2001

Why Doesn't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence

Laurie S. Kohn
Georgetown University Law Center, kohnls@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/122

29 Hastings Const. L.Q. 1-60 (2001)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub
Part of the Constitutional Law Commons, and the Law and Gender Commons
Why Doesn't She Leave?  
The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence  

29 Hastings Const. L.Q. 1-60 (2001)  

Laurie S. Kohn  
Associate Professor of Law  
Georgetown University Law Center  
kohnls@law.georgetown.edu  

This paper can be downloaded without charge from:  
Scholarly Commons:  http://scholarship.law.georgetown.edu/facpub/122/  

Posted with permission of the author
Why Doesn't She Leave?
The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence

by LAURIE S. KOHN*

Why doesn't she leave? This is a commonly asked question by people confounded by the phenomenon of women who stay in battering relationships despite the abuse they endure. Psychologists and victims advocates also grapple with this question because the

* Visiting Associate Professor and Assistant Director, Domestic Violence Clinic, Georgetown University Law Center. LL.M., Georgetown University Law Center; J.D., Georgetown University Law Center; A.B., Harvard College. I am grateful to Deborah Epstein and Linda Hirshman for their extremely thoughtful comments on earlier drafts of this Article. I want to thank Chris Murphy for his boundless support and assistance with every phase of this process. I am also indebted to the large group of friends, family, and colleagues who debated and discussed this topic with me over the past year. Finally, this project could not have been completed without the unflagging research assistance of Monique Sherman, Jennifer Gray, and Heidi Hertel.


2. Throughout this Article, I will interchangeably use victim and survivor to refer to individuals who endure violence in their intimate relationships. During my work with this population, I have found little consensus about which term most accurately and appropriately describes their status. Primarily, it is important to note that these individuals are three-dimensional figures whose identities are not monolithically dictated by the nature of their relationships. It is for the ease of the reader that I reduce the phases
paradox often casts doubt on the credibility of victims and the efficacy of legal and social science responses.

Despite the persistence of the question, social science literature is replete with reasons why a victim does not or cannot leave a battering relationship. Commonly cited explanations include lack of financial resources; fear of physical retribution; lack of access to information about options for escape; enduring love for the batterer and belief he will change; learned helplessness; and depression. This Article, however, focuses on a pervasive and previously unexamined reason: the victim’s fear that the batterer will publicize truthful confidential information that will hurt her. If the victim

“individual who has been battered” or “individual who has survived violence by an intimate partner” to victim and survivor.

3. Mahoney, supra note 1, at 5 (stating that much scholarship has been generated to address the central question of why she does not leave). See e.g., Truss, supra note 1 (examining the dynamics of power and control that trap women in battering relationships).

4. Maria L. Imperial, Self Sufficiency and Safety: Welfare Reform for Victims of Domestic Violence, 5 GEO. J. ON POVERTY L. & POL’Y 3, 3 (1997) (stating that many victims of domestic violence are financially dependant on their batterers whose abuse undermines their efforts to keep their jobs); Peter Margulies, Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice, 62 GEO. WASH. L. REV. 1071, 1076 (1995) (citing the financial pressures on both high income and low income women who consider leaving battering relationships).

5. Working Group, Charging Battered Women with “Failure to Protect”: Still Blaming the Victim, 27 FORDHAM URB. L.J. 849, 858-59 (2000) (“If she takes [the batterer’s] threats seriously, and statistics show she should, then she may conclude it is safer for her and her children in the short term to stay in the relationship.”). See generally Joyce Klemperer, Symposium on Reconceptualizing Violence against Women by Intimate Partners: Critical Issues: Programs for Battered Women – What Works?, 58 ALB. L. REV. 1171, 1178 (1995) (citing the need for safety as the most critical issue for a woman fleeing an abusive relationship).

6. Margulies, supra note 4, at 1077 (chronicling the significant barriers victims encounter in accessing social services and legal assistance when leaving a battering relationship).

7. Even despite full access to resources for escape, some victims will simply stay in a battering relationship because they still love the abuser. A woman will be the hostage of her own ambivalence: loving the abuser, but hating the abuse. See generally Nan Seuffert, Domestic Violence, Disclosures of Romantic Love, and Complex Personhood in the Law, 23 MELBOURNE U. L. REV. 211 (1999) (exploring the challenges this ambivalence creates in legal discourse).

8. See generally LENORE E. WALKER, THE BATTERED WOMAN (2d ed. 1980) (introducing the application of learned helplessness theory to victims of domestic violence to explain why they may stay in a battering relationship).


10. Throughout this Article, I will often refer to individuals who are battered as
were to seek the court's protection, most state courts have the authority to prohibit the batterer from divulging the information. Under state law, most judges can issue a domestic violence protection order that includes a restriction on the batterer’s speech. But are these restrictions constitutional?

This Article examines the potential constitutional barriers to the issuance of this relief.

Part I will define the scope of the problem by examining case studies of three victims who typify the victims in need of such protection. They possess the characteristics that batterers most commonly threaten to reveal: HIV status; sexual orientation; and immigration status.

Part II looks to the speech restriction itself against the backdrop of females and the perpetrators as males. This label is only shorthand and is not intended to cast into doubt the existence of female on male battering. While men are victims of intimate violence and women the batterers, the statistics bear out that in the majority of cases, the reverse is true. Bureau of Justice Statistics, U.S. Dep't. of Justice, Characteristics of Crime (2001) (“Intimate violence is primarily a crime against women — in 1998, females were the victims of 72% of intimate murders and the victims of about 85% of nonlethal intimate violence.”); Office of Justice Programs, U.S. Dep't. of Justice, Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey (2000) (providing the statistic that 1.5 million women as compared with 834,732 men are raped and/or physically assaulted by intimate partners annually); Marta B. VereJa, Protection of Domestic Violence Victims under the New York Human Rights Law's Provisions Prohibiting Discrimination on the Basis of Disability, 27 Fordham Urb. L.J. 1231, 1234 (2000) (stating that three quarters of all victims of domestic violence are women). This shorthand is not intended to denigrate the experiences of men who are beaten by their partners, nor call into question that such battering exists. Furthermore, gender shorthand is not intended to deny the existence of same-sex battering. Same-sex battering exists and is often the context in which the dynamic of threats of revealing confidential information arises, as will be discussed later.

11. Often victims who do seek the court's protection later withdraw their petitions for protection because of the on-set of such threats.

12. I base this conclusion on my own experience of working with hundreds of victims of domestic violence in the District of Columbia over the past five years and the observations of those whom I have interviewed who work with victims on a daily basis in D.C. Superior Court.

13. By arguing that speech “outing” an individual for being gay or HIV positive is harassment and should be enjoined, one risks perpetuating stereotypes that the allegation should be one associated with shame. However, I make no normative statement regarding the appropriate societal reaction to this information. Instead, my analysis is descriptive of common societal reactions to information relating to HIV and sexual orientation. I see the need for domestic violence speech injunctions based on HIV positive and/or gay, lesbian or bisexual victims' fears about this societal reaction. As one commentator stated, “[t]o deny the existence of prejudice because acknowledging it seems politically incorrect does a disservice to society.” David H. Pollack, Comment, Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of “Outing”, 46 U. Miami L. Rev. 711, 733 (1992).
of First Amendment jurisprudence, analyzing what level of scrutiny a court would accord this type of restriction. Part III analyzes the First Amendment value of the speech in question, analogizing to jurisprudence regarding blackmail statutes. Part IV examines doctrines in which courts have considered First Amendment challenges to restrictions that protect state interests similar to those at issue in the domestic violence context. Those interests include privacy, child welfare, and protection from domestic violence. Next, Part V briefly refers to prior restraint caselaw to determine if this injunction would present an invalid prior restraint on speech. In Part VI, the Article presents the parameters of a domestic violence speech restriction that is most likely to survive constitutional scrutiny. Finally, the Article concludes by arguing that although such injunctions might encounter significant legal challenges, they are normatively important and constitutionally sound relief.

I. Scope of the Problem

A. HIV status

Joanne met Larry when she was 30 years old. After a year of peace and relative happiness, Joanne and her son, a child from a previous relationship, moved in with Larry. Not long thereafter, Joanne tested positive for HIV. Despite Joanne's frequent inquiries into Larry's health status and his representations that he annually tested negative for HIV, Joanne suspected that Larry had infected her. And then the violence began. Larry punched her repeatedly in the face when she upset him. Once he pinned her against a wall by her throat, strangling her until she passed out.

Although Joanne knew she had to protect herself and her son from this violence, she felt isolated from the rest of the world. Aside from her doctors, Larry was the only person who knew that she was HIV positive. Joanne did not trust anyone else with this sensitive information because the potential effect of its publicity on her employment as a childcare provider would be devastating. Larry understood this. At first his threats were subtle, but soon, whenever

14. All client narratives consist of various components of several client stories that I have encountered in my extensive practice in the District of Columbia Superior Court's Domestic Violence Unit. Amalgamating client attributes and assigning pseudonyms are intended to protect client privacy. For an enlightening discussion of the complexity of using client narratives, see Binny Miller, *Give them Back Their Lives: Recognizing Client Narrative in Case Theory*, 3 MICH. L. REV. 485 (1994).
he suspected Joanne was preparing to move out, he would tell her that if she did not stay, he would write a letter to her employer, she would lose her job, and she would never again work with children. Joanne would reconsider and stay with Larry, frightened that her employers might well react with panic to her health status despite the precautions that she took in protecting the children she cared for from transmission. Larry would also threaten to contact people at her son’s school. Joanne feared that this would result in her son being ostracized by his peers and teachers.

Joanne finally dared to leave when her son walked in the bedroom to see Larry holding a knife to her throat. The ten year-old called the police and the next day Joanne went to court to petition for protection.

This harrowing example is by no means uncommon in abusive relationships. Literature examining same-sex battering routinely refers to the fear of HIV “outing” as being a primary cause of the secrecy that characterizes same-sex domestic violence.\textsuperscript{15} Victims often decide against seeking legal protection because they are concerned that their batterers, in return, will publicize this information to people who will take discriminatory actions against them. Victims might experience detrimental repercussions both professionally and socially due to fear of HIV transmission and/or homophobia.\textsuperscript{16}

B. Sexual orientation

Jacques came to court to file for a protection order after his former partner, Mike, had kidnapped him, driven him to a secluded park off the highway, and attempted to slit his throat. Abuse had characterized their relationship for well over a year before it culminated in this kidnapping. Jacques was the only son of a large African immigrant family. The family was extremely close and with the exception of Jacques all of the adult children lived at home. Although Jacques had moved out a year before to live with Mike, his


family did not know he was gay. In their minds, Mike was their son's roommate. Because Jacques was their only son, his parents had pinned on him all of their hopes of generations of American children carrying on their family name. Knowing this, Jacques had determined never to inform his parents about his sexual orientation.

This was the technique by which Mike coerced Jacques to remain involved with him despite the abuse. Mike had easy access to Jacques's family and could easily follow through with his frequent threats to "out" Jacques to his parents. Jacques thought that he could remain in a relationship with Mike long enough to deter him from following through with his threats. Ultimately, however, staying became too dangerous.

Fearing homophobic responses, gay men and women often hide their sexual orientation from employers and family members.\(^{17}\) This fear gives batterers a manipulative tool to force victims to endure additional abuse. As long as a victim knows that a batterer intends to publicize this information and finds his threats credible, he may well stay in an abusive relationship rather than face the potential repercussions,\(^{18}\) which could include loss of child custody, employment, and family and personal relationships.\(^{19}\)

---


18. Vaughn v. Odom, 1988 WL 15711 (Tenn. Ct. App. Feb. 25, 1988) (considering a complaint for outrageous conduct and extortionate threats against defendant who, when plaintiff attempted to terminate the relationship, threatened to tell plaintiff's family and employers about their homosexual affair); Knauer, supra note 15, at 337 ("Homophobia in the United States often prompts (or forces) individuals in same-sex relationships to conceal their relationship or at least the sex of their partner."); Claire Renzetti, Violence in Lesbian and Gay Relationships, in GENDER AND VIOLENCE 287 (Laura L. O'Toole & Jessica R. Schiffman eds., 1997) (Claire Renzetti found that 21% of lesbian battered women in her study reported that their partners threatened to "out" them); Kathleen Finley Duthu, Why Doesn't Anyone Talk about Gay and Lesbian Domestic Violence?, 18 T. JEFFERSON. L. REV. 23, 31-32 (1996) (illustrating the powerful tool of homophobia used by same-sex batterers); Ros Davidson, Gay-on-Gay Violence: The Gay Community's Dirty Secret—Domestic Violence—Is Finally Coming out of the Closet, SALON MAG., Feb. 1997 (citing threats of "outing" as a powerful tool in battering relationships), available at www.salon.com/archived/1997/news.html. See also Phyllis Goldfarb, Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence, 64 GEO. WASH. L. REV. 582, 594-96 (1996) ("Another difference in the experience of battering for abused lesbian and gay victims is an even greater relative isolation than that experienced by abused heterosexual women, which intensifies the victim's vulnerability and the batterer's power.").

19. Knauer, supra note 15, at 337 (chronicling the potential costs of "outing"); Duthu, supra note 18, at 31 (elucidating the possible effects of sexual orientation status publicity).
C. Immigration status

Marielle typifies the dilemma facing a significant number of immigrant women. An immigrant from Venezuela, she married a man who had already obtained his citizenship. Although her immigration application was pending, Marielle had not yet obtained her green card. Over the course of their relationship, her husband repeatedly cheated on her and raped her. He regularly shoved and pushed Marielle around their apartment when he was angry. Whenever she gathered her belongings in a suitcase or tried to call the police, her husband would tell her that he would make sure she would be deported if she left. When he began stalking her wherever she went, Marielle finally determined that she must risk deportation to maintain her safety.

