TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 31 | Number 4 Article 3

August 2015

The Difficulty of Balancing the Doctrine of Prior Restraint with the Right of Privacy

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THE DIFFICULTY OF BALANCING THE DOCTRINE OF PRIOR RESTRAINT WITH THE RIGHT OF PRIVACY

SUPREME COURT OF NEW YORK APPELLATE DIVISION, THIRD DEPARTMENT

Porco v. Lifetime Entertainment Services, LLC[1]
(decided April 17, 2014)

I. INTRODUCTION

The public has always been curious about the lives and personalities of celebrities.[2] In an effort to capitalize on this demand, networks seek exclusive rights to the individual's story in order to produce docudramas.[3] Unfortunately, docudramas may expose unflattering facts in dramatic detail.[4] Under the assumption that "the life of a public figure belong[s] to the citizens," high public demand has given rise to unauthorized docudramas.[5] Consequently, public figures have sought judicial injunctions to prevent public disclosure of their private lives alleging a violation of their right of privacy.[6] New York State provides a narrow privacy statute to protect public figures from name and likeness misappropriation in the commercial context, which grants an injunction as an absolute right.[7] However, when the alleged privacy violation arises from impending speech—that is, speech that has not yet been spoken—the courts are reluctant to issue injunctions, correctly finding that such a sanction is an un-

[1] 984 N.Y.S.2d 457 (App. Div. 3d Dep't 2014).

[2] Teri N. Hollander, *Enjoining Unauthorized Biographies and Docudramas*, 16 LOY. L.A. ENT. L.J. 133, 134 (1995).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 135.

[7] *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009) ("Any person whose name, portrait, picture or voice is used within this state for advertising purposes . . . without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state.").

constitutional prior restraint on freedom of speech rights.[8]

The doctrine of prior restraint is derived from the First Amendment, which prevents the government from restraining an individual's free speech.[9] Courts have interpreted the term "prior restraint" to be a "law, regulation or judicial order that suppresses speech—or provides for its suppression at the discretion of government officials—on the basis of the speech's content and in advance of its actual expression."[10] Both federal and New York State courts apply the same analytical framework for determining whether a preliminary injunction imposed on impending speech is an unconstitutional prior restraint.[11] In addition, the courts apply a strict scrutiny standard, placing a heavy burden on the party seeking the injunction to prove that the scales of equity clearly balance in his or her favor.[12]

However, for an individual who has become a public figure as a result of participating in a highly publicized criminal trial, the analysis that New York courts undertake to determine whether to issue an injunction to protect that individual's narrow privacy right while simultaneously trying to prevent an unconstitutional prior restraint can be perplexing.[13] New York enacted a privacy statute in an attempt to reconcile the two rights, but the statute's vagueness has resulted in conflicting interpretations and confusion.[14] To provide clarity, New York's privacy statute should be amended with clear language to determine whether and when to issue an injunction. Or, in the alternative, a court could distinguish between commercial and non-commercial speech when applying the analytical framework for a preliminary injunction to avoid diminishing a public figure's narrow privacy right. This Note will discuss the issue presented to the court in *Porco v. Lifetime Entertainment*—whether a temporary restraining order against a television network seeking to produce a movie about a citizen's murder prosecution constituted a prior restraint on the freedom of speech.

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[8] *See* discussion *infra* Part IV.A.

[9] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 586 (1976).

[10] *See, e.g.*, Alexander v. United States, 509 U.S. 544, 550 (1993); United States v. Quattrone, 402 F.3d 304, 309 (2d Cir. 2005); Ash v. Bd. of Mgrs. of 155 Condo., 843 N.Y.S.2d 218, 219 (App. Div. 1st Dep't 2007).

[11] *See* discussion *infra* Part IV.A.

[12] *Id.*

[13] *See* discussion *infra* Part VI.B.

