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Balancing Regulation and Rights in Venezuela's Media War

MOLLY CARNEY[1]

I. INTRODUCTION: THE VIOLENT PHOTOGRAPH BAN

On Friday, August 13, 2010, the front page of prominent Venezuelan newspaper, *El Nacional,* featured a photograph of piled-up bloody bodies at an overcrowded Caracas morgue.[2] The graphic photo depicted about a dozen dead bodies, many naked, lying on stretchers and the floor.[3] It accompanied a story about Venezuela's rise in violent crime, and in particular, the country's high homicide rates.[4] Another opposition newspaper, *Tal Cual*, republished the photograph the following Monday.[5]

Government actors responded quickly. The National Ombudsman's Office claimed that the photograph unduly upset children and adolescents.[6] Venezuelan police officers searched the *El Nacional* newspaper office, allegedly in order to gain more information as to when the photo was actually taken.[7] President Hugo Chávez called the photo "journalistic pornography."[8]

The Tuesday after the photo was published, August 17, 2010, a Caracas court banned all of the nation's newspapers from publishing

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2. *See* Dan Molinski, *Grisly Photo Stirs Venezuela Voters*, WALL ST. J. (Aug. 21, 2010), *available at* http://online.wsj.com/article/SB10001424052748703579804575441921817476204.html; Simon Romero, *Venezuela, More Deadly than Iraq, Wonders Why*, N.Y. TIMES (Aug. 22, 2010), *available at* http://www.nytimes.com/2010/08/23/world/americas/23venez.html?pagewanted=1; *Venezuelan Press Denounces Court Ban on Violent Images*, LATIN AM. HERALD TRIB., http://laht.com/article.asp?CategoryId=10717&ArticleId=363622 (last visited Nov. 22, 2010).

3. Romero, *supra* note 2.

4. *Id. See infra* notes 159163 and accompanying text (citing Venezuela's high homicide rates).

5. *See* Molinski, *supra* note 2.

6. *See Venezuelan Press Denounces Court Ban on Violent Images*, *supra* note 2.

7. *Venezuelan Police Search Newspaper Office*, LATIN AM. HERALD TRIB., http://www.laht.com/article.asp?ArticleId=363737&CategoryId=10717 (last visited Nov. 22, 2010).

8. *See* Molinski, *supra* note 2.

violent photographs for the next thirty days.[9] The court partially reversed its ruling on Thursday, August 19, 2010, limiting the ban to the two newspapers that had run the photo.[10] Each ruling asserted that a ban was a necessary measure to protect the nation's children from moral and psychological harm and to protect the nation's safety.[11]

Voices on both sides of the debate characterized the photo and court rulings as political moves in advance of upcoming legislative elections.[12] The two newspapers that published the photograph are known voices of opposition to President Chávez.[13] Chávez maintained that the photo, which had actually been taken eight months before, was a scare tactic by the opposition to attract voters for the elections.[14] The opposition papers and Western news outlets portrayed the ban as not only a political move to silence them before the elections, but also as an infringement of free expression.[15] Following the court ban, *El Nacional* featured the word "CENSURADO" ("CENSORED") in place of a front-page photo accompanied by the headline, "[t]hey're prohibiting publishing images and news about violence."[16] The text further maintained that the paper would have published a photo of a father crying for his murdered son but for the recent censorship.[17] Venezuelan media members such as *Tal Cual*'s editor, Teodoro Petkoff, publicly criticized the ban.[18] International news organizations were highly critical

9. *Id. See also Venezuelan Press Denounces Court Ban on Violent Images*, *supra* note 2 ("For the next four weeks, no newspaper, magazine or weekly of the country can publish images that are violent, bloody, grotesque, whether about crime or not." The court planned to issue a more definitive ruling a month later, on September 17.).

10. *Venezuelan Press Denounces Court Ban on Violent Images, supra* note 2.

11. *Id.*

12. *Id.*

13. *Venezuela*, PRESS REFERENCE, http://www.pressreference.com/Uz-Z/Venezuela.html (last visited Nov. 22, 2010). *El Nacional* is considered Venezuela's "second most important newspaper" after the slightly more conservative *El Universal*. Although the paper supported Chávez in the 1998 presidential election, its political views have since moved towards the left. *Tal Cual*, a tabloid founded in 2000 by leftist politician, former Cabinet member, one-time guerilla, and journalist Teodoro Petkoff may be "the most visually intriguing in the crowded Caracas scene."

14. Molinski, *supra* note 2.

15. *Carlos Lauria, Venezuelan Censorship Over Morgue Photo is Selective*, COMM. TO PROTECT JOURNALISTS (Aug. 20, 2010, 4:10 PM), http://cpj.org/blog/2010/08/venezuelan-censorship-over-morgue-photos-is-select.php.

16. Molinski, *supra* note 2*; see also* Rory Carroll, *Venezuela Ban on Violent Images Fuels Censorship Row*, THE GUARDIAN (Aug. 18, 2010), *available at* http://www.guardian.co.uk/world/2010/aug/18/venezuela-violent-images-censorship (running the word "Censored" in the place of photographs is a protest tactic used in Venezuela during its 1950s dictatorship).

17. *Id.*

18. *Id.* (Petkoff argued that the ban was a "clearly political" act "in the face of what he sees as the irresponsible conduct of the government with regard to the violence that is besetting Venezuela." He further claimed "*Tal Cual* has never engaged in sensationalism on the subject of crime. "It was foreseeable," according to Petkoff, that the Chávez administration would "kill the messenger" in the media rather than "pay attention to the message.").

of the court's ruling, maintaining that the ban constituted censorship blocking freedom of speech.[19] For example, the National Journalists Association claimed, "[a] noble cause such as the protection of minors is being used as an excuse to silence the media."[20]

This article argues that the "media war" between the Chávez government and opposition voices, ongoing during Chávez's fourteen years as President, is a double-edged sword. [21] While the Chávez government and its supporters consistently portrayed media regulations as necessary protections, privately owned opposition media and many international organizations condemned them as threats to freedoms of speech and information.[22] An action such as the violent photo ban, which could be considered a battle in the media war, can be framed distinctively according to each conflicting viewpoint.[23] In this media war, however, a clear "win" by either side would be detrimental to the public. Therefore, this Article proposes that a nuanced balancing approach best resolves the conflict between regulation and rights. Looking forward, this Article provides a theoretical framework for assessing post-Chávez media regulation in Venezuela.

Part II discusses the Chávez government's position in support of media regulations, such as the violent photo ban. Avowed commitment to Bolivarian Socialism and condemnation of private media ownership by Chávez and his supporters underlie media restriction. Two main objectives provide further justification for media regulation. First, the Venezuelan legal framework consistently calls for the protection of children. Second, threats by political opposition to government and social stability necessitated preservation of national security. The government and its supporters relied upon these objectives to

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19. *See, e.g.*, Molinski, *supra* note 2 (for example, news sources such as the B.B.C. and Wall Street Journal framed the ban as "censorship" while international organizations such as the Committee to Protect Journalists and the National Journalists issued statements condemning the ban).

20. *Venezuelan Press Denounces Court Ban on Violent Images*, *supra* note 2 (The Association also expressed concern that the ban would "create self-censorship" in the affected media outlets.).

21. This article focuses on Chávez's interactions with the private media from his election in 1999 until the end of his third presidential term in October 2012. *See Venezuela's Media War*, B.B.C. NEWS (Mar. 6, 2003), *available at* http://news.bbc.co.uk/2/hi/americas/2827273.stm (introducing the concept of the "media war). Chávez was re-elected to another six-year presidential term in October 2012, but he passed away after an ongoing struggle with cancer on March 5, 2013. *See Chávez Celebrates Re-election in Venezuela*, B.B.C. NEWS (Oct. 8, 2012) *available at* http://www.bbc.co.uk/news/world-latin-america-19867445; *Iconic Venezuelan President Hugo Chávez Dies*, B.B.C. NEWS, (Mar. 6, 2013), *available at* http://www.bbc.co.uk/news/world-latin-america-21679053.

22. *See, e.g.*, Chris Kraul, *Hugo Chavez Targets Venezuelan Media*, L.A. TIMES (July 22, 2009), http://articles.latimes.com/2009/jul/22/world/fg-venez-censor22.

23. Romero, *supra* note 2 ("The debate over the morgue photograph published by *El Nacional* is intensifying, evolving into a broader discussion over the government's efforts to clamp down on the news outlets it does not control.").

substantiate the violent photograph ban.

Part III examines the role of media regulation in Venezuela from the perspective of Chávez's opposition. According to the opposition position, restrictions upon the press threatened rights and unjustifiably exceeded the government's role. Privately owned media sources and international organizations tended to support this position and demand limits on Chávez's regulation of the media. The opposition characterized measures against, and restrictions on, the press, such as the violent photograph ban, as dangerous threats to the freedoms of expression and information.

Part IV analyzes the competing positions discussed in Parts II and III. Going forward, post-Chávez, Venezuela's public interest must be the crucial consideration, as the nation is plagued by crime and economic difficulty. Contemporary international coverage of the media war and frameworks for analyzing the media fail to focus on the priorities of the people and of political pluralism. Emphasizing one extreme to the exclusion of the other in the media war endangers the public good. Therefore, analysis of the Venezuelan media war requires a balance between the two positions. Since the current frameworks fail to adequately account for both reasonable regulation and rights protection, this article proposes a novel theoretical model that balances each alongside the needs of the public. Applying the balancing approach to the violent photo ban displays this approach's superiority.

Finally, Part V concludes that the balancing approach should be used to address future media regulation in Venezuela and other nations. By taking into account the competing objectives in the media war and averting unfettered control by either side, this approach will best uphold the public good.

II. REGULATING FOR THE PEOPLE: THE CHÁVEZ GOVERNMENT PERSPECTIVE

During Chávez's time in office, his administration and supporters consistently cited a number of objectives regarding creating and upholding media regulation. An introduction to the aims of Chávez's Bolivarian Socialism and the contrasting concentration of private media ownership illustrates the fundamental government concerns underlying the use of regulation. In presenting the Chávez administration's perspective, this part focuses upon two further objectives of regulation: protecting children and preserving national security.[24] The court issuing the violent photograph ban and the government's defense cited these

24. Other possible objectives include disseminating cultural values, avoiding propaganda and hate speech, protecting public health, and moral concerns. *See* Angel Luis Olivera Soto, *Prior Restraints in Venezuela's Social Responsibility on Radio and Television Act: Are They Justified?*, 40 GEO. WASH. INT'L L. REV. 401, 402 (2008).

concerns, which recur in Venezuela's legal framework.[25] From the perspective of the Chávez regime, socialist and people-centered objectives justified restrictions such as the violent photo ban.

A. Promotion of Bolivarian Socialism & Reduction of Private Media Ownership

The historical development of Chávez's strained relationship with the private media provides some initial insight into his actions. The Venezuelan government has long regulated the media, alternately creating and eliminating restrictions.[26] While a few past presidents enjoyed friendlier relationships with the media,[27] the "war" between Chávez and the media was neither directly attributable nor novel to the Chávez administration.[28] The relationship between the administration and private media evolved throughout Chávez's fourteen-year presidency.[29] During election times and his presidency, Chávez relied upon both public and private media to develop and maintain support and identification with the people.[30] Nevertheless, much of the privately-

25. *See Venezuelan Police Search Newspaper Office*, *supra* note 7*;* Molinksi, *supra* note 2.

26. For example, the 1939 Communications Law heavily restricted broadcast licensing, creating a "virtual monopoly in the nation for those few broadcasters who were already lucky enough to be in the air," while the 1940 Telecommunications Law mandated state control over all major communications matters. Jose Antonio Mayobre, *Venezuela and the Media: The New Paradigm,* LATIN POLITICS, GLOBAL MEDIA 176, 183 (Elizabeth Fox and Silvio Waisbord, eds., 2002). Reductions in regulation and liberalization of the broadcasting industry during the late 1980's and early 1990's prompted minor increases in media pluralism; however, licenses were awarded mainly to political allies and party members. *Id.* at 179.

27. Although President Carlos Andrés Pérez (President from 1974-79 and 1989-93) occasionally conflicted with the media, "he knew how to play the game." *Id.* at 181. Pérez had an especially strong relationship with the Cisernos brothers—one of his first formal visits as president was to the Venevision station, and he also fled to the station during a coup in 1990. *Id.*

28. During the 1960's the Romulo Betancourt administration suspended constitutional provisions, shut down the media outlets of communist parties, and pursued policies limiting opposition media. PRESS REFERENCE, *supra* note 13. The Luis Herrera Campins (President from 1979-84) administration often clashed with the media, and developed a new national communication policy that reduced the power of private media outlets. Following his presidency, at least one television network explicitly banned Herrera from its broadcasts. President Jaime Lusinchi (President from 1984-89) generally communicated with the media through his private secretary-mistress-eventual wife, a radio announcer. He publicly broke with the media by the end of his presidency. Mayobre, *supra* note 26, at 180.

29. *See* BARRY CANNON, HUGO CHÁVEZ AND THE BOLIVARIAN REVOLUTION: POPULISM AND DEMOCRACY IN A GLOBALISED AGE, 129 (2009) (describing a progression in the relationship between Chávez and the media from balance, to hostility, to seditious rebellion. Although he had media support at the beginning, Chávez's failure to continue providing advertising income and subsidies led the private media to become "a space for consensus-seeking amongst the opposition, and not between government and opposition as it had hitherto acted.").

30. El Nacional and broadcasters including the Cisneros family supported Chávez's first campaign for president. GREGORY WILPERT, CHANGING VENEZUELA BY TAKING POWER: THE HISTORY AND POLICIES OF THE CHÁVEZ GOVERNMENT 206 (2007). During his daily Alo Presidente show, Chávez regularly attended to individual complaints and requests for aid from citizens. *Id.* at 48. VENEZUELAN POLITICS IN THE CHÁVEZ ERA: CLASS, POLARIZATION, AND

owned media became increasingly anti-Chávez in its coverage.[31] Chávez supporters, on the other hand, claimed that the administration regulated appropriately in the face of serious new challenges by the opposition, and strived to improve the status of media for all people.[32]

Chávez's attempted transformation of Venezuelan politics and society further elucidated his relationship with the opposition and private media. Chávez continuously emphasized class and social concerns rather than simply pursuing conventional market-driven economic objectives.[33] His avowed commitment to a new form of socialism, "Bolivarian Socialism," motivated novel approaches to government regulation and goals.[34] Furthermore, Chávez attempted to minimize privatization and business interests through the nationalization of major industries and community delegation, demonstrating his prioritization of the people.[35] In pursuit of pluralism, the Chávez administration also encouraged and facilitated the establishment of grassroots groups and public communication outlets as mechanisms for direct popular participation.[36]

Venezuela's private media, on the other hand, remains one of the nation's few major privatized and capital-concentrated industries.[37]

CONFLICT (Steve Ellner & Daniel C. Hellinger eds., 2003).