According to a survey of Latina immigrants in the Washington D.C. metropolitan area, threats of deportation are a prevalent and powerful tool used in battering relationships. The respondents ranked fear of reports to the Immigration and Naturalization Service (INS) and fear of deportation as the two most powerful deterrents to leaving an abusive relationship. Immigrant women must choose between two intimidating prospects: an abusive home life or deportation. The U.S. House of Representatives recognized this catch-22 for victims when it debated the Violence Against Women Act of 1994:

Domestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizen’s legal status depends on his or her marriage to the abuser. Current law fosters domestic violence in such situations by placing full and complete control of the alien spouse’s ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse. Under the Immigration and Nationality Act, a U.S. citizen or lawful permanent resident can, but is not required to, file a petition requesting that his or her spouse be granted legal status based


21. Dutton, supra note 20, at 293.

22. See H.R. REP. No. 103-395, at 26 (1993) (“[Battered immigrant women] fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.”).
on a valid marriage. Also, the citizen or lawful permanent resident can revoke such a petition at any time prior to the issuance of permanent or conditional residency to the spouse. Consequently, a battered spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges, or calling the police because of the threat or fear of deportation.\(^{23}\)

Each of these victims — Joanne, Jacques, and Marielle — might have a private right of action if the batterer actually divulged the personal information. All three victims might be able to sue for invasion of privacy\(^{24}\) or intentional infliction of emotional distress.\(^{25}\) These actions, however, at best would bring the victim only monetary damages and offer no relief from the central problem: the proverbial cat is already out of the bag. Of course, no legal action could protect her from the consequences of bias in a social context.

Further, although state employment law and the federal Americans with Disabilities Act may protect people who are HIV positive, coverage typically excludes most small employers such as day care centers and individuals who employ domestic workers.\(^{26}\) At present, there is no federal protection for employment retaliation on the basis of sexual orientation.\(^{27}\) Moreover, the expense, futility, and length of such suits render legal action of little solace.

Under the laws of all fifty states and the District of Columbia, a victim of family violence can obtain a protection order if she can prove that she has an intimate relationship with the perpetrator and that the perpetrator committed an abusive act against her.\(^{28}\) Once a

---

23. Id.
24. See infra Part IV.A.
25. See, e.g., Hormn v. Goyal, 711 A.2d 812, 818 (D.C. Ct. App. 1998) (laying out the elements of a suit for intentional infliction of emotional distress). The Supreme Court has suggested, however, that the First Amendment may bar recovery where the speech is truthful. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (denying recovery for intentional infliction of emotional distress for truthful statements about a public figure).
27. The Non-Discrimination in Employment Act, H.R. 2355, which would have offered employment protection to gays and lesbians, failed to pass the Senate in 1999.
victim has proven these elements, she is entitled to relief intended to protect her from violence and allow her to live independently from the batterer. The forms of relief generally associated with protection orders are “stay away” and no contact provisions — the perpetrator must stay away from the victim’s person and home and may not contact her by phone or in writing. However, many state statutes offer broad relief in addition to these basic provisions. Under D.C. law, for example, the court is authorized to grant whatever relief is “appropriate to the effective resolution of the matter.”

Thirty-nine other jurisdictions offer a broad, catch-all provision under their civil domestic violence laws. Under this statutory hook, advocates can propose remedies designed to stop the violence and to allow the victim to stay out of the battering relationship. The judge can specifically tailor the injunction to circumstances. It is under such provisions that victims like those illustrated above could obtain effective court-ordered protection.

For example, these statutes implicitly authorize a court to direct a perpetrator not to divulge certain information about the victim. In order to protect Joanne, for example, the court could include a provision that reads: “The Respondent shall not directly or indirectly reveal any information about the Petitioner’s health status to the Petitioner’s employer or to any individuals associated with the Wilson

school with intent to cause emotional distress or harass the Petitioner, except pursuant to subpoena or court order.” Under D.C. law, provisions such as this one have been granted in civil protection orders.31

In most jurisdictions, protection orders are enforceable by criminal contempt proceedings.32 As is the case where the batterer violates a stay away provision, he would be accountable to the court for non-compliance with a speech restriction. Violation of this order, therefore, would potentially subject the perpetrator to a fine or jail time, which increases the order’s effectiveness.33


33. One wonders, even if the court has authority to grant such a provision, would a batterer be truly deterred from revealing this information by a simple civil court order? If a victim were to leave a battering relationship based on what turned out to be the false promise that a court order would protect the secrecy of this information, these orders may actually prove detrimental to a victim. Such a provision would deprive the victim of the opportunity to effectively conduct and rely on her own risk assessment. Reliance on an exaggerated perception of the effectiveness of such a provision would dramatically distort her assessment.

The effectiveness of a speech restriction is consistent with the effectiveness of any protection order provision. Protection orders are most successful at deterring the behavior of perpetrators who have committed low-level violence. ADELE HARRELL, BARBARA SMITH & LISA NEWMARK, COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS 50-57 (Urban Instit. 1993) (analyzing the effectiveness of protection orders and suggesting that they are most effective when the perpetrator has a minimal criminal history); Elizabeth Topliffe, Note, Why Civil Protection Orders are Effective Remedies for Domestic Violence But Mutual Protective Orders are Not, 67 IND. L.J. 1039, 1046-1047 (1992) (“When issued and
At first blush, the domestic violence speech restriction proposed above may appear to offend the Free Speech Clause of the First Amendment. Fearing reversal, a judge might initially refuse to issue such an order that blatantly restricts speech in a seemingly content-based fashion. However, as this Article demonstrates, the denial or invalidation of such an injunction would depend on an unnecessarily rigid interpretation of the First Amendment in light of the type of speech involved and the state’s interests in issuing the protection order.

II. Content Based or Content Neutral?

In order to assess the constitutionality of the injunction, a court would first determine the level of scrutiny appropriate to this speech restriction by classifying the provision as content neutral or content based. Judicial categorization of speech restrictions between these two categories can be highly outcome-determinative, since the standard for determining the constitutionality of a content-based
A domestic violence speech restriction would most likely survive constitutional scrutiny if characterized as content neutral

If the court characterized this injunction as content neutral, it would be far more likely to withstand constitutional scrutiny. For a content-neutral restriction to be constitutionally sound, it simply needs to serve a significant government interest and be narrowly tailored to serve that interest. However, because this argument contorts First Amendment jurisprudence this Article will pause only briefly to analyze the viability of this characterization.

Courts commonly classify restrictions regulating the time, place, or manner of the speech as content neutral. Several principles assist courts in identifying such content-neutral restrictions. Two of these principles may be relevant to the analysis: 1. The issuing government actor had a purpose for adopting the restriction independent of the content of the speech; or 2. The prohibition targets conduct rather than speech and therefore implicates lesser First Amendment

36. See, e.g., Ambassador Books & Video v. Little Rock, 20 F.2d 858 (8th Cir. 1994) (upholding a content-neutral city ordinance); Paulsen v. Gotbaum, 982 F.2d 825 (2d Cir. 1992) (upholding a city permitting regulation as a valid time, place, manner restriction).


38. See infra note 74 and accompanying text.


40. A third rationale used by the courts is the secondary effects doctrine that is closely tied to the speech as conduct principle. Under the secondary effects doctrine, a court may classify a speech restriction as content neutral because the “target of the restriction is the secondary effect of . . . the conduct . . . not its expressive content.” Aguilar v. Avis Rent A Car System, Inc., 53 Cal. Rptr. 2d 599, 607 (Cal. Ct. App. 1996), cert. granted, 921 P.2d 602 (1996). The secondary effects doctrine, however, offers meager assistance in an effort to characterize a domestic violence speech restriction as content neutral. The secondary effect of the batterer’s speech would be the victim’s emotional distress or loss of employment. In Boos v. Barry, the Supreme Court held that “emotive impact of speech” is not a secondary effect that would transform a speech restriction into a content-neutral prohibition. Boos v. Barry, 485 U.S. 312, 321 (1988). The California Supreme Court disagreed with the California Court of Appeal's reliance on the secondary effects doctrine in upholding the Avis injunction. Because the secondary effect of the defendant’s racist speech would amount to the emotional impact on the listener, the court found the lower court’s reliance untenable in light of Boos.
concerns.

1. Neutral purpose without reference to content

In identifying content-neutral speech restrictions, the Supreme Court inquires "whether the government has adopted a [restriction] of speech because of disagreement with the message it conveys. A [restriction] that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers' messages but not others." In short, a restriction is content neutral if it is "justified without reference to the content of the regulated speech." For this inquiry, the government's purpose in adopting the restriction is the "threshold consideration."

Recently, in Hill v. Colorado, the Supreme Court upheld a state statute that created a "bubble zone" around people approaching health care facilities. The statute precluded individuals from breaching the bubble zone to distribute leaflets to, counsel, educate, or otherwise protest those entering the health care facility. In order to confirm that the state employed content-neutral justifications for enacting the legislation, the Court looked to the legislative history of the statute. The Court found that the statute was content neutral because the state's interest in restricting the speech focused exclusively on protecting access to health care, privacy, and on providing the police with guidelines for enforcement.

In Madsen v. Women's Health Center, the Court considered the constitutionality of an injunction creating a "buffer zone" around abortion clinic entrances and driveways. The district court had issued the injunction after the protesters had blocked access to an abortion clinic and harassed doctors at their homes, in defiance of an earlier injunction. Determining that the buffer zone injunction was content neutral, the Court upheld the injunction against a constitutional

43. Madsen, 512 U.S. at 763.
44. Hill, 530 U.S. at 719-20.
45. Id. The Supreme Court also found two other bases for concluding that the statute was adopted without reference to content. However, the Court noted that each element provided a sufficient independent basis for the Court's conclusion.
46. Madsen, 512 U.S. at 759.
chall enge.\textsuperscript{47} Again, the Court based its analysis on the state court’s intent in crafting the injunction. The Court determined the lower court’s intent was simply to protect those entering abortion clinics from the conduct of those who had violated the court’s original order.\textsuperscript{48} The Court found the lower court’s intent completely unrelated to the protesters’ message.

While the speech restrictions in both \textit{Hill} and \textit{Madsen} above de \textit{facto} restrict speech of those who espouse one viewpoint, the Court considered this effect irrelevant to the content inquiry.\textsuperscript{49} The Supreme Court maintained that the sole consideration under this principle of First Amendment jurisprudence is the stated intent of the restriction’s drafters, not the effect the content-neutral injunction may have on those whose speech is enjoined.\textsuperscript{50}

Superficially, a domestic violence speech restriction might appear to be content neutral when assessed based on the issuing court’s intent. To be entitled to a protection order, the victim must prove that the batterer has committed abusive acts toward her.\textsuperscript{51} To illustrate her need for a speech restriction, the victim must provide evidence that the batterer threatened to publicize personal information about her if she left. Without the latter evidence, the victim would not have proven that the relief is “necessary to the effective resolution of the matter.”\textsuperscript{52} At the close of evidence, a court would have ample justification to restrain the batterer’s speech about specific issues related to the victim. Such an order would be necessary to protect the victim from retaliation, harassment, and invasion of privacy. These purposes are completely unrelated to the suppression of ideas. If the court intended to suppress the content of the speech without regard to the protection of the victim, the injunction would read broadly to prohibit publication to any audience of the personal facts at issue. Instead, the injunction would preclude the batterer from publicizing the facts only in the ways that would subject the victim to harassment and invasion of privacy.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} \textit{Id.} at 753.
\item \textsuperscript{48} \textit{Id.} at 763.
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} Of course, the identification of legislative or judicial intent is fraught with subjective interpretation. In practice, courts may identify a content-neutral justification simply so that they may uphold the restriction.
\item \textsuperscript{51} See supra note 28 for reference to various state statutes identifying the evidence a victim must produce to be entitled a protection order.
\item \textsuperscript{52} See supra note 30 and accompanying text for the statutory cites and language that authorizes a court to issue a speech restriction in the domestic violence context.
\end{itemize}
\end{footnotesize}
However, although one might successfully argue that the issuing court crafted the injunction entirely without reference to the content or viewpoint of the speech to be enjoined, the injunction would still explicitly forbid the discussion of specific topics. In contrast, neither of the speech restrictions analyzed in Hill and Madsen targeted specific topics.\textsuperscript{53} The injunction and statute proscribed speech in specific locations delivered in a specific manner.\textsuperscript{54} Therefore, in addition to being adopted without reference to viewpoint and content, both speech restrictions prohibited \textit{all speech} delivered in a specific manner in specific locations. Because it enjoins speech of a specific content, a domestic violence speech restriction does not bear the central characteristic of constitutionality that is endemic to time, place, manner restrictions. Although not explicitly stated by the courts, it is axiomatic that in order to satisfy the test for content neutrality by looking to the state's purpose, an injunction would also need to be silent as to the specific content of the restricted speech.

2. \textbf{Content-neutral proscriptions on conduct}

Courts characterize some restrictions on speech as content neutral because the regulation or injunction primarily prohibits conduct rather than speech. Although speech may get "swept up incidentally within the reach of a statute directed at conduct rather than speech,"\textsuperscript{55} courts often find that such a restriction poses only a minimal burden on speech. The Supreme Court articulated this principle as follows: "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . ."\textsuperscript{56}

A typical illustration of this principle is harassment statutes.\textsuperscript{57}

\textsuperscript{53} Hill v. Colorado, 530 U.S. 703 (2000) (determining the constitutionality of a "bubble zone" around individuals entering health care facilities in which protesters cannot distribute leaflets or offer counseling or advice); Madsen, v. Women's Health Center 512 U.S. 753 (analyzing an injunction creating a buffer zone around abortion clinic entrances such that demonstrators could not protest or distribute their message). \textit{See also} Ward v. Rock Against Racism, 491 U.S. 781 (1989) (characterizing as content neutral a regulation proscribing volume guidelines for outdoor concerts).

\textsuperscript{54} Hill, 530 U.S. 703; Madsen 512 U.S. 753.


\textsuperscript{56} Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

\textsuperscript{57} Stalking statutes also pass constitutional muster as content-neutral restrictions. At least forty-eight states and the District of Columbia criminalize stalking. M. Katherine Boychuck, Comment, \textit{Are Stalking Laws Unconstitutionally Vague or Overbroad?} 88 Nw. U. L. REV. 769, 769 n.1 (1994) (listing stalking laws in existence at time of publication).
Courts construe these statutes as criminalizing the act of speaking in a harassing fashion. That the conduct is expressive does not transform the statutes into content-driven speech restrictions. For example, the Second Circuit upheld the constitutionality of a telephone harassment statute because it “[c]learly . . . regulates conduct, not mere speech. What is proscribed is the making of a telephone call, with the requisite intent and in the specified manner.” Finding that verbal harassment statutes are not directed at “the communication of opinions or ideas, but at conduct,” courts uniformly uphold these statutes as valid proscriptions on speech.