[14] *Id.*

II. KEY FACTS

On November 15, 2004, an ax-wielding intruder entered into Peter and Joan Porco's residence in Bethlehem, New York, killing Peter and violently assaulting Joan.[15] When investigators arrived at the scene, they asked Joan whether her son, Christopher Porco ("Porco"), had been her attacker.[16] Joan was able to affirmatively nod, rendering Porco as the prime suspect for the attack.[17]

Meanwhile, over 200 miles away at the University of Rochester, Porco received a phone call from a local reporter notifying him of his father's murder.[18] While his mother was undergoing emergency surgery, Porco was taken to the Town of Bethlehem Police Department where he repeatedly denied having anything to do with the attack on his parents.[19] After approximately six hours of interrogation, Porco was arrested for the murder of his father and the attempted murder of his mother.[20] The police conducted a subsequent investigation to prove that Porco could have left the University of Rochester campus to carry out the deadly attack and return before the discovery of his parents' bodies.[21] Although there was no forensic evidence to tie Porco to the crime scene, the prosecutor's timeline of the attack was damaging to Porco's defense.[22]

As a result of his father's role in the Albany legal community and the heinous nature of the crime, Porco requested a change of

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[15] People v. Porco, No. 05-848, 2006 N.Y. Misc. LEXIS 2859, at *2 (Cnty. Ct. Albany County June 29, 2006).

[16] *Id.*

[17] *Id.*; *see* Patti Aronofsky, Katherine Davis, Elena DiFiore & Mead Stone, *The Porco Murder: Did a College Student Take an Ax to His Parents?*, *Forty eight hours*, CBSNEWS (Aug. 17, 2013), http://www.cbsnews.com/news/the-porco-murder-did-a-college-student-take-an-ax-to-his-parents/ [hereinafter *The Porco Murder*].

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *The Porco Murder*, *supra* note 17. Porco asserted that he never left campus and was asleep on the fraternity couch the entire evening. *Id.* But campus security cameras and a surveillance camera on the roof of an on-campus medical center showed footage of a distinctive yellow jeep, similar to Porco's jeep, leaving campus. *Id.* In addition, several eyewitnesses claimed to have seen the distinctive yellow jeep on the highway going in the direction of Porco's parents' house. *Id.* Furthermore, Porco's fraternity brothers testified that they did not see Porco asleep on the couch at all that night. *Id.*

[22] *The Porco Murder*, *supra* note 17; *see* Robert Gavin, *Porco Murder Case Holds Public in Thrall*, TIMES UNION (Dec. 28, 2012, 7:12 AM), http://www.timesunion.com/local/article/Porco-murder-case-holds-public-in-thrall-4150120.php [hereinafter *Porco Murder Case*].

venue due to the intense pre-trial publicity.[23] On June 13, 2006, Porco's trial was transferred from Albany County to Orange County, New York.[24] On December 12, 2006, after a seven-week trial and less than six hours of deliberation, the jury found Porco guilty of second-degree murder and sentenced him to life imprisonment.[25] Considered "the most notorious crime of the Capital Region's history," Porco's murder trial attracted national media coverage.[26] Newspaper articles and televised news segments were dedicated to reporting the unfolding events and the trial of the "ax murderer from Delmar."[27]

After Porco's sentencing, Lifetime Entertainment Services ("Lifetime") sought to broadcast a film titled, *Romeo Killer: The Christopher Porco Story* ("Romeo Killer"), based on the true story surrounding the murder and the subsequent criminal proceedings.[28] Upon learning of Romeo Killer, Porco sought an injunction to prevent the film from airing on the ground that the use of his name in connection with the movie violated his privacy rights under New York Civil Rights Law sections 50 and 51.[29] Unaware of the contents of the movie, Porco argued that Romeo Killer was a fictionalized account of the events leading up to his criminal trial, which required Lifetime to obtain his prior written consent.[30] Lifetime argued that Romeo Killer was based on true events taken from court records, interviews with witnesses, and other public documents.[31] Hence, Porco's prior written consent was not required because the film was de-

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[23] People v. Porco, 816 N.Y.S.2d 361 (App. Div. 2d Dep't 2006).