31. Only in later elections did the media adopt anti-Chávez positions, publish incorrect poll results and provide greater space to opposition candidates. Mayobre, *supra* note 26, at 183.

32. *See* Interview by Juan Reardon with Edwin Chirinos Duque, a professor at the Bolivarian University of Venezuela in Merida, and a supporter of Venezuelan President Hugo Chavez, and interview with Maria Perez, member of Acción Democrática, or Democratic Action (AD), an anti-Chavez political party (June 30, 2011), http://venezuelanalysis.com/analysis/6314 (presenting a dialogue between two Venezuelan political activists). Duque stated "[t]he updating of technologies, the launching of numerous local, national, and regional radio, television, and internet-based medias has [sic] succeeded in breaking the hegemonic communicational barriers imposed by the global elite." *Id.*

33. *See* STEVE ELLNER, RETHINKING VENEZUELA POLITICS: CLASS, CONFLICT, AND THE CHÁVEZ PHENOMENON 5 (2008). Since his last popular election, Chávez remained well-supported, especially by lower classes. *Id.*

34. *Id.* at 118, 171. *See also* IAIN BRUCE, THE REAL VENEZUELA: MAKING SOCIALISM IN THE 21ST CENTURY (2008). (discussing the transition from democratic to socialist rhetoric, particularly after Chávez's 2005 announcement that he was implementing twenty-first century socialism). For more insight into Chávez's objectives and actions, *see Blog de Hugo Chávez*, CHÁVEZ.ORG.VE (last visited Nov. 1, 2011), http://www.Chávez.org.ve; CORREO DEL ORINOCO (English Edition), *available at* http://www.correodelorinoco.gob.ve/english-edition/ (last visited Nov. 1, 2011) (government-controlled, pro-Chávez newspaper).

35. ELLNER, *supra* note 33, at 118.

36. *See* ELLNER, *supra* note 33, at 177-94 (discussing government promotion of popular participation through grassroots and state-facilitated groups like Bolivarian Circles). *See also* Eva Golinger, *Documents Reveal Multimillion Dollar Funding to Journalists and Media in Venezuela,* VENEZUELANALYSIS (July 15, 2010), http://venezuelanalysis.com/analysis/5495 ("Not only do media and journalists in Venezuela have a near-absolute freedom of expression, during the past decade, under the Chávez administration, hundreds of new media outlets, many community-based, have been created in order to foster and expand citizens' access to media. Community media was prohibited under prior governments, which only gave broadcasting access to corporations willing to pay big money to maintain information monopolies in the country.").

37. *See* WILPERT, *supra* note 30, at 206.

Influential businessmen, large corporations, and wealthy families own the majority of the industry and possess a substantial market share in Venezuelan media distribution.[38] For example, the immense global corporation, Grupo Cisneros, owns not only Venevision, Venezuela's leading television network, but also holds interests ranging from entertainment and telecommunications companies to Los Leones del Caracas, Venezuela's championship baseball team.[39]

From the perspective of the Chávez administration, the privately-owned media, controlled by a few powerful and wealthy individuals, did not represent the citizenry's rights and desires nor accurately report the news. Media owners, while utilizing their power to shape public perception and policy, are likely to serve personal property and privilege interests rather than the needs of the people.[40] Eleazar Diaz Rangel, the editor-in-chief of *Ultimas Noticias*, Venezuela's highest-circulating newspaper, has stated, "What's not published in Venezuela is what media owners don't want published."[41]

Political polarization defined the divisions between the private media and Chávez. Due to the relative lack of interest and competing factions in greater Venezuelan society, private media may be the "only solid base of power of the old elite," which is itself reliant upon racism

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38. Private media possesses the greatest market share of Venezuela's media distribution—private ownership (including family, widely held, and employee-owned) of Venezuela's top five daily newspapers is 100% and top five television stations is 75%. Simeon Djankov et. al, *Who Owns the Media?*, 46 J.L. & ECON. 341 (2003) (analyzing the concentration of media ownership and "media freedom" based upon journalists jailed, media outlets closed, journalists jailed, and internet restrictions, measured alongside controls such as GDP, autocracy, political and economic freedom, and health outcomes). *See also* Mark Weisbrot and Tara Ruttenberg, *Television in Venezuela: Who Dominates the Media?*, CENTER FOR ECONOMIC AND POLICY RESEARCH, (Dec. 2010), *available at* http://www.cepr.net/documents/publications/2010_12_venezuela_media.pdf (finding market domination by private channels and estimating that over 94% of television viewed by Venezuelans is not pro-government).

39. CISNEROS GROUP, http://www.cisneros.com/Home (last visited Nov. 17, 2011). The Cisneros Group, which is owned and controlled by a Venezuelan family with longtime access to the Presidential Palace and a history of supporting democratic candidates, has now expanded its communications business to approximately forty countries and is headquartered in South Florida. Gerardo Reyes, *Self-Censorship in Latin America*, 11 MEDIA L. & POL'Y 1 (2002). *See* Naomi Klein, *Venezuela's Media Coup*, THE NATION (Feb. 13, 2003), http://www.naomiklein.org/articles/2003/02/venezuelas-media-coup. ("Venezuela's private television stations are owned by wealthy families with serious financial stakes in defeating Chávez. Venevision, the most-watched network, is owned by Gustavo Cisneros, a mogul dubbed the 'joint venture king' by the New York Post. The Cisneros Group has partnered with many top US brands-from AOL and Coca-Cola to Pizza Hut and Playboy-becoming a gatekeeper to the Latin American market.").

40. *Id.*

41. Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations, "*What's Not Published in Venezuela Is What Media Owners Don't Want Published*," VENEZUELANALYSIS (Dec. 13, 2010), http://venezuelanalysis.com/analysis/5854media war (As one pro-Chávez sociologist stated, "What has developed is an anchor between citizens and media outlets that reinforce their existing political opinions . . . As such, the media has a dedicated audience that is politically and ideologically aligned but, on the whole, uninformed.").

and classism.[42] Moreover, many media leaders "promulgate a pro-U.S. [sic], market friendly, liberal democratic agenda" that tends to be more consistent with the aims of Chávez's opposition than that of his Bolivarian Revolution.[43] These incompatibilities resulted in a dynamic and increasingly combative relationship between Chávez and the private media.[44]

Overall, from the Chávez administration's perspective, the power and influence of Venezuela's private media threatened the development of a new socialist society. Chávez's reaction to the violent photograph reflected these concerns, as he declared "The country demands respect . . . The publication of this image just shows desperation, because they are trying to sabotage the Bolivarian Revolution by any means."[45]

B. Protection of Children

The court issuing the violent photograph ban presented psychological and moral protection of children as its chief justification.[46] From the government's perspective, the graphic nature of these particular photographs (naked bodies at a morgue), in conjunction with its casual exhibition (displayed on newsstands or by home delivery), posed irreparable harm to children.[47] Likewise, the

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42. WILPERT, *supra* note 30, at 205. As the formerly powerful elite loses campaigns and other bases of power, they are desperate for restoration of the status quo. *Id.* at 206. The old elite has used the media to gain middle class support by such methods as campaigns taking "advantage of the latent racism and classism in Venezuela culture." *Id.* at 20. *See also* CANNON, *supra* note 29, at 63 (2009) (discussing the private media's employment of race- and class-based fears in mobilizing the middle and upper classes against proposed 2001 enabling laws); Ellner and Hellinger, *supra* note 30, at 20 (discussing both racism of the opposition and Chávez's disproportionately effective communication towards poor and uneducated classes).

43. WILPERT, *supra* note 30, at 126.

44. *See* Reardon, Perez & Duque, *supra* note 32. Pro-Chávez voice Duque declares "a pool of television channels and radio stations, in addition to their internet-based allies, go about shamelessly lying, experimenting with all of the ideological venoms produced in U.S. and European labs." *Id.* "Their objective is to keep their follows following, founded in a submissive mindset, individual chains which are stronger than real, physical chains. If one takes a look at the programming on Venezuelan television, a majority of shows are based on fascist, right wing content that advances their political interests." *Id.* "Everything these media elite produce is created in the image of their economic interests, including their disgraceful attempts to coerce leaders and secure electoral victories against parties and leaders they disagree with." *Id.* "The corporate media is a supranational entity that uses threats and manipulation to guarantee its interests are defended, overriding many of the most fundamental national judicial mechanisms." *Id.*

45. *See* Golinger, *supra* note 36 ("Today, corporate media outlets and their journalists use communications power to publicly promote the overthrow of the Venezuelan government. The owners and executives of these media corporations form part of the Venezuelan elite that, under the reigns of Washington, ran the country for forty years before Chávez won the presidency in 1998.").

46. *See* Molinski, *supra* note 2.

47. "Imagine you're walking on the street with your children and you pass a newsstand with today's papers displayed as usual and the front pages clearly visible to all who pass by. But to your horror, today's national daily has an almost full-page graphic image of dead, bloodied

Venezuelan legal framework emphasizes the protection of children as an important public concern. The Chávez administration often employed this concern in creating and defending regulation.

The most significant foundation of Venezuela's media regulatory structure, the Law of Social Responsibility in Radio and Television ("*Ley de Responsabilidad Social en Radio y Televisión*," hereinafter RESORTE), uses child protection as a purpose and guide in establishing its broadcasting requirements.[48] While this law does not expressly target newspapers such as those that published the violent photograph, it demonstrates the fundamental moral justification relied upon by the Chávez government. The law's fundamental purposes include "protection of the children and adolescents" and "integral education of the children."[49] Likewise, the government maintained that RESORTE was needed for "the development of children and adolescents who constitute the group of society most susceptible to influence."[50]

RESORTE mandates strict requirements for children's programming. For example, television and radio messages must qualify as "directed at children" for at least eighteen hours per day.[51] RESORTE presented the government with one major means by which to protect children, while also demonstrating the perceived importance of this objective.

Further pronouncements regarding children's rights encouraged the use of government regulation to protect children. Venezuela's Organic Law for the Protection of Children and Adolescents (LOPNA) guarantees children and adolescents certain rights and protections from the State, society, and families.[52] LOPNA places affirmative duties upon media outlets and the government alongside negative restrictions upon potentially harmful material when creating and broadcasting children's programming.[53] Additionally, Venezuela's 1999 Constitution articulates a national commitment to child protection, education, and

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bodies piled on top of each other in the local morgue. Every newsstand you walk by has the same image, even repeated in several national and local papers. Your children are forced to see this with no warning." Golinger, *supra* note 36.

48. *See* Soto, *supra* note 24, at 465. The Venezuelan law for broadcast media, RESORTE, was enacted in December 2004. *Id.* RESORTE regulates all aspects of Venezuelan radio and television programming, production, and viewership. *Id. See also* LEY RESORTE, http://www.leyresorte.gob.ve/ (last visited Nov. 20, 2011).

49. *Id.* at 442.

50. *Id.*

51. *Id.* at 431–35. All television channels are required to show child-friendly programming at certain specified times under "all users" and "supervised" blocks, along with developing child-specific programs. *Id.* These provisions are strictly enforced. *Id.*

52. Ley Orgánica para la Protección del Niño y del Adolescente, La Gaceta Oficial N° 5.266 (Oct. 2, 1998) (Venez.) [hereinafter LOPNA], *available at* http://www.ventanalegal.com/leyes/ley_organica_proteccion_nino_adolescente.htm (last visited Nov. 22, 2010).

53. *See, e.g.*, LOPNA arts. 70–73 (providing for affirmative obligations); *Id.* art. 75 (prohibiting information and/or images that "promote or incite violence").

development.[54] Regarding media, Article 58 reads "[c]hildren and adolescents have the right to receive adequate information for purposes of their overall development."[55] In addition, international laws specifically expound upon the children-centered aspirations of the domestic framework.[56]

Venezuelan courts have also used the protection of children as a basis for making certain media-related decisions. For example, in February 2007, a child welfare court[57] fined *Tal Cual* author Laureano Marquez and editor Teodoro Petkoff a total of almost $50,000 for addressing a satirical editorial letter to President Chávez's daughter.[58] The letter first appeared on the front page of the opposition newspaper in November 2005.[59] It asked Chávez's nine-year old daughter Rosinés to request that her father "soften his attacks on his political opponents."[60] The government prosecuted the newspaper on the child's behalf.[61]

Citing LOPNA and the UNCRC, the court asserted several

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54. The newest Constitution of Venezuela [Constitución de la República Bolivariana de Venezuela] [hereinafter Constitution] was adopted on December 20, 1999. *See* Constitución de la República Bolivariana de Venezuela, *available at* http://venezuelanalysis.com/constitution. The 1999 Constitution was the result of a long process: a popular referendum to ask the people if they wanted a new Constitution, the calling of a Constitutional Assembly, and approval as a final referendum by popular vote. PRESS REFERENCE*, supra* note 13. The country was renamed the Bolivarian Republic of Venezuela at this point, signifying Chávez's new objectives. *Id.* Examples of child-centered language include Title III, Chapter V, entitled "Social and Family Rights," which discusses familial rights and responsibilities. Article 78 provides for legal rights and recourse: "Children and adolescents are full legal persons and shall be protected . . . The State shall promote their progressive incorporation into active citizenship, and shall create a national guidance system for the overall protection of children and adolescents." Constitution art. 78.

55. Constitution, *supra* note 54, art. 58.

56. For example, Venezuela became a signatory to the United Nations Convention on the Rights of the Child (CRC) in 1990. CRC's Article 17 addresses mass media, delineating State obligations such as encouraging "the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being." Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25, art. 17(e) (Sept. 2, 1990), [hereinafter CRC] *available at* http://www2.ohchr.org/english/law/crc.htm ("State Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."). Additionally, Article 13 provides that children "shall have the right to freedom of expression." CRC art. 13.

57. In Spanish, the court, which is specifically intended for cases involving children and adolescents, is called the "Tribunal de Protección del Niño y Adolescente de la Circunscripción Judicial del Estaso Lara." *A Decade Under Chávez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela*, HUMAN RIGHTS WATCH 91 (2008), http://www.hrw.org/en/reports/2008/09/18/decade-under-ch-vez. The 1999 Constitution established the court with the premise that a separate court would best protect children's rights and development. *Id.*

58. *Id.* at 90 (citing Case No. KP02-V-2006-00226). *Tal Cual* is one of the newspapers that published the violent photograph. *See supra* note 13.