Courts have also found that, under certain circumstances, employment discrimination laws regulate conduct rather than speech even when the proscribable behavior is verbal. The Supreme Court in R.A.V. v. City of St. Paul intimated in dictum that certain words may be constitutionally proscribable when they violate a statute aimed at conduct.

For example, sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

Since fighting words do not ever enjoy constitutional protection, the Court’s reference to them is unremarkable. However, the Court’s inclusion of the emphasized phrase, “among other words,” suggests that the Court would permit enjoining otherwise protected speech if that speech were to amount to discriminatory conduct.

The California Supreme Court recently upheld another injunction based on content-neutral regulation of speech in Aguilar v.


60. R.A.V., 505 U.S. at 389-90 (emphasis added).

Avis Rent A Car System, Inc. The U.S. Supreme Court denied certiorari review of the injunction. In Avis, the trial court found that an Avis supervisor had harassed Latino employees by using racial slurs and by leveling unfounded accusations at them on the job, thereby violating the state anti-discrimination law. The lower court issued an injunction against Avis prohibiting its agents from using any derogatory racial or ethnic epithets directed at or descriptive of Hispanic or Latino employees. In concluding that the injunction was constitutionally valid, the California Supreme Court relied upon its observation that the injunction targeted the act of employment discrimination. Discriminating against an individual on the job, the court reasoned, is primarily conduct, whether or not accompanied by speech.

A court would be hard pressed to find that a domestic violence speech restriction targets only conduct. Although, like harassment statutes this injunction proscribes speech that amounts to harassment, the proposed domestic violence speech restriction goes farther than harassment statutes by specifying the content of the barred harassing communication. Harassment laws are constitutional in part because

63. Id. at 849.
64. Id. at 850 ("Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc. . . . as long as he is employed by Avis Rent A Car System, Inc., in California."). The California Court of Appeals remanded the case to the trial court to redraft the injunction to limit its application to the workplace. Id. The Court of Appeals also directed the trial court to include an illustrative list of derogatory epithets in order to provide the defendant with adequate notice of what constitutes prohibited speech. Id.
65. Although the Avis Court hinted heavily that it upheld the injunction because it regulated conduct and was narrowly tailored to meet an important state interest, the court never explicitly stated the basis for its conclusion that the injunction is constitutionally permissible. The Court seemed satisfied to cite to Supreme Court precedent holding that the First Amendment permits the imposition of civil liability for speech amounting to discrimination under Title VII of the Civil Rights Act of 1964. Id. at 854-55.
66. Id. at 854.
67. The typical protection order directs the batterer not to harass the victim. See, e.g., PA. STAT. ANN. § 6108(a)(9) (West 2000) (permitting a court to enjoin harassment). Protection orders including such provisions have withstood First Amendment challenges. See Schramek v. Schramek, 429 N.W.2d 501, 506 (Wis. Ct. App. 1988) (holding that a restraining order's no contact provision does not infringe on free speech because it is directed not at speech but at the suppression of physical abuse). See generally, Klein & Orloff, supra note 28, at 905-10 (reviewing decisions related to the constitutionality of protection orders). However, this language would be too vague to proscribe harassment consisting of divulging personal information about the victim.
they are silent as to the actual content of the harassing speech. It is too far a stretch, then, to assert that an injunction that prohibits the discussion of certain topics enjoins only harassing conduct. An additional complication arises because the privacy-invading speech at issue does not constitute illegal behavior under any statute. In both the *R.A.V.* dictum and the *Avis* case, the courts noted that the speech to be restrained violated a valid statute.

An advocate might consider proposing an injunction that facially enjoins conduct rather than content. For example, in analyzing the *Avis* decision, Professor Charles Calleros propounds a theory that injunctions issued in employment discrimination cases, if properly drafted, should always regulate in a content-neutral fashion. Relying on *R.A.V.*, Professor Calleros concludes that the government “may selectively regulate less than an entire category of proscribable speech if it does so on the basis of the ‘conduct’ of selectively targeting victims rather than the content of the speech directed at the victims.” In order to illustrate his point, Professor Calleros proposes an alternative formulation of the injunction issued in *Avis*, which would assure its constitutionality.

Although the injunction might identify the specifics of past unlawful speech, it need not, and perhaps should not, enjoin only certain words or views. It instead could enjoin the supervisor from continuing to target Latino employees on the basis of their race or national origin from unwelcome and distracting, humiliating, or intimidating speech or conduct, if the speech or conduct could substantially interfere with their work when viewed cumulatively.

In short, the re-conceived injunction would enjoin any expressive conduct that, described broadly, would violate anti-discrimination laws.

Although the *R.A.V.* dictum emboldened Professor Calleros to assert that injunctions prohibiting certain types of harassing or discriminatory speech might qualify as content neutral, *R.A.V.* offers

68. In some states, threats to divulge information may constitute blackmail, see infra Part III.B., but the actual utterance of the words would not necessarily violate any statute.


71. *Id.* at 266.

72. *See supra* note 65 and accompanying text to review the injunction upheld by the *Avis* Court.

73. Calleros, *supra* note 70, at 292.
little useful guidance to advocates seeking to craft a constitutionally permissible domestic violence speech restriction. The contortions that Professor Calleros performs to create an injunction that targets conduct would result in an injunction that is overbroad and vague. A domestic violence speech restriction following Professor Calleros' formulation would read as follows: "The Respondent shall not conduct himself in any way that shall humiliate, taunt, or antagonize the Petitioner if the conduct is substantially likely to result in negative repercussions for the Petitioner." This injunction prohibits the speech the victim fears without any reference to content. However, it gives no guidance to the batterer regarding what conduct is prohibited and sweeps far more broadly than necessary. In trying to wrestle the injunction into a content-neutral formulation, an advocate would eviscerate its effectiveness and render it unconstitutional on overbreadth grounds. Even definitional acrobatics fail to transform this injunction into a content-neutral restriction.

B. This injunction likely would be characterized as a content-based restriction subject to higher judicial scrutiny

Although advocates may be tempted to argue that a domestic violence speech restriction is content neutral and therefore subject to lower level scrutiny, First Amendment jurisprudence reveals that most courts would construe the injunction as content based. Indeed, the issuing court restricts the content of the batterer's message rather than the manner or venue in which it is delivered. First year law students often learn that courts apply a bright line test to each

74. Advocates who have argued on appeal in favor of domestic violence speech restrictions have followed this path, asserting that the restriction is content neutral. From an advocacy perspective, such an argument appears safer. If the court agreed that the restriction was content neutral, it would be likely to uphold the injunction against a First Amendment challenge. Arguing that a narrowly drawn injunction serves an important state interest would not be challenged in most courts. Recognizing protection against extortion, privacy, and freedom from harassment, a court may well identify an important state interest is served by the injunction. The more challenging threshold argument, however, that the injunction is content neutral, requires more argument than given by advocates to date. Amicus Brief for Appellee at 27-28, Ruiz v. Carrasco, IF 3206-97 (D.C. Super. Ct. Fam. Div. Intrafamily Branch, Dec. 19, 1997) (No. 98-FM-39 & 98-FM-40) (2001) (arguing in two paragraphs that an injunction prohibiting the appellant from contacting any government official about the appellee is content neutral because it targets his conduct rather than the content and was adopted without regard to the message the speech conveys); Brief for Appellee at 27, Ruiz v. Carrasco, IF 3206-97 (D.C. Super. Ct. Fam. Div. Intrafamily Branch, Dec. 19, 1997) (Appeal No. 98-FM-39 & 98-FM-40) (2001) (arguing in one paragraph that the injunction is content neutral because it was issued under a content-neutral statute).
content-based restriction to determine its viability. This test constitutes strict scrutiny analysis, which assesses whether the burden on speech is necessary to achieve a compelling state interest, whether the injunction is narrowly tailored to meet that interest, and whether alternative avenues for communication exist. In fact, the reality of First Amendment jurisprudence is far murkier. Contemporary First Amendment jurisprudence reflects a free form balancing of state interests against speech. Acknowledging the inevitability of judicial


76. The murky waters of First Amendment jurisprudence may be attributable, at least in part, to the eternal debate over the central, unifying theory behind the Free Speech Clause. Jurists and commentators have long debated and struggled with the rationale informing First Amendment protection. See generally Cohen v. California, 403 U.S. 15, 24 (1971) (“[The First Amendment] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (examining the theoretical framework of the First Amendment); Suzanne Sangree, Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight, 47 Rutgers L. Rev. 461, 506 (1995) (identifying broad values espoused by the First Amendment including generally, the free market place in ideas); Mary Strauss, Sexist Speech in the Workplace, 25 Harv. C.R.-C.L. L. Rev. 1, 22 (1990) (“The following justifications [for the First Amendment] are most frequently offered: (1) speech enables citizens to make decisions required for self-governance; (2) speech advances the search for truth; and (3) speech enhances self-realization and the individual’s potential for growth and advancement.”); Richard Delgado, Words that Wound: A Tort Action Calling for Racial Insults, Epithets, and Name Calling, 17 Harv. C.R.-C.L. L. Rev. 133, 175 (1982) (citing four other purposes behind the First Amendment).


78. Connick v. Myers, 461 U.S. 138, 150-54 (1983) (balancing the right of public employees to speak on matters of public concern against the state interest in governance); Virginia Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761-62 (1975) (chronicling the development of the doctrine protecting free speech in the context of commercial information and stressing that the nature of the speech affects the analysis); Pickering v. Bd. of Educ. of Will County, 391 U.S. 563, 570 n.3 (1968) (stating that there are no absolutes in the area of speech in government employment because “it is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal.”); Scheetz v. Morning Call, 747 F. Supp. 1515, 1527 (E.D. Pa. 1990) (“Before this court can balance these rights, it notes that balancing is legitimate. Time and time
balancing, Justice Harlan wrote “[w]henever . . . [First Amendment] protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.”

Typically, content-based restrictions that withstand this scrutiny fall into one of the categories that the courts have segregated from the protective reach of the First Amendment, such as fighting words,\textsuperscript{80} defamation,\textsuperscript{81} obscenity,\textsuperscript{82} and advocacy of imminent lawless behavior.\textsuperscript{83} However, content-based restrictions that do not fall into one of these categories are not per se invalid. Instead, after balancing, a court may find that the restriction fits into what the Supreme Court refers to as “a more general exception for content discrimination that does not threaten the censorship of ideas.”\textsuperscript{84}

A court facing a constitutional challenge to a domestic violence speech restriction would have no direct precedent to which to turn. Although at least one court has granted such a restriction, none has

\begin{footnotesize}
\begin{itemize}
  \item Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
  \item Roth v. United States, 354 U.S. 476 (1957).
\end{itemize}
\end{footnotesize}
resulted in an appellate decision.\textsuperscript{85} Because privacy-invading speech in a domestic violence context does not fall into one of the predetermined categories of unprotected speech, the court would therefore engage in balancing, weighing the value of the speech against the countervailing interests to be protected by the injunction.

### III. In the Balance: The Value of Speech

When a statute or injunction restricts speech that has no First Amendment value a court assessing the constitutionality of the restriction need not conduct a balancing test. Although the restriction might be struck on vagueness grounds, it does not unconstitutionally infringe on free speech. Therefore, any analysis of the constitutionality of a domestic violence speech restriction should begin with an examination of the speech itself; for if it is not protected speech, any injunction would stand, regardless of the interests involved. In reality, the constitutional assessment of speech is rarely a zero sum game. Only speech that falls into one of the unprotected classifications is categorically accorded no First Amendment protection. Most other speech falls somewhere along a continuum between protected and unprotected expression.\textsuperscript{86} Its placement along that continuum indicates the weight a court allocates to the speech when balancing it against state interests in restraining the speech.

#### A. Importance of context

The context of the speech is vital to determining its place along the continuum — its level of constitutional protection.\textsuperscript{87} Of course,


\textsuperscript{86} R.A.V., 505 U.S. at 422 (Stevens, J., concurring) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all."); Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) ("This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others . . .").

\textsuperscript{87} The relationship between the speech and the intent of the First Amendment can also influence the value a court ascribes to speech. Sometimes particular expression will be accorded little or no First Amendment protection because it does not serve these goals. In Chaplinsky v. New Hampshire, the Supreme Court noted that they have sanctioned exceptions to First Amendment protection where the speech constitutes "no essential part of any exposition of ideas, and [is] of such slight social value as a step to the truth that any benefit that may be derived from it [is] clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). In United States
time, place, manner doctrine illustrates the importance of context, since it is commonly accepted that a state may regulate speech more freely if the restriction is based on the venue of the communication or the way in which it is delivered. Justice Holmes' famous hypothetical in *U.S. v. Schenck* further illustrates the influence of venue: "The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic."

In *Schenck*, the Supreme Court illustrated the importance of contextual intangibles in ascribing constitutional value to speech. The Court considered whether a document produced by the Socialist party urging draft obstruction exposed its authors to prosecution under the Espionage Act of 1917. The Court determined that the First Amendment did not insulate the defendants from prosecution because the speech enjoyed no constitutional protection. In reaching this conclusion, the Court took heavily into consideration that the country was at war. "We admit that in many places and in ordinary times the defendants in saying all that was in the circular, would have been within their constitutional rights. But the character of every act

---


89. See supra Part IIA.

depends upon the circumstances in which it is done." 91

The Supreme Court's decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies* presents a fairly dramatic illustration of the importance of context to First Amendment analysis. 92 In *Milk Wagon*, the Court reviewed an order enjoining protesters from picketing a dairy. While the Court acknowledged that the First Amendment ordinarily protects protesting, it upheld the injunction based on the defendants' prior conduct. The record revealed that multiple incidents of violence had accompanied the defendants' prior protests, including beatings, window smashing, and looting. 93 Because of the violent background of the protesting, the Court found that even peaceful protesting had acquired a coercive taint. The Court concluded that "acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence." 94 The Court held that the First Amendment would not protect such expression simply because protesting constituted speech. Instead, the Court stressed the importance of a more nuanced consideration of context to assess the value of speech: "[U]tterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." 95

What is the value of speech divulging private information in a domestic violence context? Under the modern interpretation of fighting words, a court could not conclude that the speech falls into this narrow category of unprotected speech. When first articulated by the Supreme Court in *Chaplinsky v. New Hampshire*, the definition of fighting words was extremely broad, covering words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 96 Such a broad definition would permit the regulation of nearly any offensive speech. The Court recognized the definition's overbreadth, however, and narrowed its reach to include only face-to-

---

91. *Id.* at 52.
92. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941). *See also* Roth v. United States, 354 U.S. 476, 514 (1957) ("Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."); Long v. State, 931 S.W.2d 285, 293 (Tex. Crim. App. 1996) ("Conduct which alone would constitute protected activities may be actionable if it is part of a common plan that includes activity that is clearly unprotected.").
94. *Id.* at 294.
95. *Id.* at 293.
face encounters that are likely to provoke immediate violence.\(^{97}\) Addressed to a third party and unlikely to provoke imminent violence, speech divulging personal information about a battered partner does not implicate the fighting words exception.\(^{98}\)

In an effort to ascribe a relative constitutional value to privacy-invading domestic violence speech, one must look to the context in which the words would be uttered. These words would be spoken after the victim has left the violent relationship. Having failed to coerce the victim to stay in the intimate relationship, the batterer would inform an employer about the victim’s HIV status, for example, to retaliate against the victim for her departure. The absence of a political or otherwise socially justified motive would be illustrated by his prior coercive threats to divulge the information and by his failure to circulate the information when the victim remained in the relationship. An Oklahoma court stated that the Constitution was never intended generally to protect speech in the context of domestic violence: “We [] reject any notion that the First Amendment . . . ever covered threatening or abusive communications to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse.”\(^{99}\) Under this general analysis, the constitutional value of privacy-invading domestic violence speech is low and would not appear to weigh heavily in the balance against countervailing interests.