[24] *Id.*

[25] People v. Porco, 896 N.Y.S.2d 161, 162 (App. Div. 2d Dep't 2010). Porco subsequently appealed, arguing that the trial court erred in permitting the detective to testify as to how Joan Porco affirmatively nodded when asked if Porco was her attacker. *Id*. The Appellate Division, Second Department, affirmed, holding that although the testimony should have been excluded, its admission was harmless error due to the overwhelming evidence against the defendant. *Id*. at 163. In addition, jurors commented that the decision to convict Porco had nothing to do with Joan Porco's affirmative nod because they believed "she didn't know what she was nodding to." *The Porco Murder*, *supra* note 17.

[26] *Porco Murder Case*, *supra* note 22.

[27] *Id. See* Eriq Gardner, *Judge Bans Airing of Lifetime TV's Chris Porco Movie (Exclusive)*, THE HOLLYWOOD REPORTER (Mar. 20, 2013, 10:22 AM), http://www.hollywoodreporter.com/thr-esq/lifetimes-chris-porco-movie-banned-429988 [hereinafter *Judge Bans Airing*]. The murder trial was covered in CBS' 48 Hours Mystery and the truTV Series Forensic Files. *Id.*

[28] *Id.*

[29] Porco v. Lifetime Entm't Servs., 984 N.Y.S.2d 457, 458 (App. Div. 3d Dep't 2014). For a detailed discussion of N.Y. CIV. RIGHTS LAW §§ 50 and 51, see *infra* Part VI.B.

[30] *Porco*, 984 N.Y.S.2d at 458.

[31] *Judge Bans Airing*, *supra* note 27.

fined as "newsworthy," an exception to New York's privacy statute.[32]

In a shocking decision to the entertainment industry, the Clinton County Supreme Court granted the temporary restraining order ("TRO") against Lifetime, thus preventing the film's impending broadcast.[33] In applying the traditional preliminary injunction test,[34] the court was not convinced that Porco would be properly compensated for an invasion of his privacy with monetary damages after the film's broadcast.[35] Furthermore, the court dismissed Lifetime's argument that an injunction would be a prior restraint on speech.[36] Lifetime filed an emergency application with the Appellate Division, Third Department to vacate the injunction, arguing that the network would lose over one million dollars and the injunction would "harm its brand, and represent a disaster to free speech."[37]

III. THE THIRD DEPARTMENT'S DECISION AND REASONING

The issue presented to the Appellate Division for the Third Department was whether the TRO granted by the Clinton County Court, based upon violations of New York's privacy statute, was an unconstitutional prior restraint on Lifetime's freedom of speech.[38] Porco argued that, pursuant to New York Civil Rights Law sections 50 and 51, the use of his name in connection with Romeo Killer without his written consent was an invasion of his privacy.[39] Further, he argued that the movie was a dramatized and fictionalized version of events leading up to his criminal trial, and therefore, did not fall within the statute's newsworthy exception.[40] In response, Lifetime argued that the film did not violate Porco's right to privacy because it took all the facts from public records and interviews with eyewitness-

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[32] *See* discussion *infra* Part VI.B.

[33] *Lifetime*, 984 N.Y.S.2d at 458.

[34] Rosemont Enters., Inc. v. McGraw-Hill Book Co., 380 N.Y.S.2d 839, 842 (Sup. Ct. N.Y. County 1975). In order to grant a preliminary injunction, the moving party must show: (1) "the likelihood of its ultimate success on the merits; (2) that irreparable harm will occur absent the granting of the preliminary injunction; and (3) that a balancing of the equities in the case at bar mandates . . . the injunctive relief." *Id.*

[35] *Judge Bans Airing*, *supra* note 27.

[36] *Id.*

[37] *Id.*

[38] *Lifetime*, 984 N.Y.S.2d at 458.