59. HUMAN RIGHTS WATCH, *supra* note 57, at 90.

60. *Id.*

61. *Id.*

rationales related to child protection, including the child's honor and reputation, privacy, family life, and social development.[62] The judge found in particular that the column had "seriously compromised" the rights established by Article 65 of LOPNA.[63] The judge also reasoned that the letter harmed the father-child relationship because the satirical letter "incited disrespect for symbols of the nation and for her father, since, regardless of the office he holds, he deserves his children's respect, and a medium of communication should not encourage a young girl to despise her father, or involve a girl in political argument concerning the post that he holds, nor does the girl need to have direct knowledge of the political objections of the citizens . . . ."[64]

Overall, the child-centered nature of the Venezuelan legal framework demonstrates an avowed commitment to protecting, educating, and positively influencing the development of children. In this way, the Chávez government justified media regulation as necessary to protect the rights of a particularly vulnerable segment of society by preventing the dissemination of potentially destructive information.

C. Preservation of National Security

Chávez supporters characterized *El Nacional* and *Tal Cual*'s publication of the violent photograph as just one opposition attack in an ongoing "media war" against the Chávez government and its citizenry.[65] In Chávez's view, the private media's powerful influence during Venezuela's recent history of political and social unrest required restrictions.[66] In particular, media played an essential role throughout the tumultuous *coup d'état* in 2002, in which Chávez was removed from

62. *Id.* at 91.

63. *Id* at 91–92. *See* LOPNA, *supra* 52, art. 65. Protects children's "right to honor, reputation, self-image, private life, and family privacy, which may not be subject to arbitrary and illegal interference." The Article prohibits the publication of information that could affect a child's honor or privacy, especially those who are victims or perpetrators of crime. *Id.* The judge's rationale, however, was partially based on common sense: "there is no report to determine how her rights were damaged, what were the disturbances in her family life, what was the harm caused, but we know that it is so, since we have all been children. . . ." *Id.*

64. *Id.* at 91. "The judge concluded that the child's rights to honor, peer-group relations, family life, and social development had been gravely affected." *Id.* at 92. Two days after the article's publication Chávez had discussed his daughter's reaction to the article on his Aló Presidente radio show, saying "She said to me: 'Papi, it's a lack of respect for the coat-of-arms.' She didn't complain about herself, but about the coat-of-arms, you see? How fantastic children are! How fantastic children are to teach a lesson to those animals infesting the sewers!" *Id.* In deciding the case two years later, the child welfare judge referenced this reaction, stating "it is also evident, and follows from the [president's] speeches on 'Hello President' that neither the father, nor the child herself, agrees with the publication." *Id.* (internal quotes omitted).

65. *See, e.g.*, Romero, *supra* note 2 ("The government says the photograph was meant to undermine it, not to inform the public.").

66. *See supra* note 30 (discussing the private media's turn against Chávez).

office for forty-seven hours.[67] Privately owned, opposition-supporting media outlets provided constant publicity in support of an opposition-organized march demanding Chávez's resignation.[68] Chávez, detained by the opposition, agreed to step down temporarily from the presidency, but refused to resign.[69] The media, however, led the public to believe that he had indeed resigned.[70] When Chávez returned to power two days later, privately owned television stations omitted the news, instead airing the film *Pretty Woman* and Tom and Jerry cartoons.[71]

Following the 2002 coup, the war between Chávez and the media continued. For example, several privately owned media outlets supported a general strike shutting down Venezuela's oil industry in protest of the Chávez government.[72] During the sixty-seven-day long strike, these stations broadcasted approximately 700 pro-strike, anti-Chávez advertisements per day.[73]

Media-promoted unrest threatened not only the Chávez administration's stability, but also social stability.[74] Both publicly and privately owned outlets were targeted by violence related to the media war.[75] Even when attacks targeted opposition media, the government strived to preserve the peace and condemn such actions.[76] Furthermore,

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67. *See* Klein, *supra* note 39.

68. *El Nacional* and *Tal Cual*, the newspapers that published the violent photo, were two of the predominant print media sources providing highly partisan coverage in the time surrounding the 2002 media coup. HUMAN RIGHTS WATCH, *supra* note 57, at 69. "[I]n the days leading up to the April coup, Venevision, RCTV, Globovision and Televen replaced regular programming with relentless anti-Chávez speeches, interrupted only for commercials calling on viewers to take to the streets: 'Not one step backwards. Out! Leave Now!' The ads were sponsored by the oil industry, but the stations carried them free, as 'public service announcements.'" Klein, *supra* note 39.

69. A counter-march in support of president/clash between two sides occurred also. Soto, *supra* note 24, at 407. Chávez finally stepped down at the urging of high forces.

70. Klein, *supra* note 39. A transitional government was put in place, led by Pedro Carmona as interim President, but a counter-coup by the pro-Chávez Presidential Guard returned Chávez to power within the next two days. *Id.*

71. *Id.*

72. The oil industry, which has been struggling in recent years, is the foundation of Venezuela's economy. *See* Romero, *supra* note 2. Lost economic activity during this particular strike, which lasted for sixty-four days, cost the country approximately $14 billion. Bernardo Alvarez Herrera, *Venezuelan Ambassador to the United States, Political Conflict and Freedom of Expression in Venezuela*, ILSA J. INT'L & COMP. L., 565, 567 (2005).

73. *Id. See* Klein, *supra* note 39.

74. Herrera, *supra* note 72, at 567.

75. For example, drive-by shooters injured two workers at the regional branch of ViveTV, a state-owned, community-based television channel. Tamara Pearson, *Shooting Attack on Venezuelan Community Television Station ViveTV*, VENEZUELANALYSIS (Aug. 1, 2011), http://venezuelanalysis.com/news/6395 ("Vive's programming consists of cultural and education shows. 90% of Vive's content is created outside the studio, unlike the other state owned station, VTV, which is highly studio based. Vive is known for its grassroots, community-based & created coverage. It has also organized tens of thousands of media production workshops around country.").

76. *See, e.g.*, Rory Carroll, *Venezuelan TV Station is Stormed by Supporters of Hugo Chávez*, THE GUARDIAN (Aug. 4, 2009), *available at*

the violent effects of the media war often reached the general population. Throughout the 2002 coup, murders, injuries, and looting endangered public safety.[77] As the Chávez administration struggled with societal crime, violent and disturbing imagery in the press challenged stability instead of promoting it.[78]

From the perspective of the Chávez administration, selectivity and misinformation in the private media further challenged public confidence in the government. Privately owned media sources accused Chávez of implausible dealings ranging from commanding slum militias to causing a major mudslide.[79] They also misreported information such as the results of public opinion polls and omitted important events such as the launching of the first Venezuelan satellite, named the Simon Bolivar.[80] Such selective releases of information and deliberate misinformation provoked future unrest against the government and provided the rationale for the need to restrain the media.

As with the protection of children, the 1999 Constitution consistently calls for the preservation of national security.[81] For example, Article 322 maintains, "[n]ational security is an essential competence and responsibility of the State, based on the overall development of the latter, and its defense is the responsibility of all Venezuelans."[82] Societal responsibility for preserving order should be shared by public and private entities.[83] Similarly, RESORTE repeatedly

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http://www.guardian.co.uk/world/2009/aug/04/venezuela-tv-station-armed-raid (Individual supporters of Chávez stormed the Globovision office, armed with tear gas and handguns. Interior minister, Tareck El Aissami, asserted that the attacks were not the result of government influence: "We condemn this attack energetically and reject this type of violent action against Globovision. We don't accept that violence is the instrument to solve our differences.").

77. *Id.*

78. *See, e.g.*, *Reggae Artist Defies Ban on Violent Images*, FREEMUSE (Aug. 24, 2010), http://www.freemuse.org/sw38948.asp. The music video "Rotten Town" was released just after the violent photo ban was issued, when it still applied to all violent images. *Id.* The video, by Venezuelan reggae singer Onechot, portrays an innocent child struck down by a stray bullet and his blood seeping through Caracas' streets. The video has spread rapidly across the Internet despite government protests. *Id.*

79. Opposition in the media has accused Chávez of "plotting assassinations and bombings, sponsoring foreign terrorist organizations and leading anti-democratic movements across the hemisphere, and commanding an army of clandestine guerilla groups and slum militias." Soto, *supra* note 24. Commentaries and editorials "appeared to blame Chávez for just about every problem in Venezuela, from the Vargas mudslide to the coup." WILPERT, *supra* note 30, at 205.

80. *Id.* at 24 (regarding inaccurate reporting of public opinion polls); *Map of Freedom in the World: Venezuela,* FREEDOM HOUSE (2009), http://www.freedomhouse.org/template.cfm?page=363&year=2009&country=7733 (last visited Nov. 22, 2010) (regarding media's failure to report on satellite launch).

81. In fact, the seventh of its nine sections is entitled "National Security." *See* Constitution, *supra* note 54, art. 322–32.

82. *Id*. art. 322.

83. "National security is based on shared responsibility between the State and civil society to implement the principles of independence, democracy, equality, peace, freedom, justice, solidarity, promotion and conservation of the environment and affirmation of human rights. . . . The principle of shared responsibility applies to the economic, social, political, cultural,

asserts national security objectives, declaring that "content dissemination is governed by the public interest by virtue of its importance and impact on social, cultural, political, economic and national security."[84] These references to national security provide authority and an ideological ground for security-based media restrictions.

According to the Chávez administration and its supporters, this history of threats by Venezuela's privately owned media towards the government, and against social stability, validated the use of regulations. Venezuelan ambassador to the United States, Bernardo Alvarez Herrera, framed the government's stability concern: "What is the proper role of the state when it is faced with a media whose power is roughly equal to that of that state, and when that power is used actively to destabilize a democratically elected government?"[85] Discussing the violent photograph ban, Chávez stressed the potentially destabilizing nature of the battle, stating, "[t]he opposition have been working on a mix of plans, so that by today we would have been in a state of chaos in the country . . . Nonetheless, it seems as though their plans haven't worked and they are desperate now, so they are trying to generate reactions from the people."[86]

In sum, the Chávez government justified media regulations with its objectives of promoting Bolivarian socialism, protecting children, and preserving national security. In light of the needs of the Venezuelan people, goals of the government, and the national legal framework, such regulations may be necessary. According to the government perspective, reasonable regulations like the violent photograph ban benefited the people and advanced the aims of the Bolivarian Revolution.

III. ENDANGERING RIGHTS: THE OPPOSITION ARGUMENT AGAINST MEDIA REGULATION

Critics of the violent photograph ban characterized it as an

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geographical, environmental and military spheres." Constitution, *supra* note 54, art. 326.

84. LEY RESORTE, *supra* note 48, art. 3. The government is responsible for "[t]he protection of national security." RESORTE art. 6(2).

85. Herrara, *supra* note 72, at 565–66 (Herrara's speech to the International Law Student's Association advanced the government's view on political conflict and freedom of expression in Venezuela, advocating that freedom of expression and the press are thriving in the nation.). *See also* Soto, *supra* note 24, at 456 ("It is a vital interest of the state to protect its political stability and prevent potential plots to overthrow its democratically elected government, and the political unrest in Venezuela, combined with the antagonistic role the media has played in it" can justify reasonable restrictions. The restrictions on freedom of expression imposed by RESORTE are justified based on the security of the nation.).

86. Eva Golinger, *Media Pornography*, VENEZUELANALYSIS, (Aug. 19, 2010), http://venezuelanalysis.com/analysis/5581.

infringement upon rights of the people and press.[87] While the Chávez government emphasized the need for regulations like the ban, opposition voices in privately owned media sources and supportive international organizations portrayed such measures as unwarranted risks to rights exceeding the government's authority.[88] According to this position in the media war, measures silencing opposition in the media threatened freedoms of expression and information.

A. Measures Against the Press

The opposition cited government action against and influence over the press as a threat to rights. According to the opposition, the Chávez administration unreasonably targeted privately owned media with extreme regulation and punishment. Chávez's stated concerns about media ownership conflicted with growing government control over both public and private media.

The opposition suggested that targeted attacks against the media such as imprisonment, sanctions, and shutdown of news sources unduly silenced any challenges to Chávez.[89] From this perspective, these attacks promoted self-censorship in all privately owned media, damaged the well-being and business of targeted individuals and entities, and threatened individual rights.[90]

The government punished many individual members of the media.[91] For instance, Oswaldo Álvarez Paz, an opposition leader and former state governor who writes columns for *El Nacional*, was jailed and prosecuted in February 2010 for publicly claiming that Chávez

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87. *See Venuzela's Media War, supra* note 21 and accompanying text.

88. One strong representation of the "opposition" is the Democratic Unity Table (MUD), the political coalition formed in preparation of the 2012 Presidential election, and the party of two-time Presidential candidate Henrique Capriles Radonski. *See* UNIDAD VENEZUELA, http://www.unidadvenezuela.org/ (last visited Apr. 15, 2013). *See also* ALLAN R. BREWER-CARIAS, DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT (2010) (Chávez opponent argues that the undemocratically enacted 1999 Constitution has led to the dismantling of Venezuelan democracy.).

89. *See, e.g.*, *Journalist Committee Denounces Repressive Measures by Chávez*, SOUTHERN PULSE (Feb. 23, 2011), http:www.southernpulse.com/_webapp_3834678?Journalist_committee_denounces_repressive_measures_by_Chávez (citing a report by the Venezuelan Journalists Protection Committee criticizing overly "aggressive" government regulations); WILPERT, *supra* note 30, at 33 (claiming that while the Chávez government did explicitly censor as feared by the opposition, the opposition protests intimidation of the private mass media occurring through methods such as fines and broadcast licensing).

90. *See* Soto, *supra* note 24.

91. *See, e.g.*, Ender Ramírez Padrino, *CNP Repudia Ataques Contra Periodistas y Medios de Comunicación*, EL NACIONAL, (Aug. 3, 2011), *available at* http://www.el-nacional.com/www/site/p_contenido.php?q=nodo/226286/Nación/CNP-repudia-ataques-contra-periodistas-y-medios-de-comunicación. (National Committee to Protect Journalists complains of government silencing of journalists and lack of access to information, specifically repudiating attacks on LIVE TV host Zulia Fe y Alegria.).

supports Basque and Colombian terrorists.[92] Similarly, columnist Francisco Perez was jailed in June 2010 after accusing a local mayor of nepotism in a newspaper editorial.[93] A federal court sentenced Perez, who had forty years of journalism experience, to three years and nine months in prison and fined over $18,000 (USD).[94] The court relied on insult laws, questioned by the opposition, which provide for penalties including imprisonment, fines, disclosure of private information,[95] and the denial of licenses.[96] The court specifically relied upon an insult law prohibiting "disrespectful expression toward government officials."[97]

The Perez case represented a trend of punishing media members with severe penalties defined by wide judicial discretion but strong administrative influence.[98] Such decisions appeared problematic because they promoted fear of punishment while incentivizing selective self-censorship.