**B. Protection of analogous extortionate speech**

Extortionate\(^{100}\) speech provides a useful analog to privacy-invading speech in a domestic violence context. Because the speech is

---


98. Despite the Cohen Court’s significant narrowing of the doctrine, Professor Charles Lawrence presents a powerful argument that racist speech could be characterized as fighting words because face-to-face racist speech is the functional equivalent of fighting words as defined by the Cohen Court. According to Professor Lawrence, the Cohen Court envisioned fighting words exchanged between people of equal bargaining power who were empowered to retaliate. See Charles R. Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431 (1990).


100. I will interchangeably use the terms blackmail and extortion to refer to this type of behavior. Although historically courts and legislatures may have drawn some distinction between the two conducts, that distinction has become nebulous. James Lindgren, Unraveling the Paradox of Blackmail, 84 COLUM. L. REV. 670, 673 (1984) (“The terms blackmail and extortion are often used interchangeably.”). See also Greenspun v. Gandolfo, 320 P.2d 628, 630 (Nev. 1958) (“Though the word ‘blackmail’ may not be a word of art, it is a word of common parlance and popular usage, often defined as synonymous with extortion.”).
of a similar nature, the court's assessment of the value of extortionate speech suggests the corresponding significance to be ascribed to domestic violence speech. Blackmail generally refers to the use of threats to gain an advantage by inducing someone to do or refrain from doing something they have a legal right to freely do or not do. Blackmail statutes criminalize speech intended not to communicate any expressive content, but only to attain personal gain. Similarly, the batterer utters privacy-invading words not with the intent to benignly communicate ideas, but to achieve personal vindication. Often, blackmail statutes criminalize threats to commit what would otherwise be legal actions outside the context of the threat. In the same way, the domestic violence speech restriction enjoins speech that might otherwise be protected if uttered outside the context of a domestic violence relationship. Moreover, the privacy-invading speech garners a coercive patina similar to extortionate speech because the batterer used the threat of it previously to gain control over the victim. Identifying the unifying elements of blackmail statutes both struck and upheld suggests the parameters necessary to constitutionally enjoin speech of minimal constitutional value through a domestic violence speech restriction.

Blackmail statutes constitute part of the familiar fabric of our criminal law. While these statutes vary greatly in breadth and scope, they share one uniform characteristic. They criminalize

101. See, e.g. FLA. STAT. § 836.05 (2000) and discussion infra Part III.B.

102. Many commentators have struggled with the inconsistent body of precedent to determine the circumstances under which and the reasons why extortionate speech may be criminalized. See Lindren supra note 100, at 671 ("Possible rationales for blackmail have been presented by some of the leading scholars of this century, including Arthur Goodhart, Robert Nozick, Lawrence Friedman, Richard Posner, and Richard Epstein. None, however, has successfully explained the crime."). See also State v. Robertson, 649 P.2d 569, 587 (Or. 1982) ("In sum, our review of the cases that have tested laws against extortion, intimidation, or coercion under the First Amendment yields no principled guidance on freedom of expression to state verbal demands coupled with verbal threats.").

103. In addition, a small minority of states recognize a common law tort suit for extortion. See, e.g., Zohn v. Menard, Inc., 598 N.W. 2d 323, 329-30 (Iowa 1999) (stating that Iowa recognizes a civil cause of action for violation of the criminal extortion statute); Furbur v. Cal. Satellite Sys., 786 P.2d 365 (Cal. 1990) (affirming that California permits civil suits for monetary damages on the basis of extortion).

104. Some statutes criminalize only threats made in order to gain a pecuniary advantage. See, e.g., MASS. ANN. LAWS ch. 265, § 25 (Law. Co-op. 2001); OHIO REV. CODE ANN. § 2905.11 (Anderson 2001); 18 PA. CONS. STAT. ANN. § 3923 (West 2001); VA. CODE ANN. § 18.2-59 (Michie 2001). Other statutes proscribe a broader array of threats, made with a variety of intents, to accuse a person of a crime, expose a secret, or impair an individual's reputation in any way. See, e.g., 18 U.S.C. § 876 (2001); LA. REV. STAT. ANN § 14:66 (West 2000); FLA. STAT. ch.836.05 (2000); D.C. CODE ANN. § 22-3852
speech. Although courts do not characterize extortionate speech as a preestablished category of speech that the state may freely enjoin, such as fighting words, blackmail statutes are commonly assumed to pass constitutional muster. Although some statutes have been struck as overbroad, some of the most broad statutes have survived First Amendment challenges.

Federal caselaw reveals a general assumption that extortionate speech is within the states’ power to prohibit. When commenting on the constitutionality of blackmail statutes, federal courts broadly confirm their validity. The Fifth Circuit held: “It may categorically be stated that extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all.”105 Analyzing the constitutionality of a government secrecy agreement, the Fourth Circuit emphasized that “[t]hreats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal.”106

When courts undertake a more exacting analysis of the constitutionality of blackmail statutes, they generally uphold the statute when it is narrowly drawn and prohibits extortionate behavior carried out with a specific malicious intent. Some statutes are upheld in the absence of an intent requirement if the statute proscribes only threats to commit unlawful acts. In those statutes, the unlawful conduct requirement allows the court to infer wrongful intent.

To illustrate a statute that was upheld because it satisfied these elements, we look to the Ninth Circuit’s analysis of the federal extortion statute, 18 U.S.C. § 876.107 The statute provides:

> Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits [in the postal service] any communication ... addressed to any other person and containing any threat to injure the property of another or reputation of the addressee or of another ... shall be fined under this title or imprisoned not more than two years, or both.108

(1999).

105. United States v. Quinn, 514 F.2d 1250, 1268 (5th Cir. 1975).
106. United States v. Marchetti, 466 F.2d 1309, 1314 (4th Cir. 1972). See also United States v. Velasquez, 772 F.2d 1348 (7th Cir. 1985) (upholding a retaliation statute that punished speech by holding that threats to punish another for his having given testimony to the government is a statement of intention rather than an idea or opinion and is therefore not protected speech).
This statute prohibits a range of threats including threats to take actions that are, in themselves, legal. On the face of this statute, for example, it would be criminal for a man to send a letter to an intimate partner threatening to disseminate damaging personal information about her unless she remained in a relationship with him. In *United States v. Hutson*, the court found that the statute survived an overbreadth challenge because the statute specifically detailed the prohibited conduct and because its intent requirement ensured that it would not chill political speech. "The 'intent to extort' requirement of section 876 guarantees that the statute reaches only extortionate speech, which is undoubtedly within the government's power to prohibit." \(^{109}\) In the court's view, the intent to extort transformed even threats to commit otherwise legal acts into criminal behavior.

State court blackmail jurisprudence is consistent with the *Hutson* decision. The Florida Supreme Court upheld a blackmail statute in *Carricarte v. State*. \(^{110}\) The Florida statute at issue criminalized utterances which "constitute malicious threats to do injury to another's person, reputation or property... with the intent to extort money or the intent to compel another to act or refrain from acting against his will." \(^{111}\) The court held that the statute's proscription on threats to commit legal actions was not fatal to its constitutionality because the statute required malicious intent. \(^{112}\)

Finally, a Virginia appeals court upheld the state's blackmail statute that prohibited threats to commit legal or illegal acts with intent to extort any pecuniary benefit. \(^{113}\) The court found that the statute did not infringe unconstitutionally on speech because it prohibited only speech to accrue pecuniary gain. \(^{114}\) As such, the statute contained an implicit intent requirement, requiring threats to be committed with an extortionate intent. This requirement prevented the statute from sweeping too broadly and proscribing protected speech.

In recent years, courts have invalidated several state blackmail statutes on the grounds of overbreadth. \(^{115}\) Each invalidated statute

\(^{109}\) *Hutson*, 843 F.2d at 1235.

\(^{110}\) *Carricarte v. State*, 384 So. 2d 1261, 1262 (Fla. 1980).

\(^{111}\) Id. at 1263.

\(^{112}\) Id.


\(^{114}\) Id. at 241-42.

prohibited a wide range of conduct. For example, the Oregon coercion statute criminalized threats to take a broad array of actions in order to compel another to engage in or refrain from engaging in certain conduct. None of the statutes conditioned criminality on a finding of intent. The courts found that a broad spectrum of behaviors would be unconstitutionally prohibited under the statutes. For example, the statutes facially prohibited a mother from informing her former husband that if he did not pay child support, she would report him to the court; prohibited a union from threatening to take collective action if its members did not receive higher wages; prohibited a prosecutor from offering a plea bargain in certain circumstances; and criminalized speech commonly acceptable in journalism, law enforcement, and academia.

Although each state suggested that the courts engraft an intent

---

116. Some states criminalize blackmail through more modern statutes referring to intimidation or coercion. See Lindgren, supra note 100, at 673 (defining the terms used in the regulation of extortionate behavior).

117. OR. REV. STAT. § 163.275 (1999) provides:
(1) A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in him a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement the actor or another will:
   a. Unlawfully cause physical injury to the other person; or
   b. Unlawfully cause damage to property; or
   c. Unlawfully engage in other conduct constituting a crime; or
   d. Falsey accuse some person of a crime or cause criminal charges to be instituted against the person; or
   e. Cause or continue a strike, boycott or other collective action injurious to some person's business, except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
   f. Testify falsely or provide false information or withhold testimony or information with respect to another's legal claim or defense; or
   g. Unlawfully use or abuse his position as a public servant by performing some act within or related to official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.
(2) Coercion is a Class C felony.

118. Weinstein, 898 P.2d at 515; Whimbush, 869 P.2d at 1248; Ivan, 856 P.2d at 1120; Robertson, 649 P.2d at 578.
120. Whimbush, 869 P.2d at 1248, 1251.
121. Ivan, 856 P.2d at 1120.
122. Robertson, 649 P.2d at 589.
requirement to save the statutes from constitutional infirmity, each court found that a wrongful intent element would not rectify the constitutional overbreadth. According to the Supreme Court of Colorado, "a specific intent requirement does not eliminate overbreadth concerns when the effect associated with the intent provision (in this case, to induce another to act against his or her will) encompasses a substantial amount of protected activity."124

Does this mean that intent is also irrelevant to the constitutionality of a narrowly drawn blackmail statute? Not necessarily. Where the courts have denigrated the ameliorative constitutional effect of an intent requirement, the statute at issue has been vastly overbroad, facially criminalizing immense quantities of political and social speech. Narrowly tailored statutes, such as the federal and Florida laws, which include intent requirements and criminalize the threats of even lawful activities have successfully survived constitutional analysis.

A domestic violence speech restriction would closely resemble the affirmed blackmail statutes. Like the federal, Florida, and Virginia statutes, the domestic violence speech restriction would sweep very narrowly, enjoining minimal speech. A domestic violence speech restriction, like the federal and Florida statutes, would proscribe what is ordinarily legal speech, but when coupled with malicious intent becomes unprotected speech.

The domestic violence speech restriction suggested in Part I incorporates an explicit intent requirement. It specifies that the Respondent not divulge certain private information with the intent to harass or to cause emotional distress to the Petitioner. Such a requirement would assure that only maliciously motivated speech would be enjoined. A batterer's discussion of the victim's HIV status with his doctor, for example, would not be actionable because it would not be uttered with the intent to cause the victim emotional distress.

An intent requirement, however, would present a challenge to enforcement. It would require that victims prove intent beyond a reasonable doubt in order to prevail in a contempt action against the batterer. Because most domestic violence victims enter the legal system unrepresented,126 this burden would be particularly onerous

123. Weinstein, 898 P.2d at 517; Whimbush, 869 P.2d at 1248; Ivan, 856 P.2d at 1122.
124. Whimbush, 869 P.2d at 1248.
125. See supra Part I.
126. For example, approximately 70% of individuals petitioning for protection orders
and would significantly diminish the enforceability of the prohibition. However, such an intent requirement would not completely eviscerate the provision. The mere existence of a court order would deter the batterer from divulging the information. In fact, although courts may question the effectiveness of protection orders in eradicating abusive behavior, judges acknowledge their role in deterring abuse.\footnote{See, e.g., Maldonado v. Maldonado, 631 A.2d 40, 43 (D.C. 1993) ("A [restraining order], of course, does not guarantee protection . . . [r]ather its existence serves as a potential deterrent and provides a measure of peace of mind for those whose benefit it was issued."). Cf. Ronald B. Adrine & Alexandra M. Ruden, Court Enforcement of Civil Protection Orders and Related Issues, in OHIO DOMESTIC VIOLENCE LAW ch. 12 (2000) (stating that the threat of court enforcement of the protective order in the form of contempt provides a deterrent to future abuse).} Further, advocates or victims would be able to make a strong case to prove intent in cases where the judge admits evidence of past threats to reveal the information.