[39] *Id.*

[40] *Id.* at 459. *See also supra* Part VI.B for a discussion of the newsworthy exception.

es, and therefore, it fell within the newsworthy exception. [41] Importantly, Lifetime sought a reversal of the lower court's ruling, arguing that the TRO was a prior restraint on its First Amendment right to freedom of speech.[42]

The Appellate Division accepted Lifetime's argument and reversed the county court's ruling.[43] First, the court defined a prior restraint as any "law, regulation, or judicial order that suppresses speech . . . on the basis of speech's content and in advance of its actual expression."[44] As the court explained, prior restraints are the least acceptable infringement on First Amendment rights because "a free society prefers to punish the few who abuse the rights of free speech after they break the law than to throttle them . . . beforehand."[45] Thus, because it is difficult to determine what someone will say in advance, public policy prefers a wait-and-sue approach—that is, initiating a civil or criminal proceeding after a defendant has abused his or her right to freedom of speech.[46]

Second, the court noted that although freedom of speech is not absolute, a prior restraint carries "a heavy presumption against its constitutional validity."[47] Only in the exceptional case, when a moving party can clearly establish that the expression in dispute will "immediately and irreparably create public injury," will a court consider granting an injunction.[48] The court emphasized that harm to the plaintiff alone does not satisfy the public injury element.[49] Rather, the plaintiff has the heavy burden of proving that the broadcast will create "imminent and irreversible injury" to the general public.[50]

In the present case, the court found that the plaintiff failed to establish that the broadcast would create "imminent and irreversible injury" to the general public.[51] The plaintiff argued that the film would harm him personally by invading his privacy rights, yet Romeo Killer is a film depicting the facts surrounding the plaintiff's

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[41] *See Judge Bans Airing*, *supra* note 27.
[42] *Lifetime*, 984 N.Y.S.2d at 458.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Lifetime*, 984 N.Y.S.2d at 458.
[48] *Id.* at 459.
[49] *Id.*
[50] *Id.*
[51] *Id.*

public murder trial.[52] As the court explained, broadcasting Romeo Killer would not lead to the kind of immediate and irreparable harm to the general public that would warrant an injunction because the movie itself is a matter of public interest.[53] The court concluded that, while the TRO in this case constituted an unconstitutional prior restraint on free speech, Porco may still seek monetary damages once the film is broadcast if "the defendant abused its rights of speech" by lying or using offensive language.[54] Romeo Killer was ultimately aired on March 23, 2013 on the Lifetime Network and was advertised as the "Lifetime Original Movie Chris Porco doesn't want you to see."[55]

IV. THE DOCTRINE OF PRIOR RESTRAINT

A prior restraint is any "law, regulation or judicial order that suppresses speech . . . on the basis of the speech's content and in advance of its actual expression."[56] Since the inception of the Bill of Rights, the right to freedom of speech and the doctrine of prior restraint have worked hand in hand.[57] The doctrine is broad and flexible in order to remain consistent with the First Amendment's main purpose to prevent "all such previous restraints . . . practiced by other governments."[58] The two common types of prior restraints are administrative licensing and judicial injunctions,[59] which normally arise "in the context of the press . . . or in licensing and permit schemes for speech in public places."[60] In addition, prior restraint issues have arisen in cases involving claims of an invasion of privacy or name

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[52] *Lifetime*, 984 N.Y.S.2d at 459.

[53] *Id.*

[54] *Id.*; *see also* CBS v. Davis, 510 U.S. 1315, 1318 (1994) (holding that "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context").

[55] Eriq Gardner, *Lifetime TV Wins Appeal Over Chris Porco Movie Ban*, THE HOLLYWOOD REPORTER (Apr. 18, 2014, 9:05 AM), http://www.hollywoodreporter.com/thr-esq/lifetime-tv-wins-appeal-chris-697553 [hereinafter *Lifetime TV Wins*].

[56] *Ash*, 843 N.Y.S.2d at 219 (citing *Quattrone*, 402 F.3d at 309).

[57] *Quattrone*, 402 F.3d at 309-10 (citing *Neb. Press Ass'n*, 427 U.S. at 559) ("[T]he elimination of prior restraints is the 'chief purpose' of the First Amendment.").

[58] *Id.* at 310.

[59] Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 298 (1999).