From the opposition perspective, the shutdown of privately owned television channels also indicated government impropriety. Following the 2002 media coup, Chávez identified four major opposition channels as the "four horsemen," blaming them largely for the coup's success.[99] These channels became government targets. In 2007, the government shut down RCTV Internacional, the most popular television channel in

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92. *See* Roger Noriega, *The Jailing of Oswaldo Álvarez Paz*, FORBES, (Mar. 23, 2010), http://www.forbes.com/2010/03/23/hugo-chavez-venezuela-oswaldo-alvarez-paz-opinions-contributors-roger-noriega.html. Paz also acknowledged the existence of drug trafficking in Venezuela. *Id.* He was charged with conspiracy, "public instigation of criminality" and "spreading false information." *Id.*

93. *See* Roy Greenslade, *IFJ Condemns Jail Sentence on Venezuelan Columnist*, GUARDIAN (June 18, 2010), http://www.guardian.co.uk/media/greenslade/2010/jun/18/press-freedom-venezuela.

94. *Id.* The International Federation of Journalists maintained, "[i]t is a brutal, unacceptable judgment with very few international precedents." *Id.*

95. For example, in July 2005, the Office of the Attorney General used insult laws to justify the investigation of major newspaper *El Universal* for an article that was critical of Chávez and the judiciary. In November of the same year, an *El Nacional* writer was forced to hand over a tape of interviews, with the government's justification being that he had made them near the presidential palace. Freedom House, *Freedom of the Press*: *Venezuela* (2009), http://www.freedomhouse.org/template.cfm?page=251&country=7088&year=2009. *Id.*

96. *See, e.g.*, *Freedom of the Press*: *Venezuela* (2009), FREEDOM HOUSE, http://www.freedomhouse.org/template.cfm?page=251&country=7088&year=2009 ("In August, the National Telecommunications Commission (CONATEL) closed two FM radio stations for operating without proper licenses. The closures were condemned in Venezuela and abroad as politically motivated.").

97. HUMAN RIGHTS WATCH, *supra* note 57 at 65 (these laws were reformed in 2005 to increase penalties for criminal defamation and libel).

98. *See, e.g.*, Soto, *supra* note 24 (citing the deprival of freedom of expression rights by some courts, often combined with the use of broad judicial discretion and a lack of strong justification); HUMAN RIGHTS WATCH, *supra* note 57 (discussing several court cases in which harsh penalties were issued for journalists and referencing the vagueness of provisions as one explanation for unduly harsh outcomes).

99. *See* HUMAN RIGHTS WATCH, *supra* note 57. The four horsemen were the channels RCTV Internacional, Globovision, Venevision and Televen. *Id.*

Venezuela, by denying renewal of its public license and forcing it to move to subscriber cable.[100] In early 2010, the Chávez administration further ordered cable networks to stop broadcasting the channel, saying it would lift the suspension only if RCTV agreed to comply with its demands, for example, by agreeing to broadcast Chávez's speeches.[101] In June 2012, Guillermo Zuloaga, an owner of the television news channel Globovision, fled the country after the government issued a warrant for his arrest.[102]

The Chávez government also doled out penalties that the opposition considered extreme. For example, in October 2011, the National Commission on Telecommunications (CONATEL) fined Globovision $2.16 million USD for its coverage of a prison riot.[103]

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100. This was a highly unpopular decision condemned domestically and internationally. WILPERT, *supra* note 30, at 232. *See also* Reardon, Perez & Duque, *supra* note 32, at 232 ("In Venezuela Freedom of Speech is of vital importance and it's no secret to anyone that the closure of our oldest running television channel, RCTV, had a huge impact on Venezuelan society. After RCTV was closed, a large number of young people and other members of civil society raised their voice, and continue to do so, on behalf of freedom of expression. From that moment on people began to understand the importance of keeping themselves informed. Meanwhile, the government has gone on to close numerous other means of communication, including approximately 362 radio broadcasts and many other written media, though they maintain the independent media outlets that they consider too dangerous to close because of the enormous social backing and support they have – Globovision, for example."). The government's perspective on the shutdown was that RCTV's participation in the 2002 coup, oil industry shutdown, and other regulatory violations, combined with the government's discretionary power over licensing, legally permitted and in fact obligated the closure. WILPERT, *supra* note 30, at 232.

101. *See* Anthony Mills, *Venezuelan Student Killed in TV Protests*, INT'L. PRESS INST. (Jan. 26, 2010), http://www.freemedia.at/site-services/singleview-master/4682/.

102. *See Venezuela Orders Arrest of TV Owner Critical of Chávez*, B.B.C. NEWS (June 12, 2010), http://www.bbc.co.uk/news/10300428; *T.V. Channel Owner Arrested in Venezuela*, U.S.A. TODAY (June 12, 2010), http://www.usatoday.com/news/world/2012-06-venezuela-tv-channel_N.htm. The state prosecutor claimed that the warrants were related to business issues with two car dealerships partially owned by the Zuloagas. *Id.* The opposition considered Globovision to be its main channel, even though it could only be watched by people with cable or an open signal source. Reardon, Perez & Duque, *supra* note 32. In March 2013, Globovision announced that it had accepted a buyout offer, blaming its financial difficulties upon regulations by the Chávez government. Tamara Pearson, *Venezuelan Opposition Channel Globovision to be Sold after Elections,* VENEZUELANALYSIS, (Mar. 12, 2013), http://venezuelanalysis.com/news/8201.

103. *See* AVN, *Comisión de Medios de la AN avala decisión de Conatel de multar a Globovisión*, EL NACIONAL (Oct. 18, 2011), *available at* http://www.el-nacional.com/noticia/5628/16/Comisión-de-Medios-de-la-AN-avala-decisión-de-Conatel-de-multar-a-Globovisión.htmlón-de-Medios-de-la-AN-avala-decisión-de-Conatel-de-multar-a-Globovisión.html; Juan Francisco Alonso, *Globovisión Accuses Government at International Courts*, EL UNIVERSAL (Oct. 20, 2011), *available at* http://www.eluniversal.com/nacional-y-politica/111020/globovision-accuses-government-at-international-courts (discussing Globovision's decision to appeal the fine to domestic and international courts); Tamara Pearson, *Venezuelan Opposition TV Globovision Fined for Manipulation*, VENEZUELANALYSIS, (Oct. 19, 2011), http://venezuelanalysis.com/news/6569. A gang at Venezuela's El Rodeo Prison took other prisoners hostage in June 2011. *Id.* CONATEL claimed that the station had created a "situation of uncertainty and anxiety" by encouraging families to protest outside of the prison, retransmitting the same interviews 269 times over four days, and showing footage of the

Opposition coalition MUD called the fine a "disguised attempt to close the channel," while Venezuelan NGO *Alianza por la Libertad de Expresión* (Alliance for Freedom of Expression) characterized the penalty as "arbitrary" and "disproportionate."[104] Such attacks appeared to be targeted against political opposition, and more specifically the four horsemen.

The Chávez government argued that the publication of incendiary pieces such as *El Nacional*'s violent photo fostered social instability, but the pattern of violence challenged this proposition.[105] Although violence occurred against the media at large, this violence largely targeted the privately owned opposition media.[106] For example, in 2008 several opposition media members were subject to brutal attacks, including a reporter, a photographer,[107] the vice president of a daily newspaper,[108] and a news anchor.[109] At times, Chávez called for such attacks in the media, and indeed government officials executed some of the attacks.[110] Citizen protests against government restrictions also led to violence. In January 2010, a student was killed and nine police officers injured during protests against the government order to stop broadcasting RCTV International.[111] The imbalance of violence against opposition media suggests that the Chávez media regulations may have served a political role exceeding the government's authority.

The opposition feared that the Chávez administration limited the media in order to preserve its own political power rather than to protect Venezuela's citizenry. It blamed polarization in the press on government control over the media and the selective use of sanctions

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prisoner's mothers. *Id.* CONATEL cited RESORTE Articles 27 and 29, which respectively provide for a fine of up to 10% of income and/or the suspension of transmissions for "promoting anxiety, disorder, or justifying crime." *Id.* The penalty equaled about 7.5% of the station's 2010 gross income. *Id.*

104. *Id. See* El Universal, *Alliance for Freedom of Expression Rejects Fine on TV Channel*, EL UNIVERSAL (Oct. 20, 2011), *available at* http://www.eluniversal.com/nacional-y-politica/111020/alliance-for-freedom-of-expression-rejects-fine-on-tv-channel.

105. *See supra* Part II(B) (discussing threats to social stability).

106. *See* FREEDOM HOUSE, *supra* note 96 ("Violent attacks against the media such as shootings and assaults occur regularly.").

107. In July 2008, a reporter and photographer from opposition newspaper La Verdad were assaulted by local officials while attempting to cover waste disposal practices. *Id.* The official confiscated the journalists' equipment and they were allegedly beaten and held for over two hours. *Id.*

108. The vice president of the Caracas daily *Reporte Diario de la Economia*, Pierre Fould Gerges, was murdered in Caracas on June 2, 2008. *Id.*

109. Two weeks after Gerges' murder, news anchor, Javier Garcia, of the opposition channel RCTV was found stabbed to death in his apartment. *Id.* Supposedly he had been robbed, but the case was still being investigated at the end of 2008. *Id.*

110. *See* HUMAN RIGHTS WATCH, *supra* note 57, at 72 (arguing that such attacks upon individuals and social stability are generally not the fault of the journalists but instead governmental actions).

111. *See* Mills, *supra* note 101.

against opposition-supporting media.[112] The government already exercised strong influence over the public, not only through media-related policy, but also through publicly owned media sources.[113]

If this was a media war, not all of the media was the enemy—the government chose which parts were. As of 2009, government-controlled publications included a daily newspaper, a number of television channels with national coverage, and Chávez's daily radio and television program (*Aló Presidente*), broadcasted on the *Radio Nacional* network.[114] The government further exercised control over commercial broadcasting in a variety of ways.[115] Most notable among Chávez's presidential powers over public access was the mandatory broadcasting of *cadenas*, official announcements replacing scheduled programming on all television channels.[116] Overall, the government's media influence and selective sanctioning suggested the need for strong counteracting voices.

Past use of media and policy buttressed the premise that Chávez might attempt to defeat his political opposition through media control. As he came to power and throughout his presidency, Chávez took advantage of the media by gaining and retaining publicity in broadcasts and articles using publicly owned media outlets.[117] For example, in the child welfare court case discussed in Part II, *Tal Cual*'s editor, Petkoff, argued that Chávez himself was responsible for making his daughter

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112. Reardon, Perez & Duque, *supra* note 32 ("The polarization of the means of communication was inevitable; with a great majority of media now controlled by the government, and with only a few independent channels that must watch what they say for fear of government reprisal, fines, and possible closure of their media outlet." The opposition viewpoint in this dialogue also compares the large number of government-owned and controlled television networks to the lack of opposition-owned and controlled channels.).

113. Along with media control, "Mr. Chávez and his allies still control every significant federal institution in the country, including the Supreme Court, the national oil company, the attorney general's office and the human rights ombudsman's office. The bureaucracy has also been expanding through dozens of new expropriations and nationalizations of private corporations." Romero, *Shift in Venezuelan Politics as Chavez's Opposition Reclaims Seats in the Legislature*, N.Y. TIMES (Sept. 28, 2010), *available at* http://www.nytimes.com/2010/09/28/world/americas/28venez.html?_r=0.

114. *See also* Djankov, *supra* note 38, at 353 (finding that countries with greater state ownership of the media have less press, political, and economic freedom).

115. Before broadcasting, television programs and network chains must link to a central program. Mayobre, *supra* note 26, at 183. Commercial television stations are forced to buy packages including Channel 5, which features educational and documentary programming. *Id.*

116. During the first nine years of his presidency, Chávez ordered 1,710 mandatory broadcasts of his speeches and other government events, for a total of 43 days of uninterrupted transmission, often during peak viewing hours. During two months of the 2002-03 oil strike, President Chávez used 40 hours of airtime in addition to his weekly television and radio program. HUMAN RIGHTS WATCH, *supra* note 57, at 70.

117. PRESS REFERENCE, *supra* note 13, at 13. "The broadcast media helped to create Chávez." *Id.* Chávez appeared on television during failed 1992 coup that first brought him in the public eye. *Id.* Before his election in 1998, he participated in televised interviews and debates. *Id.* It has been suggested that the print media, including papers like *El Nacional* and *Tal Cual*, has often been created more opposition to Chávez than the televised media. *Id.*

into a public figure in his speeches.[118] Additionally, Chávez created a 2009 reform abolishing term limits for the presidency and other elected offices to reinforce and extend his political power.[119] These actions showed a willingness to use both media and regulation for pure political gains.[120]

Opponents to Chávez media regulation asserted that the government dangerously restrained the media through the use of law and judicial enforcement.[121] Obligations under laws such as RESORTE restrained what the media could broadcast and publish, with stations facing suspension and revocation of licenses for broadcasting material deemed inappropriate.[122] Through specific registration and licensing requirements, the government selected whom, and under what conditions, could publish or broadcast.[123] Failure to comply with requirements could lead to shutdown by the CONATEL.[124] As of August 2009, thirty-four radio stations had recently had their licenses revoked, allegedly for "irregular paperwork."[125] The government targeted over two hundred additional radio stations for other alleged irregularities.[126] The high number of stations facing difficulties involving government regulators demonstrated that government sanctioning may have been inappropriate and arbitrary, buttressing the

118. A few days before the article was published, during his weekly *Aló Presidente* radio broadcast, Chávez asked that the national coat of arms be modified since his daughter had noticed that the white horse on the emblem was looking the wrong way. HUMAN RIGHTS WATCH, *supra* note 57, at 92.

119. *See* FREEDOM HOUSE, *supra* note 96.

120. *Id.* ("Venezuela's leading newspapers are privately owned, and most identify with the opposition. As a result, they are subject to threats and violence by the government and its supporters, sometimes leading to self-censorship. Local and regional media are particularly dependent on government advertising revenue, leaving them vulnerable to economic retaliation for criticism.").