The state’s interest in prohibiting extortionate speech is also relevant to First Amendment analysis of blackmail statutes. In \textit{Carricarte}, the Florida Supreme Court suggested that the strength of the state’s interest in protecting against blackmail confirmed the statute’s constitutionality: "The state’s interest in shielding its citizens from these types of strong-arm tactics can only be designated as compelling. To hold otherwise would transform the First Amendment into an instrument of leverage for the influential."\footnote{Carricarte v. State, 384 So. 2d 1261, 1263 (Fla. 1980). See also City of Seattle v. Ivan, 856 P.2d 1116, 1120 (Wash. Ct. App. 1993) (suggesting that there might be a compelling state interest in protecting citizens from extortionate threats).} The same interest is at stake in the domestic violence context.

Every individual, of course, is legally entitled to leave a romantic relationship. The victims outlined in the introduction, however, are subject to "strong arm tactics"\footnote{Carricarte, 384 So. 2d at 1263.} because their abusers happen to know personal information about them. Because of the potentially dire consequences resulting from the circulation of this information, the victim may choose not to exercise her legal right to leave the relationship. She will not have any protection from his threats if she does not concede to his will. Courts have an interest in intervening where the batterer has used unfair leverage and coercion to keep the victim in the battering relationship. In fact, the state’s interest in protecting a victim in need of a domestic violence speech injunction is
even greater than its interest in protecting the average victim of blackmail. Where the average blackmail victim must pay money to avoid injury to reputation, this victim is forced to sacrifice her bodily integrity. She must endure living with an individual who physically assaults her. To guard against the success of batterer's tactics, the court has no recourse other than to restrain this limited category of speech.

Although the context of the speech at issue in a domestic violence speech restriction and its analogous nature to unprotected extortionate speech suggest that the speech may be accorded low value by the court, the analysis does not guarantee that the speech is unprotected. Therefore, it is necessary to identify the state interests to be protected by enjoining the speech. These interests must be weighed against the value of the speech to determine the viability of the injunction.

IV. In the Balance: Interests at Stake

When threatening to divulge private information about the victim, the batterer triggers several state interests. In cases where the victim has sought to retain the secrecy of this information for fear of employment or social repercussions, this dissemination is a severe assault to her privacy. The publication poses a separate threat to the victim's children. People might taunt or ostracize the children based on their parent's sexual orientation or HIV status. Moreover, the state has an interest in protecting individuals from domestic violence. That interest is profoundly implicated by a batterer's extortionate efforts to keep the victim in a violent relationship. Court doctrine regarding the propriety of speech restrictions in a family context is therefore relevant to the constitutional analysis.

A. The state's interest in privacy

In privacy suits, an individual may be liable for disclosing private facts to others in a way that would be highly offensive to a

130. While many jurisdictions require publication to more than one person in order prevail in this suit, the dissemination of certain information by an abusive spouse to certain audiences may be actionable in certain jurisdictions. However, because restitution may be of little solace to a domestic violence victim who has just lost her job because her employer has discovered that she is HIV positive, ex post remedies are relatively useless to the class of victims at issue here. Ironically, as one commentator pointed out "though injury often flows from widespread publication of disclosed information, the greatest injury may well [sic] be caused by disclosure to a single person, such as an employer or a spouse." Alan B. Vickery, Breach of Confidence: An Emerging Tort, 82 COLUM. L. REV.
reasonable person. A disclosure of personal information invades two interests that the state seeks to protect through the common law: (1) An interest in the security of personal, confidential information about which the individual has an expectation of privacy; and (2) An interest in protecting the wronged individual from the repercussions of the circulation. Although these actions impose liability for content-based disclosures, and although privacy-invading speech is not one of the exclusions from protection of the First Amendment, courts routinely impose liability when the protection of these interests outweigh the defendant’s speech rights.

Invasion of privacy suits pit two powerful American ideals against each other, requiring the courts to examine each alleged invasion on a case-by-case basis to determine which interest trumps the other. As the California Supreme Court explained: “the right to know and the right to have others not know are, simplistically considered, irreconcilable.” However, privacy suits routinely force courts to reconcile these interests.

Generally, as a value central to the American ideals of autonomy and self-definition, privacy is accorded significant respect by the judiciary. In a case challenging an invasion of privacy suit on First Amendment grounds, the Ninth Circuit stated that “[w]e note that privacy is not only a personal interest, but is also one of concern to society as a whole. . . . In our view, fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable.” The D.C. Court of Appeals, in affirming the constitutionality of tort actions for invasion of privacy, held that

1426, 1435 (1982). See also discussion supra Part I.
131. Vickery, supra note 130, at 1434-35 (identifying the interests at stake in a breach of professional confidence).
132. The Court has thus far declined to announce a per se rule regarding privacy as it has in the case of defamation which would obviate the need for this grueling process. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) (declining to decide whether “the State may ever define and protect an area of privacy free from unwanted publicity in the press.”). See also Bystrom v. Fridley High School, 822 F.2d 747, 758 (8th Cir. 1987) (“The Supreme Court has yet to decide whether tort liability for truthful publication of private matters unrelated to public affairs is constitutionally permissible.”).
134. Briscoe v. Reader’s Digest Ass’n, 483 P.2d 34, 42 (Cal. 1971).
135. Virgil v. Time, Inc., 527 F.2d 1122, 1128 & n.7 (9th Cir. 1975) (citations omitted).
the action "represents a vindication of the right of private personality and emotional security, the essence of the interest protected being aptly summarized [as] . . . 'the right to be let alone.'" In fact, the D.C. Circuit held in *Liberty Lobby, Inc. v. Pearson* that privacy is considered to be a compelling state interest, which can be so powerful that it might even overcome the presumption of unconstitutionality of prior restraints.\(^{137}\)

A court facing a First Amendment challenge to a privacy suit weighs privacy against the speech, assessing the value of the speech by reference to the public concern standard.\(^{138}\) Speech on matters of public concern holds an elevated status in the hierarchy of privacy-invading speech.\(^{139}\)

The public concern standard protects the dissemination of information to which the public has a right of access. Salacious gossip falls outside the parameters of public concern. The Second Restatement of Torts articulates this standard as follows:

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The lines to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern.

When courts balance speech against privacy, privacy most often prevails when the speaker is an individual not associated with the press.\(^{141}\) The involvement of the press transforms the individual right

---

137. 390 F.2d 489, 491 (D.C. Cir. 1967).
138. Gallela v. Onassis, 353 F. Supp. 196, 225-26 (S.D.N.Y. 1972) ("It might be argued that the Court should not place itself in the position of drawing lines and of weighing the value of various communications so as to deny to some of them, under certain circumstances, the protection of the First Amendment. But that is what courts are for . . . . Not only is such an undertaking by the courts a familiar task, but it is essential to the reconciliation of these two basic rights — privacy and freedom of speech.") (citations omitted).
139. Connick v. Myers, 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection.") (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).
141. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974) (holding that the First Amendment barred the imposition of civil liability on a television company for
to free speech into a community right of access to information. An invasion of privacy by the media must reach an intolerable level before the courts will enjoin the publication.

Even the media’s free speech rights, however, sometimes surrender to privacy in the context of an invasion of privacy suit. In *Virgil v. Time*, the Ninth Circuit suggested that a publishing house may be held liable for invasion of privacy. When researching an article on surfing, a journalist interviewed a body surfer who revealed not only his surfing escapades, but also some additional “rather bizarre incidents in his life that were not directly related to surfing.” After the interviews, but before publication, the surfer requested that the stories unrelated to surfing be redacted from the article. Contrary to his request, the article, including all revelations, ran in *Sports Illustrated*. The surfer brought an invasion of privacy action. When the trial court denied the magazine’s motion for summary judgment, the magazine appealed to the Ninth Circuit. Although it remanded the case, the Ninth Circuit determined that the article could have tortiously invaded the surfer’s privacy. As to the First Amendment concerns, the court found that the surfer’s right to privacy could outweigh the value of the speech, defined by the public’s right to know private facts about his life. “The public’s right to know is... subject to reasonable limitations so far as concerns the private facts of its individual members.” This case illustrates that even in the case of the media, freedom of speech can be defeated by an individual’s interest in privacy — even after the individual has voluntarily shared the information with the defendant.

The courts should assess an individual speaking about the private broadcasting the name of a rape victim); *Afro-American Publishing Co.*, 366 F.2d at 649 (holding that an invasion of privacy suit was barred by the First Amendment where a newspaper publisher circulated a photograph and article recounting plaintiff’s comments that the newspaper was breeding interracial mistrust and tension).

142. *Afro-American Publishing Co.*, 366 F.2d at 654 (stating that in balancing privacy against freedom of the press “the courts are called upon... to harmonize individual rights and community interests.”).
144. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975).
145. *Id.* at 1124.
146. *Id.*
147. *Id.*
148. *Id.* at 1127.
149. *Id.* at 1128.
150. *Id.*
life of another with more leniency. Because such cases do not implicate freedom of the press, courts need consider only the value of the speech to the speaker. It is the individual speaker with whom we are most concerned for the purposes of analogizing to domestic violence speech restrictions. In two relevant cases, courts found that the right to privacy outweighed the speaker's right to freely disseminate the confidential details of another's life. In *Doe v. Roe*, a psychiatrist attempted to distribute a book that contained verbatim disclosures by a patient. The patient confided these thoughts during therapy sessions. The court upheld the lower court's decision in favor of the plaintiff-patient, finding that the disclosure invaded the patient's right to privacy. Significantly, the court found that the plaintiff enjoyed a right to privacy that was "contractual and otherwise," clarifying that a protectible interest in privacy exists independently of any formal relationship between the parties.

Another doctor was found liable for invasion of privacy in *Vassiliades v. Garfinckel's*. The D.C. Court of Appeals upheld the judgment that the defendant doctor had invaded his patient's privacy when he published photographs of the patient before and after plastic surgery. The doctor distributed the photographs without the patient's consent to advertise his services. The court's holding rested on the observation that the right to privacy "stands on high grounds, cognate to the values and concerns protected by constitutional guarantees." The court used the public concern standard to scrutinize the particular speech at issue to determine its value. When the court balanced the interest in privacy against the public's right to the information at issue, it found the plaintiff "had a higher interest to be protected."

While some state courts have considered invasion of privacy suits by one individual against another, the Supreme Court has avoided
addressing the constitutionality of enjoining truthful statements by non-media actors about private individuals. The Court, however, has stated in dicta that lesser First Amendment concerns are raised when statements regard private individuals and are unrelated to public concerns.

How is this analysis relevant to the constitutionality of a domestic violence speech restriction? If a court identified the victim's privacy as the interest at stake, the court's analysis would be

161. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) ("In . . . Time, Inc. v. Hill, [we] expressly saved the question whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed.") (citing Time, Inc. v. Hill, 385 U.S. 374, 383, n.7 (1967)); Bystrom v. Fridley High School, 822 F.2d 747, 758 (8th Cir. 1987) ("The Supreme Court has yet to decide whether tort liability for truthful publication of private matters unrelated to public affairs is constitutionally permissible."). But cf. Vickery, supra note 130, at 1436 (arguing no cause of action for invasion of privacy should arise where private individuals speak about matters of private concern to friends or family because an individual should be able to operate within a zone of privacy without governmental interference).

162. This dicta appears in cases addressing the constitutionality of libel suits. While this Article focuses on judicial protection of privacy in the context of privacy torts, one can discern the Court's evaluation of the importance of privacy in the context of private citizens by reference to the development of libel laws. The Ninth Circuit acknowledged the relationship between libel and privacy law, stating that privacy suits "share[ ] . . . the same underlying purpose invoked by the [Supreme] Court . . . in upholding the state's interest in the law of libel . . ." Virgil v. Time, Inc., 527 F.2d 1122, 1128 n.8 (9th Cir. 1975). As it evolved, libel doctrine became more and more protective of speech regarding public figures and increasingly protective of privacy and reputation when involving speech regarding private individuals. This development culminated in Dun & Bradstreet, where the Court ultimately held that to prevail in a defamation action, a private individual suing for libel, concerning issues of private concern, may prevail without proving malice. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985). This standard is less protective of speech than the standard applicable to public figures suing for speech on matters of public concern. In that scenario, public figures must show malice in order to prevail in a libel suit.

The Dun & Bradstreet Court found speech regarding private individuals and matters of private concern simply of less First Amendment value than other speech: "In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury . . . and because they generally lack effective opportunities for rebutting such statements, we found that the State possessed a 'strong and legitimate . . . interest in compensating private individuals for injury to reputation.'" Id. at 756 (quoting Gertz v. Welch, Inc., 418 U.S. 323, 345, 348-49 (1974)) (citation omitted). Such speech does not have constitutional dimensions because "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." Id. at 760 (quoting Harley-Davidson Motorsports v. Markley, 568 P.2d 1359, 1363 (Or. 1977)). See also Garrison v. Louisiana, 379 U.S. 64, 72 n. 8 (1964) (stating that different interests might be involved where purely private libels are concerned, as opposed to libel suits involving the media).
analytically identical to the deliberation by courts facing First Amendment defenses to invasion of privacy suits. Courts would assess the constitutionality by weighing the individual's interest in privacy against the value of the speech. The public concern principle elucidates the value of the speech. As illustrated by the review of cases above, the nature of the information at stake can significantly affect the assessment of the speech's constitutional value. Therefore, the constitutionality of injunctions protecting HIV status, sexual orientation, and immigration status may differ and will be discussed in turn.

Turning first to injunctions protecting the confidentiality of HIV-related information, one finds significant precedent in privacy jurisprudence as guidance. The privacy interest in HIV-related information appears strong. In *Yoder v. Ingersoll-Rand*, the Sixth Circuit upheld a judgment for a plaintiff suing his employer under an invasion of privacy theory for disclosing his HIV status. The court held that the plaintiff had "no trouble establishing that his AIDS status is clearly a private fact, the disclosure of which would be highly offensive to a reasonable person," Further, many courts have held that the constitutional right to privacy covers HIV-related information. The Second Circuit explained that the:

163. Significantly, the Third Circuit held that a threat to disclose private information is as much an affront to privacy as the disclosure itself. *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000). This conclusion enabled the court to find the threat actionable as an invasion of privacy. *Id.* This holding, again, is not significant in that it might make actionable the batterer's threats. Instead, its significance rests on the court's assessment of the importance of an individual's right to privacy. If an inchoate invasion of privacy is actionable, then the court has found the damage potential wrought by the disclosure to be substantial. In essence, the court permitted the imposition of liability for future speech.


