Absent a public interest or public figure, the societal value of the depiction of ordinary (non-scripted nor acted) human acts is low. We do not believe that this type of restraint withholds any information from the marketplace of ideas.

Please note, however, that the current tendency is not to disseminate narrative description of the facts of people's lives that are embarrassing. The current epidemic is of dissemination of private images, due to the voyeuristic mindset of current media.[101] Take, for example, a plaintiff that attempts to bar the publication of a video he made where the plaintiff appears exercising in his personal gym at his house by himself. Let us assume that, for reasons not attributable to the plaintiff, the video lands in the hands of a third party that intends to publish it.[102] Let's also assume that the plaintiff is not a public figure. Plaintiff might be embarrassed by the way he is portrayed in the video for a number of reasons.[103] There seems to be no evident public interest in such a video. Without the self-wielding sword of

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100 NOWAK & ROTUNDA, *supra* nota 44, §20.61(c)(i), n. 46.

101 Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZO ARTS & ENT. L.J. 469 (2000) ("Anyone surfing the World Wide Web today is well aware that 'this new marketplace of ideas' is, in fact, a virtual and vibrant marketplace of pornography") (citing several sources to show that the concept of a marketplace of ideas is not new).

102 By this we do not imply that sharing the video would necessarily eliminate an expectation of privacy.

103 For example, plaintiff might be uncomfortable with his physical appearance, exercise performance, revealed emotions or grimaces, or with scarce clothing, among others.

freedom of the press, the defendant might have limited arguments as to why *his* right to free speech requires that society allow him to publish plaintiff's video, presuming defendant did not edit the plaintiff's video in a transformative way.[104] Of course, defendant is free to make his own video.

This is also deeply related with avoiding overbreadth of injunctions. Although the cases cited in this section consistently repeat the possibility of injunctions restraining speech, most of the cases were reversed because the injunctions went overboard.[105] We must emphasize that even if an injunction does not impermissibly constitute a prior restraint, the injunction must be sufficiently precise to provide "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden."[106]

Someone might argue that there is uncertainty in determining whether a person is a private or public figure, or whether a newsworthy event has made that person a public figure for at least certain purposes.[107] That same person might also question whether that uncertainty can significantly affect the proper exercise of the First Amendment, particularly the freedom of the press. The response is twofold. First, if the potential publisher has not been served with the injunction petition before publication, there would be no injunction liability under this law. Second, if it is served before publication, the Court would have to hold a speedy hearing where the parties would be allowed to present evidence, the plaintiff would have the burden of proof, and, in case of doubt regarding the status of public figures, the Court could deny the injunction.

VIII. JUSTICIABILITY

A question that lingers is regarding which events can lead to a party overcoming the requirements of justiciability to obtain the injunction. In *Lopez Tristani v. Maldonado*, the Supreme Court of Puerto Rico confronted this situation.[108] In said case, Plaintiff was taped during sexual acts without her consent. After a complex trial involving a divorce and a criminal proceeding, the parties stipulated for the divorce case that the tape be consigned and kept in confidence under the court's jurisdiction. Afterwards, one of the parties bound by the stipulation became the plaintiff requesting an injunction for the retrieval and destruction of the unauthorized video. The Puerto Rico Supreme Court refused to grant the request for

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104 Defendant might try to argue that the publication itself is a form of symbolic speech. However, the Supreme Court of the United States has refused such arguments. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.") Copyright injunction protection would also be applicable under these circumstances.

105 *See* Evans v. Evans, 76 Cal. Rptr.3d 859 (Cal. Ct. App. 2008); Shulman v. Group W Prods., Inc., 955 P.2d 469 (Cal. 1998).

106 United States v. Harriss, 347 U.S. 612, 617 (1954); *see also* People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal. 1997).

107 *See* Time, Inc. v. Hill, 385 U.S. 374 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

108 López Tristani v. Maldonado, 168 P.R. Dec. 838 (2006).

immediate retrieval of the video due to the parties' stipulation. However, it was ordered that the video should be kept sealed and that it would be destroyed according to the ordinary destruction policies of judicial documents (within one year).[109]

It is significant that neither the parties nor the court brought up the issue of justiciability. All participants in the case tacitly accepted that there was a case or controversy due to the fact that a private video of the plaintiff was out of her access and control, even though it was consigned and sealed under a court's jurisdiction and no threat of publication was made. In our opinion, however, this decision highlights the innate concern and fear all individuals have regarding the exposure of their privacy.

CONCLUSION

Constitutional decisions cannot be decided on abstract considerations. Attention should be paid to the specific controversy in a case. Because no right is absolute, a detailed examination of how the right is affected and what is the social benefit of such limitation is of the essence.

Constitutions are not static. New problems arise in our society that could not have possibly been envisioned by the Drafters. Everyday images are captured and instant, free, and worldwide sharing of private images are some of those unpredictable paradigm shifts. These are new societal problems that require new remedies.

The purpose of this article is not to ignore the fundamental value of the First Amendment, which we stipulate is a democratic pillar. Rather, we intend to force thought out of non-judgmental discussion of how these new technologies are changing our society. We need to accept that the balance of rights and wrongs has shifted; a new balanced is required. With this, we do not mean that a requirement for extra-constitutional solutions is necessary, rather we need to translate Constitutional principles to new societal needs so that they can serve a better purpose.

The law and subsequent injuctions should be content-neutral, focusing on the context in which the images were taken and not on their content. Therefore, problems should not arise in regards to the capturing of obscene images that might be in dispute with the regulation of content.

The public can consume any particular type of images they desire,[110] they can make their own, or even consume those private images of public figures, just not the private ones of private individuals.[111] Also, these kinds of law should focus on a compelling state interest: protecting the constitutional privacy right and dignity of individuals. Nevertheless, if we categorize that publication of private images as

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109 *Id.* at 855-56.

110 Excepting other applicable laws, if any.

111 *See* NOWAK & ROTUNDA, *supra* nota 44, §20.61(b)(ii) (commenting on New York v. Ferber, 458 U.S. 747 (1982)).

a crime, such publication would not have First Amendment protection under the *speech integral to crime* doctrine.[112]

As we have reiterated throughout this article, the values privacy protects are nothing less than individual dignity and personal freedom. Comparatively, providing images of private figures is null and only feeds social morbidity as it has the sole purpose of ridiculing an individual. Notwithstanding, to the point a court is convinced that —on balance— the individual's right must cede to society's need, the court has discretion to allow for publication of the private images.

112 *See* NOWAK & ROTUNDA, *supra* nota 44, at §20.16(g) (discussing the lack of remedy of injunction to prevent crime). For the contrary position, *see* Roscoe Pound, *Equitable Relief against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).