121. *See* BREWER-CARIAS, *supra* note 88, at 406 (citing the lack of process in administrative proceedings, use of sanctions, high-level decision making, and interruption of programming). Chief dangerous restraints in the law and targeted attacks against the media during the first decade of media regulation under Chávez include: an expansion of the scope of insult laws, increased penalties for defamation, libel, and vaguely defined incitement provisions, restrictions upon public access to information, and favoring government-owned over privately-owned television channels. *See* HUMAN RIGHTS WATCH, *supra* note 57, at 90–91.

122. BREWER-CARIAS, *supra* note 88, at 406.

123. One pre-Chávez journalism law, passed in 1994, created strict licensure requirements for journalism. PRESS REFERENCE, *supra* note 13. The law established harsh penalties, including imprisonment, for practicing without a license. *Id.*

124. CONATEL, formerly known as the Ministry of Communication, is Venezuela's independent telecommunications regulator. *Comision Nacional de Telecomunicaciones: Conatel Venezuela*, BUSINESS NEWS AMERICAS, http://www.bnamericas.com/company-profile/en/Comision_Nacional_de_Telecomunicaciones-Conatel_Venezuela (last visited Nov. 29, 2010). The agency is intended to facilitate "projects between government agencies and other organizations that promote the integration of telecommunications services, and encourages the proliferation of information through such projects." *Id.*

125. *Venezuelan TV Station*, *supra* note 76.

126. *Id.*

opposition argument against regulation.

The political opposition also pointed to the Chávez government's continuous attempts to increase government influence over media. In August 2010, the government temporarily shut down the newspaper *6to Poder* ("Sixth Power") for publishing a photo montage of six prominent female officials dressed as cabaret dancers.[127] Along with the violent photograph ban, this action suggested the government had extended its control over newspapers, despite the lack of clear publishing regulations.

A bill proposed in 2009 would imprison journalists and broadcasters for up to four years for publishing "harmful" material that threatens "the peace, security and independence of the nation and the institutions of the state."[128] In June 2010, the government created the Center for Situational Studies of the Nation, which has broad powers in limiting the dissemination of information that it deems confidential.[129] These actions indicated the government's willingness to expand control over the media, potentially a willingness to infringe upon freedoms of expression and information. On the whole, the various measures taken to restrict media, particularly privately owned opposition media, bolstered the view that the Chávez government overstepped its obligations and threatened the rights of Venezuelans.

B. International Voices Supporting the Political Opposition Position

International voices, such as global media outlets and human rights organizations, predominately favored the political opposition position, presenting government media regulation as harmful. Negative international responses to Chávez's actions against the media included placing Venezuela on media watch lists,[130] declaring that its media

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127. The article was entitled "The Mighty Girls of the Revolution." *See* El Universal, *Venezuelan Government is Urged to Respect Free Media*, EL UNIVERSAL (Aug. 31, 2011), *available at* http://www.eluniversal.com/2011/08/31/venezuelan-govt-is-urged-to-respect-free-media.shtml.

128. Will Grant, *Venezuela Mulls Tough Media Law*, B.B.C. NEWS (July 31, 2009), *available at* http://news.bbc.co.uk/2/hi/8177862.stm.

129. *Venezuela: Close Chávez's New Censorship Office*, HUMAN RIGHTS WATCH (July 21, 2010), http://www.hrw.org/news/2010/07/21/venezuela-close-chavez-s-new-censorship-office. ("On June 1, 2010, President Hugo Chávez issued a presidential decree creating the Center for Situational Studies of the Nation (*Centro de Estudio Situacional de la Nación*, CESNA), which has broad powers to limit public dissemination of "information, facts or circumstance[s]" that it decides should be confidential."). Human Rights Watch portrays this as the creation of a "censorship office," claiming that broadly worded guidelines will allow for controlling and censoring public debate through the employment of criminal penalties. *Id.*

130. In October 2000, the International Press Institute placed Venezuela on its "Watch List" for threats to the freedom of the press, and the nation has been placed on the list several times since then. *See* Michael Kudlak, *IPI Press Freedom Advocacy Mission Set to Visit Venezuela*, INT'L. PRESS INST. (Nov. 13, 2009), http://www.freemedia.at/our-activities/missions/singleview/4608/. The International Press Institute (IPI) is a "global organization of editors, media executives and leading journalists dedicated to the protection of

status was "not free,"[131] condemning actions like the violent photograph ban on a case-by-case basis,[132] and holding conferences on the topic.[133] For example, Human Rights Watch declared, "[i]n its efforts to gain ground in this "media war," the government has engaged in discriminatory actions against media airing opposition viewpoints, strengthened the state's capacity to limit free speech, and created powerful incentives for government critics to engage in self-censorship."[134] From the perspective of international organizations, the Chávez administration punished them for speaking out and reflecting dangers to Venezuelan media.[135] Critics of the Chávez regulations consistently cited reactions by international organizations as indicative of threats to their rights by the government.[136]

International law supplements domestic authority on media-related freedoms.[137] Much like the views of domestic political opposition to Chávez, international advocacy on the media tends to be ideologically

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press freedom." *Id.* They sent an "advocacy mission" to Venezuela in November 2009. *Id.*

131. The 2009 Freedom House Press Survey cited several factors related to an overall decline in press freedom. *See* FREEDOM HOUSE, *supra* note 96. Chief concerns include the "politicization of the judiciary, widespread corruption, harassment of the opposition, extensive self-censorship, and reprisals orchestrated by public officials." *Id.* Among the dangerous restrictions on media are RESORTE's vaguely worded provisions, harsh penalties for offensive material in insult laws, and denials of access to independent journalists at official ceremonies. *Id.* Past reports have also condemned the decline in press freedoms in Venezuela. *See, e.g.*, *id.* (citing increased severity in punishments for disrespect ("*descato*"), insult laws, mandatory broadcasting of *cadenas*, direct assaults against journalists and media outlets, and government control over several media sources).

132. *See* Greenslade, *supra* note 93 ("The International Federation of Journalists has condemned the jail sentence and fine handed out to Venezuelan columnist Francisco Perez."). Other organizations speaking out against the use of restraints and attacks upon the media include Reporters without Borders, the National Journalists' Guild, and Human Rights Watch.

133. *See* El Universal, *Freedom of the Press in Latin America Conference*, EL UNIVERSAL (Nov. 18, 2011), *available at* http://www.eluniversal.com/nacional-y-politica/111118/freedom-of-the-press-in-latin-america-conference.

134. HUMAN RIGHTS WATCH, *supra* note 57, at 64.

135. Journalists and organizational representatives have been subject to criminal investigations and prosecution and even forced to leave the country. *See* HUMAN RIGHTS WATCH, *supra* note 57 (The Chávez administration has instigated criminal investigations of human rights organizations allegedly receiving funding from the United States as well as prosecuted several critics of the government. Nor has the government provided protection for human rights "defenders" receiving threats.). In reaction to Human Rights Watch's *Decade Under Chávez* report, two journalists were thrown out of the country. FREEDOM HOUSE, *supra* note 96.

136. *See, e.g.*, El Universal, *IAPA [Inter-American Press Association] Rejects Laws Affecting Free Speech in Venezuela and Ecuador*, EL UNIVERSAL, Nov. 18, 2011, *available at* http://www.eluniversal.com/nacional-y-politica/111118/iapa-rejects-laws-affecting-free-speech-in-venezuela-and-ecuador (opposition cites international press association view that draft law on Communication for People's Power, which would allocate funds and provide equal assignment of official advertisements to community media, would infringe upon free speech).

137. International law has even been used in creating Venezuela's law. "In enacting RESORTE, the Venezuelan National Assembly looked abroad for guidance. The Assembly studied legislation from seven countries as well as international human rights conventions containing freedom of expression and children rights provisions during the drafting period." Soto, *supra* note 24, at 428.

democracy-driven.[138] For instance, the Inter-American Democratic Charter, signed by Venezuela in 2001, asserts that freedom of expression and the press are essential components of the exercise of democracy.[139] The Inter-American Court of Human Rights called for preliminary protective measures in favor of privately owned media outlets, which the Venezuelan government refused to enforce.[140] This authority questioned Chávez's creation and use of domestic regulations against the media.

C. Threats to Freedoms of Expression and Information

Opposition and international advocates argued that the Chávez administration's actions threatened the freedoms of expression and information for the press and the people. The violent photograph ban involved both the right to publish the image (expression) and the right of the people to know about crime and violence (information). The opposition maintained that the crucial development of a participatory democracy requires these freedoms.[141]

The opposition responded to government regulation with complaints about rights. After government closure of the *6to Poder* newspaper, opposition voices questioned the government's interference and discussed effects upon freedom of expression.[142] Opposition members regularly called for the need for information[143] and intensified

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138. *See* CANNON, *supra* note 29, at 113 (presenting democratic framework).

139. *See* BREWER-CARIAS, *supra* note 88. *See also* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

140. *See* Jo M. Pasqualucci, *Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights*, 39 VAND. J. TRANSNAT'L. L. 379 (2006). The Venezuelan embassy has renounced the authority of this court, however. *See* Ministry of People's Power for Foreign Affairs, *IACHR Attempts to Impose its Decisions on Internal Affairs in Venezuela*, EMBASSY OF THE BOLIVARIAN REPUBLIC OF VENEZUELA IN THE U.S. (Sept. 19, 2011), *available at* http://venezuela-us.org/2011/09/19/iachr-attempts-to-impose-its-decisions-on-internal-affairs-in-venezuela-2/ ("the government will proceed in denouncing the IACHR as an institution that constantly oversteps its functions and regularly makes decisions that are politically partial in nature and against the Bolivarian Republic of Venezuela.").

141. The preamble to the 1999 Constitution terms Venezuela a "democratic, participatory, and protagonistic society." *See* Ellner & Hellinger, *supra* note 30, at 181, 187. Much of the debate about this ideal considers what respective levels of direct civic participation and representation should be present. *Id.*

142. *See* B.B.C. Mundo, *¿Qué Dice una Detención Sobre la Justicia y los Medios en Venezuela?*, B.B.C. MUNDO (Aug. 24, 2012), *available at* http://www.el-nacional.com/www/site/p_contenido.php?q=nodo/231774/BBC%20Mundo/¿Qué-dice-una-detención-sobre-la-justicia-y-los-medios-en-Venezuela?. *See also supra* note 128 and accompanying text.

143. *See* Ender Ramírez Padrino and María Corina Machado, *El Futuro de los Medios Será el Respeto y el Acceso a Toda la Información*, EL NACIONAL (Aug. 3, 2011), *available at* http://www.el-nacional.com/www/site/p_contenido.php?q=nodo/226338/Nación/Mar%C3%ADa%20Corina%2

debate.[144] Often, these voices discussed freedom of the press concurrently with freedom of expression and the right to information.[145] In particular, opposition and international voices emphasized the need for improved investigative journalism in order to prevent corruption, promote democracy, and inform the people.[146] Journalists cited legal, economic, and political constraints inside and outside of the newsroom, such as the lack of access to government documents and financial resources, warnings from editors and owners, and threats to their lives.[147] In addition, the experiences of neighboring Latin American countries were cited as examples of how creating unjustifiable limitations upon the press can be a slippery slope.[148]

Venezuela's 1999 Constitution advocates for media-related freedoms by expressly granting rights of expression and information.[149] Article 57 of the Constitution proclaims, "Everyone has the right to express freely his or her thoughts, ideas or opinions orally, in writing or by any other form of expression, and to use for such purpose any means

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0Machado:%20El%20futuro%20de%20los%20medios%20será%20el%20respeto%20y%20el%20acceso%20a%20toda%20la%20información (speech by a MUD member and Deputy to the National Assembly, promising that newspapers will defend freedom of information); AVN, *Defensora del Pueblo Instó a Medios a Cuidar el Manejo de Informaciones*, EL NACIONAL (Aug. 25, 2011), *available at* http://www.el-nacional.com/www/site/p_contenido.php/comentar/www/files/comentar/p_contenido.php?q=nodo/232257/Nación/Defensora-del-Pueblo-instó-a-medios-a-cuidar-el-manejo-de-informaciones (coverage encouraging accurate media reporting).

144. *See* Gustavo Méndez, *"We, Venezuelans, are Fed Up with Polarization*," EL UNIVERSAL (Nov. 19, 2011), *available at* http://www.eluniversal.com/nacional-y-politica/111119/we-venezuelans-are-fed-up-with-polarization (president of Andrés Bello Catholic University (UCAB) and opposition supporter José Virtuoso calls for debate and dialogue, stating need for development of participatory democracy).

145. *See* Silvio Waisbord, *The Challenges of Investigative Journalism,* 56 U. MIAMI L. REV. 382 (2002).

146. Waisbord discusses investigative journalism's role in Latin America democracies, including publicizing information about wrongdoing affecting public interest and increasing political accountability. *Id.* at 377. He contends, "press freedom could be understood as a set of conditions anchored in a set of laws and practices that strengthen the autonomy of news organizations and reporters." *Id*. *See also* Reyes, *supra* note 39.

147. *Id.*; Waisbord, *supra* note 145, at 383 (citing external legal constraints including the lack of a right to information, right to reply laws of lack thereof, gag laws, insult and defamation, lack of independent judiciary, alongside political and economic constraints).

148. *See* Jairo E. Lanao, *Legal Challenges to Freedom of Press in the Americas,* 56 U. MIAMI L. REV. 347 (2002). Lanao identifies several major limits upon Latin American press freedoms: the criminalization of speech, particularly through criminal libel and insult laws; licensing and privacy restrictions; and electoral bans. *Id.* Many of these limits are similar to, or more egregious than, those occurring in Venezuela. For example, the decades-long criminalization of speech in several countries, including Bolivia, Brazil, Chile, Colombia, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Panama, and Uruguay, has led to consistent punishment of journalists in these nations. *Id.* at 356–58. One censorship-related issue in this context is the use of prior restraint to stop the dissemination of materials to the public. *Id.* at 360. These measures may threaten both individual and collective rights. *Id.*

149. *Id.* For background and analysis regarding the freedom of expression from an American perspective, see Steven Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 BOSTON U. L. REV. 1275 (1998).

of communication and diffusion, and no censorship shall be established."[150] Likewise, Article 58 provides, "Everyone has the right to timely, truthful and impartial information, without censorship."[151] These provisions provide for the ideals cited by the opposition. However, difficulties with vagueness, lack of administrative guidelines and support, and adverse judicial interpretation limited absolute reliance on Constitutional provisions.[152] Thus, the opposition needed to focus on new paradigms for promoting rights outside of the current domestic structure.[153] For example, access to public information, would promote accountability, efficiency, and transparency in political, economic, and public administration spheres.[154] The opposition viewpoint demanded the protection of both positive and negative freedoms for the people and the media.[155]

The privately owned opposition media and international voices considered Chávez's measures against the media to be threats to freedoms of expression and information, advancing the argument that regulations such as the violent photo ban were impermissible. This position called for reduced regulation and greater media freedoms.