165. *Id.* at *6.

166. *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (holding that "[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition"); *Harris v. Thigpen*, 941 F.2d 1495, 1513 (11th Cir. 1991) (assuming a constitutionally protected privacy right related to HIV status); *Doe v. Town of Plymouth*, 825 F. Supp. 1102, 1107 (D. Ma. 1993) (holding that constitutional right to privacy encompasses HIV status); *Faison v. Parker*, 823 F. Supp. 1198 (E.D. Pa. 1993) (stating the high degree of privacy protection that should be accorded to HIV information contained in a presentence report); *Doe v. City of Cleveland*, 788 F. Supp. 979, 985 (N.D. Ohio 1991) (individual has constitutional right to privacy related to HIV status when arrested); *Nolley v. County of Erie*, 776 F. Supp. 715, 731 (W.D.N.Y. 1991) (inmates have a constitutional right to privacy covering unwarranted disclosure); *Doe v. Borough of Barrington*, 729 F. Supp. 376, 385 (D.N.J. 1990) (wife has a constitutional privacy right in husband's HIV status such that it is protected against governmental disclosure by a police
extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over. Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance.

On the other hand, one could imagine that, under certain circumstances, courts could deem HIV status to be of legitimate public interest. For example, if the batterer threatened to reveal the victim's HIV status to her employer where the victim is a health care provider who does not employ universal precautions, the information could prevent transmission. A court might even deem HIV-related speech to have a political dimension because issues of funding for AIDS research and discrimination against HIV positive individuals play a role in public policy discussions. Exaggerated fear of HIV transmission might render the injunction invalid in even the most clear cut cases. The caselaw, however, indicates a strong judicial preference for protecting the privacy of HIV-related information in the absence of strong countervailing interests.

The legitimacy of the public's interest in sexual orientation is even less significant. In general, the law characterizes sexual orientation as a private matter not properly part of public dialogue absent the subject's consent. The Third Circuit recently considered

officer). Cf. Courts have further acknowledged the intimate and personal nature of HIV information that is "fraught with serious implications for that individual." Doe v. Coughlin, 697 F. Supp. 1234, 1237 (N.D.N.Y. 1988) (acknowledging that family may ostracize the individual with AIDS and that discrimination may accompany publication of HIV status); Doe v. Borough of Barrington, 729 F. Supp. at 384 & n.8 (stating that disclosure may be accompanied by excessive harassment).


168. A judge's assessment of the public's legitimate concern in HIV-related information would be greatly affected by her own understanding and perception of the disease. See Chalk v. United States Dist. Ct., 840 F.2d 701 (9th Cir. 1988) (looking to scientific data to determine the legitimate risk of HIV infection by a teacher to his students). If she believed that infected individuals could responsibly safeguard against transmission without disclosure, she might elevate the victim's interest in privacy. If however, she feared transmission anarchy, then she very well might refuse to grant the injunction. See generally Kohn, supra note 16, at n.105 (providing examples of and commentary on fear of AIDS transmission).

169. Cf. Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998) (holding that a rape victim has a right to privacy that covers aspects of the rape that serve no penalogical interest);
whether the constitutional right to privacy protects sexual orientation. In Sterling v. Borough of Minersville, the court considered whether a police officer violated an individual's right to privacy by threatening to disclose the individual's sexual orientation to his family. After reviewing the Supreme Court precedent on point, the court determined that the decedent-plaintiff's sexual orientation was "an intimate aspect of his personality entitled to privacy protection ...." In fact, the court concluded that "it is difficult to imagine a more private matter than one's sexuality ...."

The Third Circuit relied on the Supreme Court cases of Whalen v. Roe and Roe v. Wade for the broad proposition that the right to privacy extends to protect individual autonomy in private matters and an individual's interest in maintaining the secrecy of highly personal information. The court acknowledged the ambiguity of Supreme Court precedent regarding homosexuality by referring to Bowers v. Hardwick. In Bowers, the Court rejected the claim that the Constitution establishes a "fundamental right to engage in homosexual sodomy." The Sterling court, however, found that Bowers did not correlative deny a right to privacy regarding sexual orientation. The court reasoned that Bowers permitted the regulation of conduct but did not "purport to punish homosexual status," which would have contradicted the Supreme Court's proscription on criminalizing status.

Eastwood v. Dept. of Corrections, 846 F.2d 627, 631 (10th Cir. 1988) (holding that the constitutional right to privacy is implicated by a forced disclosure regarding sexual matters); Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983) (holding that the right to privacy covers sexual behavior); Greenwood v. Taft, 663 N.E.2d 1030, 1036 (Ohio Ct. App. 1995) (stating that a litigant might be able to prevail in a privacy suit against an employer for publicizing his sexual orientation). But see Paul P. v. Verniero, 170 F.3d 396 (3d Cir. 1999) (stating that an individual's constitutional right to privacy over sexual behavior may be subordinate to the government's interest in disclosure in cases involving sexual predators).

171. The court held that the threat to disclose the information constituted actionable invasion of privacy. See supra note 163.
172. Sterling, 232 F.3d at 196.
173. Id.
175. 410 U.S. 113 (1973).
176. Whalen, 429 U.S. at 599-600.
177. Sterling, 232 F.3d at 194 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).
178. Id. at 191.
179. Sterling at 195 (citing Robinson v. California, 370 U.S. 660, 667 (1962)).
Historically, allegations regarding sexual orientation have no First Amendment value. Public statements about another's sexual orientation have even been subject to government regulation as a crime. Allegations of sodomy, whether true or false, have been recognized as acts constituting robbery or extortion. Courts and legislatures determined that such allegations deprived the target of the gossip of his reputation in the community. Sodomy was considered such a grave accusation, that simply threatening to allege it could have coercive consequences. As a Maryland court explained:

If a man threatens to accuse another of an unnatural crime, sodomy, and thereby obtains property from him, the law regards it as robbery, because this offense is so loathsome that the fear of loss of character from such a charge, however unfounded it may be, is sufficient to reasonably induce a man to give up his property.

While none of these statutes was challenged on First Amendment grounds, as recently as 1970 these laws were still on the books. Such statutes indicate that legislatures historically did not view either truthful or defamatory statements regarding sexual orientation as valuable speech. The commission of sodomy was not viewed as a matter of public concern that might weigh heavily in the balance against privacy.

However, one could argue that a person's sexual orientation is a matter of public concern. One might argue that it is relevant to her professional competence in certain jobs. Litigants have asserted

180. Thompson v. State, 85 N.W. 62, 64 (Neb. 1901) (citation omitted) ("'As to the fear of injury to the reputation' says Greenleaf, 'it has been repeatedly held that to obtain money by threatening to accuse the party of an unnatural crime, whether the consequences apprehended by the victim were a criminal prosecution, the loss of his place, or the loss of his character and position in society, is robbery.'").

181. MO. REV. STAT. § 560.130 (repealed); State v. Patterson, 196 S.W. 3 (Mo. 1917) ("An indictment for robbery by extortion under § 560.130, alleging the defendant threatened to accuse a third person of the crime of sodomy, which was named, but not defined ... was sufficient as a naming of the offense which [the] accused threatened to charge.").


183. Id. (enforcing law criminalizing the accusations of sodomy).


that information regarding sexual orientation is relevant to health and safety because it correlates to HIV status.\textsuperscript{186} Some might argue that sexual orientation has a political dimension that would transform gossip into political speech.\textsuperscript{187}

An individual who has widely publicized her sexual orientation may also find it more difficult to argue that her status is not a matter of public concern. In \textit{Sipple v. Chronicle Publishing}, the court confronted a case in which a gay man blocked an assassination attempt on President Ford. A subsequent newspaper article lauded the man for his heroism and mentioned his sexual orientation. The article also suggested a correlation between the individual’s sexual orientation and the absence of an official gesture of gratitude from the White House. The individual sued for invasion of privacy. A California court held his sexual orientation was not a private fact that could be the subject of an invasion of privacy suit because the plaintiff had widely publicized his status before the publication of the article. Further, the court found that the information was published with the intent to serve a political purpose, which further insulated the defendant from liability.\textsuperscript{188} The court held that:

\begin{quote}
the record shows that the publications were not motivated by a morbid and sensational prying into [plaintiff’s] private life but rather were prompted by legitimate political considerations, i.e., to dispel the false public opinion that gays were timid, weak and unheroic figures and to raise the equally important political question whether the President of the United States entertained
\end{quote}

\textsuperscript{186}See, e.g., \textit{Sterling v. Borough of Minersville}, 232 F.3d 190, 195 (3d Cir. 2000) ("Public health or like public concerns may justify access to information an individual may desire to remain confidential. In examining right to privacy claims, we, therefore, balance a possible and responsible government interest in disclosure against the individual’s privacy interest.") (citations omitted); \textit{Poff v. Caro}, 549 A.2d 900 (N.J. Super. Ct. Law Div. 1987) (considering whether a landlord may refuse to rent an apartment to gay men on the grounds that they may become infected with HIV).


\textsuperscript{188} \textit{Id.}
a discriminatory attitude or bias against a minority group such as homosexuals.189

Because the journalist had a legitimate purpose for discussing the plaintiff’s sexual orientation, the First Amendment protected the information.

But in the vast majority of cases arising in the context of a domestic violence speech restriction, the victim’s sexual orientation would not properly be a matter of public concern.190 In most cases, information about the victim’s sexual orientation will simply be a weapon used by the batterer to exert power and control over the victim.191 If, as Sipple indicated, the intent of the individual publicizing the information is not relevant to the public concern inquiry, then the victim’s sexual orientation should be an important protected privacy interest. The timing of the batterer’s publication of the information would suggest that the batterer’s intent does not have a political or public health dimension. If the batterer intended to disseminate the information in order to serve political or public health goals, then he would share the information regardless of the victim’s willingness to stay in the relationship. However, because he threatened to divulge the information only as retribution for her non-compliance with his wishes, his intent would seem clearly nefarious and void of political or health goals.

Finally, we turn to the privacy interest in immigration status. While there are few invasion of privacy cases related to immigration status,192 public policy suggests that it might form the basis for a compelling privacy interest. Although an illegal act ordinarily would be of legitimate public concern, Congress has suggested that in the context of domestic violence and immigration, information about

189. Id. at 1049.

190. This discussion raises the issue of whether characterizing homosexuality as a private matter is normatively advisable. While some gay individuals would prefer to be entitled to exert control over access to the information, others might find deeming the matter private to be stigmatizing. Declaring that an individual's sexual orientation should not be discussed without the permission of the individual suggests the matter is actually shameful. For an interesting discussion of sexual orientation and the public/private distinction, see David A. J. Richards, The Privatization of Our Public Discourse: Public and Private in the Discourse of the First Amendment, 12 CARDOZO STUD. L. & LIT. 61, 89-95 (2000).

191. See supra note 18 and accompanying text.

immigration status obtained from a battering spouse is of little public value. In 1994, through the Violence Against Women Act (VAWA), Congress amended certain sections of the Immigration and Nationality Act, 8 U.S.C. § 1101, et seq. to address the specific quandary for battered women petitioning for immigration through their abusive spouses. Under the VAWA amendments, the Immigration and Naturalization Service (INS) was prohibited from making an adverse judgment on a petition for a battered woman based solely on evidence supplied by a spouse who battered the petitioner.\(^{193}\) Additionally, the battering spouse is under no affirmative obligation to report information concerning the petitioner to the INS.\(^{194}\) Finally, Congress further expanded protection for battered immigrant women when it passed the Violence Against Women Act of 2000, Pub. L. No. 106-386 (VAWA 2000). Through VAWA 2000, Congress provided expanded options to attain immigration status to battered immigrant women who are not the spouses of citizens or lawful permanent residents.\(^{195}\)

Congress specifically considered the plight of a battered woman whose abuser used threats of interfering with her immigration process as a means of trapping the woman in an abusive relationship. Title V [of the Battered Immigrant Women’s Protection Act of 2000] continues the work of the Violence Against Women Act of 1994 in removing obstacles inadvertently interposed by our immigration laws that may hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers by allowing an abusive citizen or lawful permanent resident to blackmail the abused spouse through threats related to the abused spouse’s immigration status.\(^{196}\)

These congressional actions suggest that the legislature, at least, has determined that the batterer’s information regarding the victim’s immigration status is of little value to the INS. First, his reports are not required and may not even be the basis for INS decisions. Further, Congress has expressed an intent to provide special assistance to immigrant victims of domestic violence. The statute indicates that her status as a battered woman is of more interest to the INS than any information about her immigration status that the batterer could provide. In the face of these legislative

pronouncements that reveal that immigration status is not a matter of great public concern, a court might allocate very little weight to the batterer's interest in communicating the information and great weight to the immigrant-victim's privacy interest in controlling the information.

B. The state's interest in protection of the family

When a victim of domestic violence requests an injunction restricting the batterer from divulging personal information about her, her privacy is not the only interest at stake. In issuing an injunction, a court might also consider the state's interest in protecting the victim from continuing domestic violence and safeguarding any children involved from the detrimental effects of the speech. Courts routinely act to protect these interests in the context of family law. Less frequently, but illustratively, courts weigh these interests against free expression in the context of injunctions on speech. This section focuses on the general strength of the state's interest in the well being of children and in protection from domestic violence, analyzing the specific treatment of speech balanced against these interests.

As the paramount factor in child custody cases and divorce cases, courts consider the best interests of the child. Physical and legal custody, visitation schedules, and parenting conditions depend on the needs of the children as perceived by the court. The parents' own needs are secondary to the child's. This interest in children's health and well-being can even override a parent's significant conflicting liberty interest.