IV. REGULATION AND RIGHTS: BALANCING THE MEDIA WAR

The conflicting positions presented in Parts II and III advocate for distinct approaches to media regulation. While the Chávez government position favored the power to create regulations, the opposition position feared government infringement upon freedoms. Both positions provide meaningful arguments for the future of Venezuelan media. On one hand, when Venezuela faces grave threats to the future of its children or

150. Constitution, *supra* note 54, art. 57.

151. *Id.* art. 58. During the constitutional assembly, Article 58 was one of the most controversial articles. WILPERT, *supra* note 30, at 33. Opponents read in a grant of power of the state to censor information that it determined to not be true or impartial. *Id.* In fact, in 1992, Venezuelan journalists blocked an effort by President Caldera to include a similar amendment. *Id.*

152. *See* BREWER-CARIAS, *supra* note 88, at 152. For example, the inability to identify the "truth" allows the government to control information-sharing and selectively punish the opposition. *Id.* The government is free to reject and even persecute for information that it claims to be in contravention of Article 58. *Id.* Brewer-Carias cites RESORTE and decisions of the Supreme Tribunal of Justice as examples of such government impropriety. *Id.*

153. *See, e.g.*, John M. Ackerman and Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006) (surveying freedom of information laws from an administrative perspective, argue that freedom of information laws are essential to imposing accountability in new democracies). The authors link freedom of expression and freedom of information: "In order to form opinions that are worthy of being expressed, individuals must have access to relevant government information." *Id.* at 88. "Citizens can only be considered to be fully informed and able to participate as democratic citizens if they are able to access the information held about them and on their behalf by the government." *Id.*

154. *Id.* at 92.

155. Freedom of information may be best framed as a positive freedom and essential individual liberty requiring affirmative government action. *Id.* This would function in connection with negative freedoms such as the freedom to express without censorship and control. *Id.* at 90.

national stability, some protection may be necessary. On the other hand, extreme regulation may threaten basic human rights. A clear "win" by either side in the media war could be detrimental to the public. Ultimately, a balance between the two positions is integral in determining whether regulations such as the violent photo ban should be permissible.

A. Emphasizing Extremes Endangers the Public Good

Emphasizing either side of the media war to the exclusion of the other harms the public good. Both positions presented realistic concerns about the potential outcomes of domination by the other. While the Chávez government argued that media regulations such as the violent photo ban were necessary measures for protecting its citizenry, the opposition argued that such measures posed threats to freedoms of expression and information.[156] Allowing one side to prevail over the other would endanger the people and pluralism. Therefore, a balance between the two positions is crucial.

1. Prioritizing the People

The well-being of Venezuelan citizens must be the paramount consideration when analyzing the competing positions.[157] Actions such as the violent photo ban should be considered in the context of the tumultuous social problems in Venezuela, not just as a battle in an ongoing media war.[158] The photo controversy arose at a time of extreme violence and social unrest.[159] Violent crime, as so prominently displayed in the *El Nacional* photograph, threatens the lives of individual citizens and the stability of a society that has been called "more deadly than Iraq."[160]

A police study leaked in 2008 estimated that approximately ten thousand violent deaths occur each year in Venezuela.[161] Studies in the past few years estimate that over fifty murders per 100 thousand Venezuelans are committed each year.[162] Likewise, approximately two

156. *See supra* parts II and III.

157. *See* CANNON, *supra* note 29, at 130 (The media war "must be put into the broader context of contemporary Venezuelan society to be understood properly.").

158. Focusing on drama, coups, demonstrations, and rhetoric wrongly deemphasizes "fundamental structural issues of economics, class, and polity." Ellner & Hellinger, *supra* note 30.

159. Romero, *supra* note 2 (citing an "unprecedented climb" in homicides over the past decade).

160. Romero, *supra* note 2 (citing contributing factors to the murder rates including a grim economic climate, the availability of "millions of illegal firearms," and deficiencies in police control). *See also* Molinski, *supra* note 2 (discussing high homicide rates as well as the potential connection between the violent photograph and threats to society).

161. Molinski, *supra* note 2.

162. Molinski, *supra* note 2. *See also* Francisco Olivares, *Factory of Violence*, EL UNIVERSAL (Nov. 12, 2011), *available at* http://www.eluniversal.com/nacional-y-

hundred homicides are committed per 100 thousand residents each year in the capital city of Caracas, where the gory photograph was taken.[163] Approximately ninety percent of murders are never solved, and the majority fail to result in even one arrest.[164] While some claim that these numbers rose significantly since Chávez's election in 1998, Chávez denied this.[165] The lack of certain measurement demonstrates the patent need for both accurate information from the government and accurate reporting in the media.[166] What is certain is that the violence portrayed in the banned photograph permeates Venezuelan society.[167] Therefore, analysis of the media war must take violence into account.

Citizens also face economic concerns.[168] Venezuela's economy has struggled since a decline in oil prices in the 1980s.[169] By recent measurements, it is the only shrinking economy in South America.[170] Venezuela has the highest inflation rate in the Western hemisphere at

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politica/111112/factory-of-violence (providing similar estimates of 57 victims per 100,000 residents, making Venezuela the second most violent nation on the continent—although this statistic comes from non-official sources and has been rejected by Chávez).

163. Romero, *supra* note 2. The city of Caracas has the second highest murder rate in the Western hemisphere. This compares to about 22.7 homicides per 100,000 people in Bogotá, Colombia's capital, and 14 homicides per 100,000 in São Paulo, Brazil.

164. *Id.* One potential explanation is the low salaries paid to police officers. Some have turned to crimes and corruption to supplement their incomes. The Chávez government recently created a new security force, the Bolivarian National Police.

165. *Compare* Romero, *supra* note 2 (stating that "the judicial system has grown increasingly politicized, losing independent judges and aligning itself more closely with Mr. Chávez's political movement and that many experienced state employees have had to leave public service, or even the country."), *with* Olivares, *supra* note 163 (stating Chávez, who claims that he has decreased murder rates, declared, "The thought of Venezuela being one of the most dangerous countries in the world is untrue. And it is false that here there is more violence, compared with 11 years ago. Eh?").

166. *See* AVN, *PNB: Medios Privados Pretenden Crear una Percepción de Elevada Inseguridad*, EL NACIONAL (Aug. 12, 2011), *available at* http://www.el-nacional.com/www/site/p_contenido.php/ayuda/p_contenido.php?q=nodo/228573/Sucesos/PNB:-Medios-privados-pretenden-crear-una-percepción-de-elevada-inseguridad (Director of Police complains that the private media advances a high perception of insecurity and attacks police, rather than discussing reductions in crime and homicide rates). The Chávez government has not published statistics on violent crime since 2003. *See also* Molinski, *supra* note 2. The government website fails to give homicide rates, although it does provide suicide statistics.

167. Recent surveys indicate that crime is the "preeminent" concern of Venezuelan citizens. *Venezuelan Press Denounces Court Ban on Violent Images*, *supra* note 4.

168. *See, e.g.*, Romero, *supra* note 2 ("While many Latin American economies are growing fast, Venezuela's has continued to shrink. The gap between rich and poor remains wide, despite spending on anti-poverty programs, fueling resentment.").

169. *Id. See* Robert Plummer, *What Now for Venezuela's Economy?*, B.B.C. NEWS (Oct. 7, 2012), *available at* http://www.bbc.co.uk/news/business-19813533?print=true. Venezuela has struggled with major economic problems including high inflation, currency devaluation, and external debt.

170. Simon Romero, *In Venezuela, a New Wave of Foreigners*, N.Y. TIMES (Nov. 6, 2010), *available at* http://www.nytimes.com/2010/11/07/world/americas/07venez.html?ref=venezuela (discussing the replacement of educated professionals leaving the country with an influx of immigrants drawn by loose immigration policies, the opportunity to make an income, and the availability of social welfare programs).

greater than thirty percent a year.[171] Additionally, socioeconomic disparities between rich and poor citizens within the nation are striking.[172] The top twenty percent of the population accounts for about fifty-two percent of all household incomes.[173] As of 2005, less than five percent of the populace owned eighty percent of the nation's land.[174] At the same time, there is a large mass of chronically and severely poor.[175] These economic issues are likely to contribute to violence and overall instability, while also deeply affecting issues including children, national security, and the role of the media.

The often conflicting positions of the privately owned opposition media and government take on greater significance when considered in light of these national concerns. Ultimately, both sides in the media war desired to solve these problems. Both sides considered the people a top priority, although each side focused upon different means towards this end. Chávez supporters considered the distribution of ownership and protection of vulnerable groups necessary, while the opposition found the government's attempts harmful to negative and affirmative rights. These positions must be reconciled according to their common aim of aiding the people.

2. Encouraging Political Pluralism, Not Polarization

Supplanting polarization with pluralism would improve, and perhaps even eliminate, the Venezuelan media war. The role of the media vis-à-vis the Chávez administration was tumultuous; the conflicting positions in the media war not easily reconciled. Nevertheless, combining regulation and media freedom can provide a crucial mix of voices. Moving forward, political pluralism will best be promoted by allowing room for both an active media and reasonable governmental regulation.

Both the privately owned media and the Chávez administration represented politicized and individualized interests that would likely interfere with the Venezuelan public interest were they to gain absolute

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171. *Id.*

172. PRESS REFERENCE, *supra* note 13. The economic stratification in Venezuela is striking. ("With such a small group of very wealthy persons and a huge mass of chronically and severely poor, Venezuela's income distribution is similar to that of traditionally wealthy yet politically corrupt nations of Africa and Asia and considerably more skewed than the United States and United Kingdom.").

173. *Id.*

174. Clive Myrie, *Revolution on Venezuela's Estates,* B.B.C. NEWS (Aug. 23, 2005), *available at* http://news.bbc.co.uk/2/hi/americas/4721961.stm. Having declared an "economic war" against the bourgeoisie, Chávez expropriated at least 207 private businesses in 2010, including banks, cattle ranches and housing developments, prompting many middle and upper class citizens to leave the country. *See* Romero, *supra* note 2.

175. PRESS REFERENCE, *supra* note 13. Although poverty rates worsened since he took office, Chávez has blamed crime and violence upon the high poverty rates in the time before he took office. *See* Molinski, *supra* note 2.

domination. In particular, the current polarization of the press is intertwined with ownership.[176] On the one hand, the private media's calls for freedom of expression and freedom of the press may be contradictory, as each demand for "autonomy of editors, publishers, and media owner . . . is often in reality a property claim disguised as a claim for free speech."[177] In a society with definite socioeconomic disparities, the lower and middle classes may require protection beyond those promoted by the freedom of expression for upper class media owners.[178] On the other hand, a publicly owned press does not necessarily lead to the representation of public voices.[179] True pluralism in Venezuela's media and society requires a "multiplicity of ideas and sources of information."[180]

Political diversity exists among the Venezuelan electorate, establishing the need for a matching multiplicity of information. For example, Chávez won presidential re-election in October 2012 with 54% of the popular vote, with turnout at around 81%, while his chosen political successor, Nicolas Maduro, won 50.7% of the vote in the April 2013 election.[181] Although these close results showed practical threats to Chávez and his party's power, his party still holds considerable support, since it maintained about half of the popular vote.[182]

Another strong example of political pluralism in Venezuela was the failure of sixty-nine Constitutional reforms proposed by Chávez.[183]

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176. *See supra* notes 38–41, 114–115, and accompanying text.

177. CANNON, *supra* note 29, at 126.

178. Enhancing opposition media protection could reinforce the gap between rich and poor rather than promoting collective betterment. In 2003, foreign minister, Roy Chaderton, "complained that the media are immune from the electoral process," claiming that "in Venezuela, you can disagree with the military, religious leaders, intellectuals and politicians, but never dare to challenge the holders of media concessions." *Venezuela's Media War*, *supra* note 21.

179. If the goal is a pluralistic and people-controlled media, maybe truly public television channels would help. WILPERT, *supra* note 30, at 24.

180. *Id.*

181. *Hugo Chávez celebrates re-election in Venezuela,* B.B.C. NEWS (Oct. 8, 2012), *available at* http://www.bbc.co.uk/news/world-latin-america-19867445; *Chávez heir Maduro wins Venezuela presidential election,* B.B.C. NEWS (Apr. 15, 2013), *available at* http://www.bbc.co.uk/news/world-latin-america-22149202. In a legislative election on September 26, 2010, opposition party members won approximately one-third of the National Assembly seats and almost half of the popular vote. Simon Romero, *Shift in Venezuelan Politics as Chávez's Opposition Reclaims Seats in Legislature*, N.Y. TIMES (Sept. 27, 2010), *available at* http://www.nytimes.com/2010/09/28/world/americas/28venez.html ("In practical terms, the seats won by the opposition enable it to block critical legislation and play a role in determining the makeup of important bodies like the Supreme Court, now packed with the president's supporters."). This election took place about a month after the violent photo ban was issued.

182. *Id.* Additionally, the opposition does not consist of a single party, as compared to Chávez's party, the United Socialist Party of Venezuela, which is the nation's largest. *Id.* "No other party rivals [Chávez's] in its nationwide reach. No party has at its disposal the resources of the federal government." *Id.* Furthermore, "no other politician is so identified with efforts to lift the poor and to include them in politics." *Id.*

183. The proposed amendments included ones allowing Chávez to create new administrative regions, the power to declare unlimited states of emergency, and the ability to re-run for election

In December 2007, the referendum narrowly failed in a popular election—with fifty-one percent of citizens voting "no"—demonstrating increased political support for the opposition but also ongoing support for Chávez's reforms.[184] Perhaps most importantly, this political defeat verified the existence of political pluralism in Venezuela, assuaging fears of an authoritarian dictatorship and demonstrating the media's responsibility to represent varying viewpoints.[185]

Political pluralism is one of the "superior values of [Venezuela's] legal order."[186] News sources, both public and private, serve a significant role in the Venezuelan political process.[187] Each side provides information and views that the other may not, which leads to greater public knowledge and debate.[188] Both sides effectively use mass media to attract and mobilize voters during elections and in other political events.[189] The most important voice, however, is that of the people because they are unlikely to see issues as purely black or white.

Despite Venezuela's political diversity, the polarization represented by both sides of the media war harms the people. Many media sources in Venezuela may in fact amplify the social polarization between the poor and privileged by pandering towards specific viewpoints and classes.[190] Divided parties should constructively work

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indefinitely. Simon Romero, *Venezuela Vote Sets Roadblocks on Chávez Path*, N.Y. TIMES (Dec. 4, 2010), *available at* http://www.nytimes.com/2007/12/04/world/americas/04venezuela.html?_r=1.

184. *Id.* During the referendum debate, the opposition and international media framed the proposed reforms as a "putative attack on private property" and an attempt to expand authoritarian power. BRUCE, *supra* note 34, at 177. From the socialist Chávez perspective, the core objective of the referendum was increasing popular power. *Id.*

185. Romero, *supra* note 183 ("For nine years, a combination of populist politics and rising oil prices have propelled Mr. Chávez's socialist program for Venezuela with an almost inexorable momentum. On Sunday, his country put on the brakes. Those results have at once given the opposition a sudden boost and demonstrated the resilience of Venezuela's institutions."). *See* Vincent Bevins, *A Failed Reform, Chávez, and Democracy in Venezuela*, LEFT TURN (Jan. 18, 2010) http://www.leftturn.org/failed-reform-ch%C3%A1vez-and-democracy-venezuela ("Chávez' proposed constitutional reform was far from the cynical power grab it was portrayed as in the U.S. press . . . . the result has finally forced recognition that Venezuelan elections are free and transparent, and that Mr. Chávez is not, and has never been, a dictator. Dictators do not lose elections.").

186. Constitution, *supra* note 54, art. 2 ("Venezuela constitutes itself as a Democratic and Social State of Law and Justice, which holds as superior values of its legal order and actions those of life, liberty, justice, equality, solidarity, democracy, social responsibility and, in general, the preeminence of human rights, ethics and political pluralism.").

187. Although the nation "has been polarized between Chávez's supporters and detractors, Venezuela still enjoys a vibrant public debate in which anti-government and pro-government media are equally vocal in their criticism and defense of Chávez." HUMAN RIGHTS WATCH, *supra* note 57, at 64.

188. The privately owned media essentially leads the opposition fight against Chávez in place of a cohesive political opposition. *See Venezuela's Media War*, *supra* note 23 ("Government sympathizers accuse the private media of leading the fight against the "Bolivarian Revolution" in the absence of a credible and united political opposition.").

189. *See* Ellner & Hellinger, *supra* note 30, at 48.

190. *Id.* at 49.

together towards building a better media for the people instead of combating one another.[191] Political pluralism will best be upheld by embracing public debate in the media rather than by giving full credence to either position in the media war.

On the whole, the interests and influence of each position in the Venezuelan media war demand a balance rather than a grant of unfettered power to either side. If the government uses regulation purely to censor political opposition, the democratic structure of the nation will be threatened. Alternatively, some power to regulate must be granted to the government, as the politicized role of the media calls for reasonable limits in order to protect the citizenry. Political pluralism, which is integral to the public good, will be maintained if each position in the media war retains a public voice.

3. International Coverage and Existing Frameworks Are Inadequate

As international analysis dominates much of the discourse on Venezuela's media war, the equally polarized, politicized nature of international coverage requires skepticism.[192] The United States government supported political opposition to Chávez, most notably though substantial funding of opposition-aligned campaigns in privately owned media.[193] Negative framing by major U.S. media sources reflected this bias by tending to distort coverage of Venezuela.[194] Other international actors more sympathetic to the Chávez administration

191. In speeches Chávez has "demonized his media critics as "facists," "terrorists," "enemies of the people," "liars," "coup-mongers," "immoral," "trash," and "laboratories of psychological warfare." HUMAN RIGHTS WATCH, *supra* note 57, at 72. The opposition has also participated in name-calling. HUMAN RIGHTS WATCH, *supra* note 57. This rhetoric is likely to be counterproductive from either side, as it does not address the real issues at stake.

192. Admittedly, this may require greater scrutiny of many of the sources cited in this article.

193. The United States government has long provided funding to Venezuelan media that supports the aims of the opposition. For example, during the oil industry shutdown in 2002 and 2003, USAID/DAI provided $10,000 for a media campaign supporting the strikers. WILPERT, *supra* note 30, at 172. More recently, United States embassy cables published by Wikileaks exposed the close relationship between the U.S. and Venezuela's private media. *See* Tamara Pearson, *Wikileaks Cables Reveal U.S. Embassy Works with Venezuelan Private Media*, VENEZUELANALYSIS (Sept. 6, 2011), http://venezuelanalysis.com/news/6469. The U.S. ambassador to Venezuela met with representatives from *El Nacional*, Globovision, and the Cisneros Group to discuss political content and U.S. funding. According to a Chávez supporter, "[f]or 2011, the U.S congress approved a multimillion budget in order to transmit the thirty minute program five days a week in Venezuela, supposedly to counteract the anti-US propaganda by the Venezuelan government." Additionally, recently declassified U.S. State Department documents show that the U.S. government funded over $4 million to private media and during 2008-10, as part of a more comprehensive $40 million investment in Venezuelan opposition through agencies including the Panamerican Development Foundation (PADF), Freedom House, and the US Agency for International Development (USAID). Golinger, *supra* note 36.

194. Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations, *supra* note 41 ("The Washington Post, The New York Times and The Wall Street Journal broadly report on and reinforce the negative frames on Venezuela that serve as a basis for debates over U.S. policy towards the country.").

supported his actions in regards to media.[195] Overall, the international response to media-related regulation and rights only amplified political polarization during Chávez's time in power.[196] Accordingly, the Venezuelan people, instead of outside voices, should control their media's future.[197]

Likewise, frameworks for assessing and aspiring to improve media may not adequately address the needs of the Venezuelan people.[198] Many models are based purely on "democratic" ideals that do not entirely account for Venezuela's dynamic political structure and consistently choose rights over regulation.[199] For example, the Fourth Estate model aspires to an independent press that fulfills its duty to publish information related to the public interest, thus promoting government accountability and monitoring democratic institutions.[200] The informed citizenry model also focuses upon the freedom of information. It considers public access to accurate information a "primary condition of democratic life."[201] While the principles behind these frameworks are useful, Venezuelan media should be analyzed under a model that considers Venezuela's current capabilities and socialist aims alongside democratic values.

Other models address the issues of ownership and popular participation in the press. For example, Herman and Chomsky's propaganda model questions the impartiality of profit-driven private media.[202] Public interest, also known as "Pigouvian," theory favors

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195. *See* B.B.C., *Argentina Gives Hugo Chávez Press Freedom Award*, B.B.C. NEWS (Mar. 29, 2011), *available at* http://www.bbc.co.uk/news/world-latin-america-12902155 (Argentine University of La Plata gave Chávez an award for efforts to break "media monopolies" and "support popular communication.").

196. Furthermore, the United States, like the Venezuelan government, seems to find limits on acceptable expression. On television Chávez held up photographs of victims of the United States bombing of Afghanistan and called it a "slaughter of innocents." ELLNER, *supra* note 33, at 198. As a result, the U.S. temporarily withdrew its Ambassador, while Colin Powell voiced his doubts about Venezuela's "democratic understanding." *Id.*

197. *See, e.g.*, Edward Ellis, *Missing the Point: Media Speculations Over Venezuela*, VENEZUELANALYSIS (Sep. 12, 2011), http://venezuelanalysis.com/analysis/64836483197 (pointing to the dearth of international coverage on the creation of a new regional alliance, the Community of Latin American States (CELAC)).

198. This discussion does not purport to be a comprehensive analysis of media frameworks; instead, it provides examples of existing frameworks.

199. Whether Venezuela should be considered a socialist or democratic nation is beyond the scope of this article; however, polarization in the media clearly reflects divergent political ideologies.

200. *See, e.g.*, JULIANNE SCHULTZ, REVIVING THE FOURTH ESTATE: DEMOCRACY, ACCOUNTABILITY, AND THE MEDIA (1998).

201. Waisbord, *supra* note 145, at 381. *See also* Mark Bovens, *Information Rights: Citizenship in the Information Society*, 10 J. POL. PHIL. 317 (2002); Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 TORONTO L.J. 259 (2001) (framing the right to freedom of information as a basic right of political participation).

202. *See* EDWARD HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (Pantheon Books, 1988) (framework for analyzing propaganda nature of media considers ownership, funding, sourcing, flak, and anti-communist

government ownership of the media and treatment of information as a public good.[203] Public choice theory, on the other hand, supposes that government-owned media is detrimental to society.[204] Finally, Habermas' public sphere model calls for societal pluralism and full participation.[205] Ultimately, the macro-economic nature of these models fails to account for the day-to-day concerns of the Venezuelan people, or contemplate more nuanced control and ownership over the media.

Thus, current frameworks for assessing media are limited. Each model chooses between regulation and rights, or provides for ownership by only one segment of society. Both perspectives in Venezuela's media war, however, possess strong rationales and goals favoring advancement of the Venezuelan people. The needs of the Venezuelan people will not be served by adopting the views of either extreme. Therefore, Venezuelan media should be analyzed using a distinct framework that balances necessary government regulation against fundamental rights.

B. Balancing Best Promotes the Public Good

Resorting to either extreme in the media war would lead to problematic results; thus, analysis of Venezuela's media war requires balancing.[206] Promoting the public good necessitates a combination of both regulations, offsetting the powerful privately owned media, *and* established rights, preventing governmental abuse. Such a framework is ideal for Venezuela for several reasons. First, a balancing framework allows for reasonable government regulation and action. Second, a balancing framework accounts for the rights at stake. Ultimately, the balance framework measures rights and regulation according to the needs of the Venezuelan people. This contextual analysis provides the requisite flexibility necessary to account for Venezuela's dynamic nature. While this analysis is especially useful for considering Venezuelan media, it can be used in considering any governmental

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ideology).

203. Djankov et al., *supra* note 38, at 341–42 (Public interest theory believes that governments maximize consumer welfare, looking at information as public good, with strong increasing returns due to low marginal costs of dissemination, and public exposure to accurate and unbiased information.).

204. *Id.* Public choice theory theorizes that government ownership "would distort and manipulate information to entrench the incumbent politicians, preclude voters and consumers from making informed decisions, and ultimately undermine both democracy and markets;" it also advocates for media's role as a fourth estate providing extra checks and balances. *Id.*

205. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (1962, English Translation 1989). *See also* CANNON, *supra* note 29, at 126.

206. A case-by-case inquiry into whether the Chávez administration's stated objectives outweigh the limitations on freedoms of expression and information would likely be unworkable and subjective, and may also lead to the problematic consequences of allowing one side to prevail.

regulation or action regarding the media.

Domestic and international laws, whether binding or merely aspirational, all advocate for a balance between regulation and rights. For instance, Articles 57,[207] 58,[208] and 60[209] of the 1999 Constitution guarantee basic rights to free speech, expression, and information alongside references to accompanying responsibilities and restraints.[210] The first sentence of Article 58 is telling: "Communications are free and plural, and involve the duties and responsibilities indicated by law."[211] While this provision grants "free and plural" communication rights, they remain subject to legal regulation through "duties and responsibilities indicated by law." Similarly, RESORTE Article 6(2) asserts "censorship is prohibited, without prejudice to the duty of the State to establish further responsibilities arising from the exercise of freedom of expression and information in accordance with the Constitution and the law."[212] Overall, these domestic laws balance recognition and restraint of the Chávez government and privately owned opposition media's conflicting positions.

International law reflects and expounds upon the balancing principles of Venezuela's domestic law. Venezuela is a long-time member of the American Convention on Human Rights (ACHR) and the United Nations International Covenant on Civil and Political Rights

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207. Article 57 reads, "Everyone has the right to express freely his or her thoughts, ideas or opinions orally, in writing or by any other form of expression, and to use for such purpose any means of communication and diffusion, and no censorship shall be established. Anyone making use of this right assumes full responsibility for everything expressed. Anonymity, war propaganda, discriminatory messages or those promoting religious intolerance are not permitted. Censorship restricting the ability of public officials to report on matters for which they are responsible is prohibited." Constitution, *supra* note 54, art. 57.

208. Article 58 reads, "Communications are free and plural, and involve the duties and responsibilities indicated by law. Everyone has the right to timely, truthful and impartial information, without censorship, in accordance with the principles of this Constitution, as well as the right to reply and corrections when they are directly affected by inaccurate or offensive information. Children and adolescents have the right to receive adequate information for purposes of their overall development." *Id*. art. 58.

209. Article 60 provides, "Every person is entitled to protection of his or her honor, private life, intimacy, self-image, confidentiality and reputation. The use of electronic information shall be restricted by law in order to guarantee the personal and family intimacy and honor of citizens and the full exercise of their rights." *Id.* art. 59.

210. *Id.* (establishing the right to express religious beliefs); *Id*. art. 61 (granting the right to expression in one's "freedom of conscience"). Soto finds that Articles 57 and 58 establish "five basic rights related to freedom of expression. These five guarantees can be summarized as follows: (i) the right to freely express thoughts, (ii) the right to communicate or obtain information, (iii) the right to establish and develop communicational media, (iv) the right to receive timely, truthful, and impartial information without censorship, and (v) the right to reply to adverse information expressed against oneself." The existence of rights, however, does not mean these rights are absolute. Soto, *supra* note 24, at 413.

211. Constitution, *supra* note 54, art. 58.

212. LEY RESORTE, *supra* note 48. *Ley de Responsabilidad Social en Radio y Televisión* [Social Responsibility on Radio and Television Act], La Gaceta Oficial N° 38.081 [Official Gazette No. 38.081] art. 6(2) (Dec. 7, 2004) (Venez.).

(ICCPR), both of which call for balance.[213] The 1999 Constitution confers preeminent legal status upon such "conventions relating human rights."[214] As an example, the ACHR expressly establishes the "right to freedom of thought and expression."[215] This right is balanced alongside other integral concerns. While the right "shall not be subject to prior censorship, [the exercise of the right] shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure" adherence to enumerated categories.[216] These categories include "the protection of national security"[217] and the "moral protection of childhood and adolescence,"[218] the chief objectives utilized in the Chávez government's argument for the use of regulations.[219]

Likewise, the ICCPR upholds every person's "right to freedom of expression."[220] This right is qualified, however, by "special duties and responsibilities."[221] The ICCPR identifies the preservation of national security as one permissible justification for legal regulations.[222] On the whole, the nuanced approach of both Conventions, like other

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213. Venezuela became a signatory to the American Convention on Human Rights in November 1969. *See generally* Comisión Interamericana de Derechos Humanos, Organización de los Estados Americanos [Inter-American Commission on Human Rights, Organization of American States], Informe Annual de la Comisión Interamericana de Derechoes Humanos 1977 [Annual Report of the Inter-American Commission on Human Rights 1977] (1978), *available at* http://www.cidh.org/annualrep/77sp/sec.1.htm [hereinafter American Convention on Human Rights]. Venezuela signed the International Covenant on Civil and Political Rights in June 1969 and ratified it in May 1978. *See* U.N. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *available at* http://www.hrweb.org/legal/cpr.html (last visited Nov. 30, 2010).