Acting to protect the welfare of children, a New Jersey court ordered a husband to relinquish his property rights to his marital residence even in the absence of any proof of physical or emotional injury to the children. After a divorce action vested property rights of the marital home in both the mother and father, the father-defendant left the marital home voluntarily. Seventeen months later he returned without warning and commandeered the master bedroom. The court found that although the plaintiff presented no evidence of actual trauma to the children, the defendant-father's

197. See In re Olson, 850 P.2d 527, 532 (Wash. Ct. App. 1993) (stating that the welfare of the children is the State's central concern in marriage dissolutions).


presence compromised the welfare of the children. "[I]t would be inimical to the best interests and welfare of the plaintiff and the children to permit their lives, both emotionally and physically, to be traumatically invaded by the defendant's unilateral decision to resume residency in the marital home." 200

In another case, the Alabama Supreme Court affirmed an injunction that significantly intruded upon freedom of association.201 In Henley v. Rockett, the court affirmed an injunction prohibiting a woman from associating with her extramarital partner in any way.202 The court found that the woman had alienated the affections of her paramour. Because the adulterous relationship compromised the "sacredness of the family relation," provided a negative example for the children, and reflected badly upon the children, the court found that the injunction appropriately restricted the woman's freedoms.203

Protection from abuse, another interest at stake in the family law context, provides the basis for the constitutionality of domestic violence restraining orders that constrain certain liberties.204 The Supreme Court of South Dakota unambiguously stated that "without a doubt, domestic abuse protection orders preserve compelling governmental interests."205 Another court questioned whether a First Amendment challenge to a domestic violence order could ever prevail, given the strength of the state's interest in protecting citizens from domestic abuse.206

Several courts have confronted the direct conflict between the interest in child welfare and protection from domestic violence on one hand and free speech on the other. In State v. Hauge, the South

200. Id.
201. See also Stark v. Hamilton, 99 S.E. 861 (Ga. 1919) (affirming an injunction prohibiting a man from talking to or coming near a woman he had "debauched . . . and induced . . . to abandon her parental abode and live with him in a state of adultery and fornication" in order to protect the child from harm).
203. Id.
204. See Schramek v. Schramek, 429 N.W.2d 501 (Wisc. Ct. App. 1988) (holding that a restraining order's no contact provision does not infringe on free speech because it is directed not at speech but at the suppression of physical abuse). See generally, Klein & Orloff, supra note 28, at 905-10 (reviewing decisions related to the constitutionality of restraining orders).
206. Gilbert v. State, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) ("We . . . first reject any notion that the First Amendment to the United States Constitution . . . ever covered threatening or abusive communications to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse.").
Dakota Supreme Court considered the constitutionality of a content-neutral protection order enjoining the respondent from sending letters to the petitioner. After balancing the “compelling governmental interest[]” in stopping domestic abuse against the respondent’s right to free expression, the court affirmed the order. “In the midst of domestic strife, preserving the mental and emotional health of the vulnerable must overcome other less compelling interests.”

Although the speech restriction regulated speech in a content-neutral fashion, the court took pains to characterize the state’s interest as compelling, suggesting that even a content-based injunction might survive constitutional scrutiny.

Cases involving content-based restrictions in the family law context often seem ludicrous in both their specificity and in the extent of their intrusion into personal lives. These cases, however, suggest how a court might respond to a domestic violence speech restriction enjoining the dissemination of HIV, immigration, or sexual orientation information to third parties. In a particularly odd case, the Florida Supreme Court ordered a mother, as part of a divorce agreement, to do all that was in her power to convince her children that she wished the children to see and love their father. Against a First Amendment challenge, the court upheld the divorce provision because the state’s interest in the welfare of children outweighed the burden on her speech. The court stated that:

"[t]here is no question that the state’s interests in restoring a meaningful relationship between the parties’ children and their father, thereby promoting the best interests of the children, is at the very least substantial. Likewise, any restriction placed on the mother’s freedom of expression is essential to the furtherance of the state’s interests because affirmative measures taken by the mother to encourage meaningful interaction between the children and their father would be for naught if she were allowed to contradict those measures by word or deed."

While the interest in protection of children and protection from violence is strong, some courts also have found speech restrictions targeted at restraining speech to third parties to be constitutionally infirm. One court partially invalidated an injunction prohibiting an

---

207. Id. at 176.
208. See In re Higbee, 1997 Minn. App. LEXIS 1416, c7-97-1588 (Dec. 30, 1997) for another case affirming the constitutionality of a content-neutral speech restriction contained in a domestic violence restraining order.
210. Schutz, 581 So. 2d at 1293.
individual from making disparaging remarks about his wife to their children. To the extent the disparaging remarks were defamatory, the court found no constitutional infirmity with the injunction. However, noting that the state had a strong interest in fostering positive relationships between parents and their children, the court limited the injunction to cover defamatory statements, maintaining that content-based restrictions are presumptively invalid and found no justification for rebutting the presumption.

In a case involving a speech restriction resembling the speech restriction analyzed in this Article, a court invalidated a provision enjoining a party from disseminating information to third parties about her former husband’s new wife. The court acknowledged, in *In re Candiotti*, the harm to the children posed by the malicious gossip at issue. However, the court found that under the California Constitution, the injunction suffered from overbreadth because it prevented the woman from talking privately to everyone about the topic. Further, the court found that such speech was “too attenuated from conduct directly affecting the children to support a prior restraint...” Although the court stressed that the California Constitution is more protective of speech than the U.S. Constitution, this case may well reflect the reaction of some courts to similar challenges under the U.S. Constitution.

A woman needing the protection of a domestic violence speech restriction enjoining the dissemination of HIV, sexual orientation, or immigration information would be acting to enable herself and any children to escape an abusive relationship, to insulate herself from any negative repercussions from the publication of the information, and to safeguard her children from derivative injury from the dissemination. As revealed above, courts characterize these interests as strong, if not very compelling. A speech restriction prohibiting dissemination to specific audiences would not suffer from the fatal overbreadth of the injunction struck in *In re Candiotti*. Under such an injunction, the court would leave the batterer with countless

---

211. *In re Olson*, 850 P.2d at 532.
212. *Id.*
214. *Id.*
215. *Id.* at 303. (Under the California Constitution, “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right . . . .” (emphasis added). The court explicitly stated that “this provision is more definitive and inclusive that the First Amendment to the United States Constitution.”).
alternative audiences for his speech. For example, the batterer would be entitled to speak *ad nauseum* to his friends, family, and health professionals about the victim's HIV status. The restriction would constrain his speech only in relation to the specific audiences that the victim fears will react adversely to the information.

The state’s strong established interests in promoting the welfare of children and protecting victims of domestic violence confirm that under certain circumstances the batterer’s speech rights would be overcome in a constitutional analysis.

V. A Domestic Violence Speech Restriction Does Not Present an Unconstitutional Prior Restraint on Speech

At the time a court issues a domestic violence speech restriction, the batterer has merely threatened to speak the privacy-invading words; the actual utterance of the words is still inchoate. Restraints on future speech bear a presumption of invalidity, because they stifle speech before it has aired and undergone an adequate analysis of its constitutional value. Moreover, prior restraints risk gagging unanticipated audiences and suppressing unintended speech.

While the prohibition on prior restraints of future speech is strong, it is not a conclusive hurdle. The Supreme Court has emphasized that not all injunctions on future speech are impermissible and that the rule against prior restraints should not serve as “a talismanic test.” For example, in *Kingsley Books v. Brown*, Justice Frankfurter advocated a flexible, “pragmatic,” individualized approach to prior restraint analysis.

The typical invalid prior restraint on speech enjoins the press from publishing newsworthy information. This type of restriction triggers the constitutional drafters' original concerns about

---

218. See, e.g., Collin v. Smith, 578 F.2d 1197, 1212 & n.5 (7th Cir. 1978) (Sprecher, J., dissenting) (“[T]his label is merely an aid to categorization of First Amendment restraints ... the cry of prior restraint is a classic example of the tyranny of words which often accompanies the uncritical employment of a once-useful phrase.”).
220. *Id.* at 442.
221. See, e.g., Neb. Press Ass’n v. Stuart, 427 U.S. 539 (1976) (invalidating a court order restraining the press from publishing or broadcasting defendant’s admissions and facts implicating defendant during criminal trial); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (striking a court order enjoining newspapers from publishing a classified historical study on Viet Nam policy, the “Pentagon Papers”).
government suppression of the press.222 Judicial analysis of prior restraints issued against non-media actors is somewhat more lax. Courts often permit restraints on the future speech of private parties when there has been a prior adjudication of the constitutional value of the speech.223 Courts have held that if past conduct has already been adjudicated illegal,224 tortious,225 or otherwise lacking in constitutional protection,226 then future conduct constitutionally may

222. N.Y. Times Co., 403 U.S. at 717 ("Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints); Near v. Minnesota, 283 U.S. 697, 716 (1930) (referring to the historical importance of freedom of the press from prior restraints on speech).

223. See Southeastern Promotions v. Conrad, 420 U.S. 546, 560 (1975) (stating that a prior restraint may avoid constitutional infirmity by bearing the indicia of certain procedural safeguards including a judicial determination).

224. When a statutory provision has been violated, caselaw is replete with decisions affirming the issuance of injunctions prohibiting future speech contravening the provision. See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (upholding an injunction against newspaper which violated municipal sex discrimination ordinance which prohibited newspaper from publishing advertisements in a discriminatory format because order would not go into effect before final determination that speech was not constitutionally protected).

225. Courts will routinely uphold injunctions against speech constituting defamation and libel. See Lothschuetz v. Carpenter, 898 F.2d 1200 (6th Cir. 1990) (upholding an injunction to prohibit defendant from repeating libelous and defamatory statements); Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984) ("We therefore hold that the injunction below, limited as it is to material found either libelous or disparaging after a full jury trial, is not unconstitutional and may stand."); O'Brien v. Univ. Cmty. Tenants, 327 N.E.2d 753, 755 (Ohio 1975) ("Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper.") (italics in original); Retail Credit Co. v. Russell, 218 S.E.2d 54, 62-63 (Ga. 1975) (affirming an injunction prohibiting future libelous speech because there had been a jury verdict finding similar speech defamatory prior to the issuance of the injunction).

226. See, e.g., San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230 (9th Cir. 1997) (affirming injunction against union prohibiting continuing display of signs near hospital entrance reading "This Medical Facility is Full of Rats" after a full hearing to determine the language was fraudulent and therefore unprotected). Another such injunction on future speech appears in the context of a bankruptcy dispute. In a Massachusetts case, a company submitted a bankruptcy plan to the court and received approval. The plan included a provision enjoining a director from entering the company premises or communicating with employees about company operations. The director appealed from the bankruptcy court to district court alleging that the injunction presented an unconstitutional prior restraint on his free speech. The court upheld the injunction, finding that while the director's behavior did not violate any specific statute or regulation, it interfered with the company's bankruptcy plan. At trial in bankruptcy court, the court issued the injunction "based upon a continuing course of repetitive conduct and granted after a final adjudication on the merits. To the extent that the speech of Haseotes constitutes conduct in violation of the [bankruptcy] Plan, it is not protected by the First Amendment." Haseotes v. Cumberland Farms, Inc., 216 B.R. 690, 695 (Bankr. D. Mass.
be enjoined. 227 "[O]nce a court has found a specific pattern of speech unlawful, an injunctive order prohibiting repetition, perpetuation, or continuation of that practice is not a prohibited 'prior restraint' on speech." 228 Because a court has already judged the enjoined speech to be of low value before the order is issued, the restriction does not implicate the interests protected by the presumption against prior restraints. For example, after a full hearing on the matter, a court issuing an injunction would not be forced to speculate about the nature of the speech to be enjoined. Therefore, the injunction would not raise significant potential for suppression of protected speech. The injunction issues no abstract command that may reach an absent audience and have a pervasive chill on speech.

While there is no steadfast rule regarding the procedural sufficiency of a prior adjudication, the caselaw reveals a consensus that a hearing on the merits adequately assesses the constitutionality of the speech. 229 The litigant gets his day in court and the court enjoys the opportunity to analyze the speech. The clearest illustration of the constitutionality of prior restraints based on prior adjudication appears in cases involving statutory violations and obscenity doctrine. 230

1997).

227. Kramer v. Thompson, 947 F.2d 666, 675 (3d Cir. 1991) ("The United States Supreme Court has held repeatedly that an injunction against speech generally will not be considered an unconstitutional prior restraint if it is issued after . . . [it] has [been] determined that the speech is not constitutionally protected.").


229. Kingsley Books v. Brown, 354 U.S. 436, 444-45 (1957) (holding that an adversary hearing to determine whether material is obscene ensures that any subsequent injunction will not be a prior restraint); Haseotes, 216 B.R. at 695 (holding a full hearing before the bankruptcy court was sufficient to determine that the speech was part of a repetitive course of conduct and not meriting First Amendment protections).

230. Another context in which courts routinely issue prior restraints on speech is litigation discovery. Under Federal Rule of Civil Procedure 26(c), courts may issue protective orders regarding discovery material whenever good cause is shown. FED. R. CIV. P. 26(c). Most states have adopted equivalent local rules permitting the issuance of protective orders. These orders, if temporary in nature, are uniformly found constitutional prior restraints on speech. Protective orders have been upheld against prior restraint challenges because they are limited in duration and scope. See Seattle Times v. Rhinehart, 467 U.S. 20 (1984) (holding that protective order did not offend First Amendment); Rodgers v. United States Steel Corp., 536 F.2d 1001 (3d Cir. 1976). In Seattle Times, the Supreme Court distinguished protective orders from other restraints on future speech because the context of pretrial discovery is such that the information is limited to a very narrow scope and the protective order applies only to information learned in the context of discovery. Seattle Times, 467 U.S. at 32. Further, the Court found that because courts have substantial interest in the privacy and reputation of those involved in litigation, a
A. Statutory violations

In *National Society of Professional Engineers v. U.S.*, the Supreme Court considered an injunction issued against a trade association that violated the federal antitrust statute.\(^{231}\) The district court found that the trade association’s code of ethics violated antitrust law by discouraging competitive bidding by its members.\(^{232}\) The injunction restricted the association from issuing any opinion, policy statement, or guideline stating that competitive bidding is unethical.\(^{233}\) The association argued that the injunction was an invalid prior restraint on speech because it enjoined future publication of codes of ethics.\(^{234}\) The Supreme Court, however, found the injunction to be valid and enforceable because the court had determined that the code of ethics had violated antitrust law. In fact, the injunction swept broadly and enjoined even more speech that a simple repetition of the same violation.\(^{235}\) The Court stated that, in order to remedy court can and often must act to protect those interests. *Id.* at 35.