214. "The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution amid the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power." Constitution, *supra* note 54, art. 23

215. "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." American Convention on Human Rights, *supra* note 213, art. 13(1).

216. *Id.* art. 13(2).

217. *Id.* art. 13(2)(b) ("the protection of national security, public order, or public health or morals").

218. *Id.* art. 13(4) ("[P]ublic entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."). *See also* Soto, *supra* note 24, at 414 (discussing this provision of the Convention).

219. *See supra* Part II.

220. "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." International Covenant on Civil and Political Rights, *supra* note 213, art. 19, ¶ 2.

221. *Id.* art. 19, ¶ 3.

222. *Id.* art. 19, ¶ 2-3 ("For the protection of national security or of public order (order public), or of public health or morals.").

international law, recognizes both rights and reasonable regulation. Moreover, the opposition media's desire to protect rights should be balanced with the Chávez government's desire to establish regulations, as Venezuelan and international law support both positions.

Looking forward, balancing the conflicting positions in the media war will best uphold political pluralism and advance the public interest if each side operates reasonably.[223] Moderation in both reporting and regulating will encourage and aid in balancing.[224] Journalists[225] and Venezuelans alike[226] desire impartiality and de-politicization in the news.[227] The government, opposition, and media should work towards a more active and informed society that is distanced from political polarization.[228] These necessary governmental regulations should be carefully crafted so as to not arbitrarily or excessively threaten rights.[229] The Chávez administration,[230] opposition members,[231] and other

223. *See supra* Part IV(A) (advocating for political pluralism rather than the exclusion of one side in the media war).

224. Although some politicization is likely to remain a major factor in the media war, increased neutrality in both reporting and regulating will benefit the debate. Additionally, regulations should restrain government sources, not only privately owned opposition sources.

225. Most journalists, who would be most effective free of politic influence, "are caught in the crossfire between media owners and the government." CANNON, *supra* note 29, at 130.

226. "Venezuelans would welcome some sort of non-political controls on all sectors of the media industry to ensure greater impartiality and balance in reporting." *Venezuela's Media War, supra* note 21. "The public [has] come to understand only too well the dangers of distortion." *Id.*

227. Potential solutions that could enhance the agenda setting, watchdog, and gatekeeper functions of press include public access laws, more resources and enforcement, and better journalism training. Waisbord, *supra* note 145, at 383.

228. In considering the media's rights and responsibilities, it may be helpful to consider the "long-held position that the national media . . . bore a public obligation to serve the national good and to work in cooperation with the government to improve social conditions." PRESS REFERENCE, *supra* note 13, at 7. "Venezuela's media, including state TV, needs tough controls to ensure diversity, balance and access, enforced at arms' length from political powers." Klein, *supra* note 39. This may require "a broader effort to 'democratize the media' so that it reflects viewpoints that were largely excluded from the commercial media in the past." HUMAN RIGHTS WATCH, *supra* note 57, at 64.

229. "[U]nder international norms on freedom of expression, broadcasting regulations must be precisely defined in order to avoid overbroad or arbitrary interpretation by officials that constrain free expression and the public's access to information and opinion." *Id.* at 64–65. Human Rights Watch maintains that phrases like "integral education of the children" may be overbroad and could infringe upon freedom of speech. *Id.*

230. More than 60 television stations and 250 grassroots radio and print operations have been established since Chávez came to power in 1999. Tamara Pearson, *The People Legislate: Grassroots Media Movement Creates Its Own Law*, VENEZUELANALYSIS (June 24, 2010), http://venezuelanalysis.com/analysis/6297. *See also* WILPERT, *supra* note 30, at 187 (Community outlets "have been sprouting up throughout the country in recent years, are acting as a catalyst, spreading the word about what changes are still needed and also educating people in the poor neighborhoods about what changes are being made and how they can get involved.").

231. *See* Carolina García Aparicio, *MUD Presenta Propuestas Para Proyecto de Ley de Medios Comunitarios*, EL NACIONAL (Aug. 10, 2011), http://www.el-nacional.com/www/site/p_contenido.php?q=nodo/227911/Nación/MUD-presenta-propuestas-para-contrucción-de-proyecto-de-Ley-de-medios-comuntarios (Venez.) (draft law for community media from opposition coalition).

Venezuelans[232] have already envisioned and implemented some community-based media reforms well-suited to the balancing framework. Further implementation of people-controlled grassroots and community-based media would be ideal.[233]

The balancing framework is especially useful when applied to the expansion of novel media forms. In fact, the nature of the Internet may necessitate balancing while providing a unique outlet for popular participation.[234] The use of social media networks by the Venezuelan people, government, and opposition exploded in recent years.[235] The individual-driven nature of the Internet makes it an ideal outlet for pursuing the goals of the people, as it allows for an equal opportunity to broadcast and express ideas. Additionally, increased peer-to-peer communication is essential to the new socialism.[236] The balancing analysis can be used as the government creates new regulations.[237] In connection with the expansion of news on the Internet, the impending likelihood of globalization encourages better development of a strong Venezuela-based media.[238]

In conclusion, the Venezuelan media war should be analyzed according to a balancing analysis. Shared domestic and international

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232. For example, a group of people recently proposed a new legal framework for regulating grassroots media, encompassing aspects, which include licensing, sustainability, and organizing. *See* Pearson, *supra* note 230. Participants cited the need for media "that doesn't see news and information as something that is bought and sold," along with observing that "[t]hose who control the media, control culture."

233. *See* WILPERT, *supra* note 30, at 24.

234. *See* Aliana Gonzalez, *Power in the Hands of Citizen Participation*, EL UNIVERSAL (May 16, 2011), *available at* http://www.eluniversal.com/2011/05/16/power-in-the-hands-of-citizen-participation.shtml (discussing rapidly changing communication and the people's increased control over journalism).

235. *See* Hugo Chávez Frias on Twitter, http://twitter.com/#!/Chávezcandanga (last visited Nov. 22, 2011); Reardon, Perez & Duque, *supra* note 32 ("I think as Venezuelans have learned to be more discerning, to inform ourselves by taking on the role of investigator through social media networks such as twitter and facebook so as to keep ourselves informed in light of the serious lack of information regarding the different difficulties our country is facing."); Rafael Rodriguez, *Venezuelans Followed Opposition Debate Through Social Networks*, EL UNIVERSAL (Nov. 16, 2011), *available at* http://www.eluniversal.com/nacional-y-politica/111116/venezuelans-followed-opposition-debate-through-social-networks (noting Venezuelan's high usage of social networking, including during opposition political debates).

236. *See* WILPERT, *supra* note 30, at 224.

237. A newly amended version of RESORTE adds Internet media regulation to television and radio controls. *See* International Media Dep't. – MINCI, *Reform of the Social Responsibility in Media Law: 4 Questions & 4 Answers*, VENEZUELANALYSIS (Jan. 5, 2011), http://venezuelanalysis.com/analysis/5914. *See also* B.B.C. Mundo, *El Mapa de la Censura en Internet y la Guerra de los Pagos*, B.B.C. MUNDO (Feb. 17, 2011), http://www.bbc.co.uk/mundo/noticias/2011/02/110217_1421_breves_tecnologia_opennet_internet_apple_google_dc.shtml (showing that no Internet censorship is currently taking place in Venezuela).

238. Except for Grupo Cisneros, so far "globalization of the media appears to have bypassed Venezuela altogether." While corporations including Sony and HBO have Caracas officers, they are largely separate from local media. Besides Cisneros, there is little to no foreign investment in Venezuela's media. Mayobre, *supra* note 26, at 182–83.

law principles commit to a balance between rights and regulation. Reasonable regulations consistent with Venezuela's legal framework should be accomplished without eliminating citizens' freedoms of expression and information. In addition, proponents of each position in the media war should strive to act reasonably. The combination of a balanced approach to the media war and attempts to improve the quality of public debate will prioritize the Venezuelan people, promote political pluralism, and allow both positions to "win" the media war.

C. Balance and the Violent Photograph Ban

Finally, this part applies the balance approach to the violent photo ban in order to exemplify this approach's superiority. Freedom to publish images subject to reasonable regulation promotes the most favorable results for the government, privately owned opposition media, and the Venezuelan people. Rather than simply focusing on whether this particular ban was reasonable, however, it must be considered in the greater political and social context.

Accounting for each position's argument, the violent photograph ban could be classified as either a reasonable regulation or a threat to rights. The government maintained the position that the ban was a necessary regulation to uphold the dual objectives of protecting children and preserving national security.[239] On one hand, allowing the privately owned opposition media to gratuitously publish gruesome images could harm children and national security. On the other hand, privately owned opposition media and international organizations portrayed the ban as a threat to rights.[240] Allowing the Venezuelan government free rein to regulate which photographs are published by the media could lead to unjustifiable censorship and the infringement of freedoms of expression and information. Each side presents realistic concerns about the other. Allowing either side to prevail by concluding that one position has a superior ban-related argument could lead to problematic and unsatisfactory outcomes for society.[241] By giving credence to each position, while prioritizing the public good, a balancing analysis is the best approach to the ban.

The violent photo ban should be considered in the greater political

239. *See supra* Part II (discussing these two stated government objectives). The government could make basic arguments alleging the ban's reasonableness. Even in its original form, the ban was only for the next 30 days. It was further restricted as a punitive measure for the two papers which had published the photo. The ban only targeted gruesome photos like the one originally published.

240. *See supra* Part III (discussing other actions against the press and potential threats to freedom of expression and information). The opposition could argue that banning photographs for the next 30 days essentially restricted publishing until the September 26 elections. In addition, the ban could force self-censorship by the media.

241. *See* Part IV(a) (proposing that favoring one side to the exclusion of the other would damage political pluralism and therefore the public good).

context. Both the publishing of the photo and the court decision coincided with upcoming legislative elections, which took place on September 26, 2010, about a month after the ban was declared.[242] The elections were a threat to Chávez' immediate power over the National Assembly, as well as an early indicator of the 2012 presidential election.[243] They were also an opportunity for the political opposition to gain greater political power and momentum.[244] While the government claimed that the photograph published in *El Nacional* and *Tal Cual* was an effort to gain voters before the election,[245] the opposition and international critics claimed that the resulting ban was an effort to silence the media and shield itself before the election.[246] Both claims against the opposing side involved underlying political motivation.[247] The opposition argued that it was simply educating the citizenry about the reality of violence in the nation, while the government argued that it was protecting children and preserving national security.[248] Both stated rationales were supported by factors other than political motivation. Nevertheless, the political context is a relevant factor in assessing the ban.

Even while considering the politicized nature of the debate over the photo ban, important underlying social issues are easily overlooked. A balanced analysis accounts for factors such as medium[249] and emotional impact,[250] including the particularly visceral impact of the photograph and the newspapers in which it was published. Nevertheless, the focus extends beyond the photograph itself. The photograph ban, albeit indicative of a greater war between the government and privately owned opposition media, is most meaningful in the context of the social and economic situation in Venezuela.[251]

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242. Romero, *supra* note 170.

243. *Id.*

244. *Id.* Examples of significant legislative control include the ability to block legislation and choose Supreme Court officials.

245. *See Venezuela Ban on Violent Images Fuels Censorship Row, supra* note 16 and accompanying text.

246. *See supra* notes 16–20 and accompanying text.

247. *See* Molinski, *supra* note 2.

248. *Id.*

249. On symbolic speech, *see* James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1 (2008). *See also* ELLNER, *supra* note 33, at 129. Photographs may be especially significant for the opposition, as they provide a clear and unified message that the opposition struggles with rhetorically. *Id.* at 131.

250. *See* Clay Calvert & Mirelis Torres, *Staring Death in the Face During Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity of Authenticity*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 87 (2011) (focusing upon wartime need for images and suggests using internet to post questionable images. "Photos are trickier than words, because their content is in large measure emotional, visceral, and because you can't edit their content."); Clay Calvert, *Voyeur War? The First Amendment, Privacy and Images from the War on Terrorism*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 147 (2004).

251. *See supra* notes 120–136 and accompanying text.

Public debate should focus on the greater societal issues represented by the photograph of dead bodies at the morgue.[252] The newspapers published the photograph as a protest to the violence plaguing Venezuela, and the government's reaction acknowledged the existence of social unrest. Nevertheless, the ban became one narrow battle in a broader media war. By focusing on such narrow battles, both positions allow their conflict to override healthy public debate on the issues. While media freedoms and the government's need for regulation must both be respected, considerations of the public good must define the balance of these conflicting forces. Thus, pluralism would best be served by a truly public discussion of the societal issues presented by the photograph.[253] Instead of escalating polarization, the media and government should provide public forums with a view towards creating mutually beneficial solutions for the people.

V. CONCLUSION

In conclusion, this Article proposes the novel use of a balancing approach in analyzing the relative roles of media regulation and rights protection. During Chávez's fourteen years in office, numerous domestic and international voices stressed the conflicts between media regulation and freedoms of expression and information. Moreover, most theoretical media models entail choosing between regulation and rights. This article recommends reconciling the government and opposition media positions in Venezuela's media war through use of a new theoretical framework that balances reasonable regulation and rights protection. As the violent photo ban demonstrates, both the Chávez government and privately owned opposition media presented meaningful arguments, however, neither position should prevail to the exclusion of the other. A theoretical balancing framework allows for both reasonable regulation and rights protection. Instead of escalating the media war, balance encourages both positions to focus upon the public good. As Venezuela begins a new era without Chávez, this approach should be used in that nation and others to assess and reconcile government regulation and rights protections.

252. *See* Romero, *supra* note 2 ("Given the government's stance in these cases, many here worry it is focusing on the messenger, not the underlying message.").

253. *See, e.g.*, Golinger, *supra* note 36 (Journalist Alberto Nolia, who often criticized political opposition to Chávez, suggested that "children are not stupid, they know what's going on. Perhaps it would be better to publish images of people killed by violent crime with explanations about who they were and the fact that now their lives are over, so that kids will understand the severity of delinquency . . . the problem of crime in Venezuela is very serious.").