While restraining orders are similarly temporary in nature, the analysis of protective orders offers little insight to the issue at hand. The limited context in which protective orders are permitted suggests that an analogy is far-fetched. Courts have a special interest in protecting the privacy of information learned during discovery because the parties have submitted to the court’s procedural rules. Further, protective orders restrain information only learned during discovery. *See id.* at 33 ("[R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."). This can be an extremely narrow scope of information. On the other hand, the information sought to be restrained in a domestic violence speech restriction has been shared prior to any court involvement and therefore is much more part of the public domain. The *Seattle Times* Court explicitly stressed the narrow applicability of protective order precedent in prior restraint doctrine: "In sum, judicial limitations on a party’s ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted parties to a far lesser extent than would restraints on dissemination of information in a different context." *Id.* at 34.

\(^{231}\) Nat’l Ass’n of Prof’l Engineers v. United States, 435 U.S. 679 (1978).

\(^{232}\) *Id.*


\(^{234}\) Nat’l Ass’n of Prof’l Engineers, 435 U.S. at 679.

\(^{235}\) *Id.* at 697.
antitrust violations, a court must sometimes impose injunctive relief that burdens constitutional rights:

While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and ... unavoidable consequence of the violation .... In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge on rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations. 236

The Court reasoned that any threat to legitimate expression could be alleviated by the Society's petitioning the court for relief. 237

As discussed above in Aguilar v. Avis Rent a Car System, the California Supreme Court upheld an injunction prohibiting an Avis supervisor from using derogatory speech descriptive of Hispanic or Latino employees after the district court found that the supervisor's past conduct had violated the state anti-discrimination statute. 238 The court held that this injunction against future speech was not an invalid prior restraint on speech. "Under well established law ... the injunction at issue is not an invalid prior restraint, because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity," 239

Arguably, like the speech restriction in National Association, the Avis injunction precludes even more speech than would be unlawful under the anti-discrimination statute. Using ethnic epithets descriptive of Hispanic workers may be perfectly lawful if it does not become pervasive or severe enough to alter working conditions. 240 The court, however, did not instruct the lower court to limit the scope of the injunction to unlawful speech.

B. Prior adjudication finding speech unprotected

Courts also issue permissible injunctions on future speech after an adjudication determining the speech lacked constitutional protection. Beginning in 1931 with Near v. Minnesota, the Supreme Court has painstakingly noted that in the context of obscenity,
freedom of speech is not absolute, nor is the ban on prior restraints.\textsuperscript{241} For example, to protect the public welfare, courts can enjoin the publication of obscene matter that may offend community decency.\textsuperscript{242} The Supreme Court stated in \textit{Times Film Corp. v. Chicago} that the "capacity for evil" associated with the speech is relevant to the permissible judicial remedy, intimating that under certain circumstances a restraint on future speech may be necessary.\textsuperscript{243} A total ban on prior restraints would incapacitate the states from best controlling their own social problems.\textsuperscript{244}

After \textit{Times Film}, the Court stepped further into the arena of obscenity and prior restraints with \textit{Kingsley Books v. Brown} and \textit{Freedman v. Maryland}. In these cases, the Supreme Court stated that courts may enjoin future publication of matter adjudicated obscene at an adversary hearing.\textsuperscript{245} In \textit{Freedman v. Maryland} the Supreme Court held that the statutory scheme requiring that filmmakers submit their movies to the Maryland censorship board for approval before distribution created an unconstitutional prior restraint on speech because the procedural safeguards were inadequate.\textsuperscript{246} Analyzing the statutory scheme devised by the legislation, the Court found that the exhibitor did not have an adequate opportunity to be heard on the propriety of censorship once the movie had been rejected. The censor's decision could not act as a final adjudication of protected expression.\textsuperscript{247} The Court stated that the best way to ensure that constitutionally protected speech would not be enjoined is an adversary proceeding: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."\textsuperscript{248}

When analyzing restraints on potential obscene publications, courts will permit a restraint where an adversary hearing has led to

\textsuperscript{241} Near v. Minnesota, 283 U.S. 697, 715-716 (1931); Smith v. California, 361 U.S. 147, 155 (1959) (observing that the states possess the power to "prevent the distribution of obscene matter").

\textsuperscript{242} Times Film Corp. v. Chicago, 365 U.S. 43, 49-50 (1961).

\textsuperscript{243} Id.

\textsuperscript{244} Id.


\textsuperscript{246} Freedman, 380 U.S. at 58.

\textsuperscript{247} Id.

\textsuperscript{248} Id.
the determination that the speech is unprotected. After this determination, the state actor may consider the potential for harm presented by the speech and fashion a remedy that can best protect the public while minimally burdening speech.

C. Application of the prior adjudication principle to a domestic violence speech restriction

In the context of a domestic violence speech restriction, a court would have the opportunity to make a determination about the value of the speech prior to issuing the restraint. Protection order statutes would ensure that there would be a prior adjudication of the batterer’s statutory violation. A victim requesting an order enjoining speech about her health, sexual orientation, or immigration status would be required to petition the court for such relief. The opposing party would be given an opportunity for an adversary hearing. In most jurisdictions, a judge would issue a protection order only if she had found that the batterer had violated a criminal statute. Once the court established a statutory violation, the caselaw indicates that the court would be able to issue a broad restriction to avoid both a recurrence of that conduct as well as future speech that is part and parcel of that conduct. Just as in National Association and Avis, the batterer would have forfeited the right to speak in certain ways based on his past conduct.

When the victim is before the court proving the abuse, she would also be able to present the facts necessary to make an assessment of the protected nature of the speech. In an adversarial trial, the judge would determine whether the batterer has a protected right to speech divulging the victim’s personal information. This procedural safeguard may adequately address prior restraint concerns raised by the domestic violence speech restriction.

If the court considered the “capacity for evil” presented by the privacy-invading speech, as it did in Times Film, then it might well conclude that a prior restraint is the most effective — potentially the


250. Id.

251. What remains unknown is the effect on the prior restraint analysis of a batterer’s consent to a restraining order or a default judgment. If the speaker merely has an opportunity for an adversary hearing, but forfeits that right, may a court enter a restraint on his future speech merely in an ex parte analysis of the nature of the speech? Case law is silent on this question.

only effective — means to protect the victim. The speech, by its very utterance, may decimate the victim's personal or professional life. The destruction may be irreparable. Given societal biases, HIV and sexual orientation status may have severe social and professional repercussions. In the case of immigration status, a federal actor might swiftly deport the victim. If the propriety of prior restraints depends even remotely on the expression's potential for destruction, then a court might find ample comfort in issuing a prospective restraint on the batterer's speech in a domestic violence situation.

The Supreme Court stated in *Nebraska Press* that prior restraints should generally be avoided because they are final and irreversible, whereas criminal and civil remedies to speech are subject to appellate review and are therefore safer.\(^\text{253}\) However, this rationale does not apply to a situation where there has been an individualized hearing adjudicating a statutory violation and assessing the nature of the speech, and where the harm to be caused by the speech is unredressible by subsequent lawsuits. As discussed earlier, once this speech has been published, the victim may have been irreversibly damaged. This is the speech that Professor Lawrence Tribe refers to as unprotected speech "projectiles," which constitute no part of a dialogue.\(^\text{254}\) Criminal and civil remedies are useless to this victim. Moreover, appellate review is always available to a litigant in a domestic violence case who believes that his freedom of speech has been unconstitutionally restrained.

The reasoning behind the constitutionality of prior restraints where the speech has been the subject of a prior adjudication is particularly appropriate in the context of injunctions. A judge may issue an injunction after she has heard the factual allegations substantiating the issuance of an injunction. She has the opportunity to narrowly tailor the injunction to the specific context and specific litigant, guarding against a generalized chill on speech or the unwitting gagging of absent parties.\(^\text{255}\) Further, the Supreme Court


\(^{254}\) Lawrence H. Tribe, American Constitutional Law § 12-8, at 837 (2d ed. 1988).

\(^{255}\) See Madsen v. Women's Health Ctr., 512 U.S. 753, 778 (1994) (Souter, J. dissenting) (stating that injunctions should be given more leeway when judged for constitutional infringement because the remedy is so narrowly tailored that it applies only to the litigant and not to society at large); Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 861 (Cal. 1999) (citing Gallo v. Acuna, 929 P.2d 596 (Cal. 1997)); Gallo v. Acuna, 929 P.2d 596, 610-611 (Cal. 1997), cert. denied sub nom., Gonzalez v. Gallo, 521 U.S. 1121 (1997) (emphasizing the salient differences between a statutory command and an
has held that trial courts should have some discretion in issuing injunctions once illegal conduct has been found, even in the realm of injunctions potentially touching on constitutional concerns, because "the district court has firsthand experience with the parties and is best qualified to deal with the flinty, intractable realities of day-to-day implementation of constitutional commands."\footnote{256 United States v. Paradise, 480 U.S. 149, 184 (1987).}

Because the court would have authority to issue the domestic violence injunction only if the injunction were proposed as part of a restraining order hearing, the court would have the chance to narrowly tailor the injunction to prohibit only the particular speech that had been threatened by the batterer. The court would also be able to craft the injunction to permit the batterer to speak about the topic to other audiences that do not pose a threat to the victim. For example, if the batterer wanted to talk to his own physician about the victim’s HIV status, he would be able to do so. Therefore, the court would not be forced to speculate about potential breadth and reach of the injunction in inhibiting valid speech.

Although a domestic violence speech restriction would carry a presumption of invalidity because it restrains future speech, the statutory scheme that permits its existence suggests that it should fall into the class of restrictions that does not offend the First Amendment.

VI. What Would a Constitutional Order Look Like?

A domestic violence speech restriction’s constitutionality will depend on the context of the battering relationship and the drafting of the order. First, the batterer must have committed abusive acts against the victim, thereby entitling her to protection under her state protection order statute. If she is not entitled to a protection order on the basis of the abuse, then the court has no authority to issue a speech restriction. The state statute must incorporate a catch-all relief provision, authorizing the court to implement any relief required to effectively end the abuse. Second, the circumstances of the abuse and coercion must render substantial the state’s interest in protecting the victim’s privacy, safety, or the welfare of any children involved. Without a strong state interest in issuing the injunction, this speech restriction will not be a valid infringement on the batterer’s injunction that renders an injunction less constitutionally infirm). \textit{But see Madsen}, 512 U.S. at 764-65 (reasoning that because injunctions represent judicial fiat, they require more stringent application of First Amendment principles).
free speech rights. Third, the history of the batterer's abuse and manipulation will need to prove the low constitutional value of the speech. Because context is vital to the constitutional valuation of speech, the victim will need to present extensive evidence of the batterer's threat to reveal the information as a coercive tool to keep her in the relationship. Moreover, to illustrate the minimal value of the speech, the victim will need to establish that the dissemination would not significantly serve public welfare. For example, she will need to show that the audiences who the batterer would address if permitted are not endangered by their lack of access to the information at issue.

The injunction itself will need to be carefully drafted. To satisfy constitutional dictates, the injunction will need to incorporate an explicit intent requirement. The intent requirement allows the injunction to fall squarely into the blackmail paradigm, suggesting the speech is of minimal constitutional value. Because the violation of the speech restriction will require a wrongful intent, the injunction will not prohibit the batterer from speaking in ways that are socially valuable and innocuous to the victim.

In order to avoid invalidity as a prior restraint, the order will need to issue after an adjudication determining either that the batterer's conduct constituted a statutory violation, or that the speech was of low constitutional value. When a victim presents evidence of a criminal act in order to obtain the protection order, the court will be able to issue the speech restriction as relief necessary to remedy the effects of the past statutory violation. On the other hand, when a victim can and is required only to present evidence of abuse that may not constitute a statutory violation, the court will be able to grant a speech restriction only after a full adversarial hearing on the nature of the speech.

Finally, any domestic violence speech restriction will need to be narrowly tailored, leaving the batterer extensive alternative avenues for speech. There will need to be an identifiable nexus between the enjoined speech and the state's protected interests. For example, the order must not prohibit the batterer from discussing his HIV status with a health care provider. Such a proscription would not substantially serve the state's interest in protecting the victim from abuse or from a breach of privacy.
Conclusion

When an abusive partner realizes that the victim truly has made affirmative efforts to leave him, he may feel emasculated. His threats, protestations of love, and domestic terrorism have all proved futile in his efforts to retain control over her. It is at this time that many batterers turn to other devices to exert domination over the fleeing partner. It is at this time that the risk of serious violence in intimate relationships is at its hight. After the victim has made efforts to escape, the batterer is most likely to seek to retaliate against her by sabotaging the independent life she tries to establish for herself. One commentator dubbed this phenomenon "postseparation woman abuse," characterizing it by the batterer's desire to "gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship." Victims consistently relay stories of the batterer's false reports to child protective services; false "anonymous" tip offs to employers about the victim's disloyalty or dishonesty; and calls to employers or family members revealing damaging, truthful personal information about the victim. While the batterer may have threatened to reveal this information in order to keep her in the relationship, once he receives court paper work confirming the victim's desire to end the relationship, he is likely to follow through on previously empty threats. A domestic violence speech injunction would deter the batterer from making this report and might give the victim the security she needs to leave the abusive relationship.

While no court has adjudicated the constitutionality of such an injunction, it is clear that the prohibition on prior restraints and strict scrutiny analysis will pose significant challenges. However, analysis of First Amendment jurisprudence suggests that under certain circumstances such a restriction will withstand constitutional scrutiny. Strict scrutiny analysis ensures that these restrictions will not have any significant corrosive effect on the Free Speech Clause. The

---

257. See Angela Browne, When Battered Women Kill 4, 61, 144 (1987) (citing the high incidence of further abuse and homicide upon separation); Mahoney, supra note 1, at 6 ("At the moment of separation or attempted separation ... the batterer's quest for control often becomes most acutely violent and potentially lethal."). According to one study at least half of women who leave their abusers are followed, attacked or harassed by them. Id. at 64. Another study revealed that half of interspousal homicides occurred after the partners had separated. Id.

258. Mahoney, supra note 1, at 65-66.

259. These anecdotes are derived from my own practice representing victims of domestic violence in the District of Columbia over the past five years.
state's interests must substantially outweigh the value of the batterer's speech for this injunction to be constitutional. Further, the injunction must be narrowly tailored and alternative avenues for communication would need to be provided. While the nature of the speech might be similar, if these threats to divulge information were taking place between neighbors or co-workers the interests at issue would be far less compelling. In contrast, in the domestic violence context, the state's interests in the victim's privacy and the protection of family safety weigh heavily against the batterer's speech rights. Protection of these vital interests against destructive gossip suggests that it is normatively important and constitutionally sound to advocate for this type of injunction.