[60] 4C N.Y. PRAC., *Com. Litig. in New York State Courts* § 97:6, n.2 (3d ed.).

misappropriation in unauthorized biographies and documentaries.[61]

Prior restraints are highly disfavored among the courts. The court considers prior restraints on speech to be the "least tolerable [of] infringement[s]" because they set out to do what the Framers sought to prevent—censorship by the government.[62] Therefore, when issuing a judicial injunction to prevent speech, federal and New York State courts apply the same traditional preliminary injunction test and strict scrutiny standard.[63]

Because the courts presume that a restraint on speech is unconstitutional, the moving party has a heavy burden to prove that a judicial injunction is the clear choice.[64] Likewise, in the context of a law or a regulation restricting speech, the government must meet the heavy burden of proving that the speech will "immediately and irreparably create injury to the public . . . —not that such expression [alone] . . . will incite criminal acts in others."[65]

Further, federal courts apply an additional test to determine the justification of a TRO to prevent the press from publishing details of a public criminal trial.[66] As a result of the added protection that speech receives when reporting on current events and the high public demand for "real person's stories," there is an increase of docudramas and biographies at the expense of an individual's privacy.[67] Consequently, a state's attempt to protect an individual's privacy may run afoul of the First Amendment resulting in an equity-balancing test that will usually tip in the defendant's favor, which minimizes the plaintiff's right to privacy, and in some cases, leads to injustice.

V. THE FEDERAL APPROACH

The First Amendment to the United States Constitution provides individuals with the fundamental right to freedom of speech and the press.[68] However, it is well established that the right is not

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[61] *See* Hollander, *supra* note 2, at 135. Prior restraint issues also arise in cases involving claims of copyright infringement. *See generally* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

[62] *Stuart*, 427 U.S. at 559.

[63] *See supra* note 34; *see also* Hollander, *supra* note 2, at 138.

[64] *Stuart*, 427 U.S. at 558.

[65] Rockwell v. Morris, 211 N.Y.S.2d 25, 32 (App. Div. 1st Dep't 1961).

[66] *Stuart*, 427 U.S. at 562-63.

[67] *See* Hollander, *supra* note 2, at 134.

[68] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of

absolute due to public policy concerns that may require the restriction of certain types of speech, such as defamation or obscenity.[69] The federal courts apply the traditional preliminary injunction test and the strict scrutiny standard to prevent a prior restraint on speech. Subsequently, the court engages in a balancing test to determine whether to uphold freedom of speech rights when in conflict with other rights.[70] Since the balance usually tips in favor of freedom of speech,[71] the aggrieved party is left with no other option but to wait for the other party to exercise its freedom of expression and then sue civilly for monetary damages.[72] Although the wait-and-sue approach may have the effect of "chilling" speech, rather than "freezing" it, courts prefer subsequent civil or criminal proceedings instead of issuing prior restraints as the appropriate sanction.[73]

Courts have held that prior restraints are especially serious when used to prevent the communication of news and commentaries on current events. In *Nebraska Press Ass'n v. Stuart*,[74] the United States Supreme Court addressed whether a TRO, issued to protect the defendant's Sixth Amendment[75] right, was an unconstitutional prior restraint on the news media's First Amendment right. After a citywide manhunt, Erwin Charles Simants was arrested and arraigned for murdering six members of the Henry Kellie family in a rural town

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speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[69] *See Stuart*, 427 U.S. at 590 (Brennan, J., concurring) (stating that obscene publications and incitements to acts of violence fall outside of First Amendment protections); *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65 (1963) ("[O]bscenity is not within the area of constitutionally protected speech or press.").

[70] RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 50, 331-39 (1983) (explaining that public policy concerns may require some rights to be restricted). *See generally Quattrone*, 402 F.3d 304; *Stuart*, 427 U.S. 539.

[71] Michael I. Meyerson, *Rewriting* Near v. Minnesota*: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1092 (2001) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES, *151-52 ("The liberty of [speech] and the press is indeed essential to the nature of a free state.")).

[72] *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.") (emphasis added); CBS v. Davis, 510 U.S. 1315, 1318 (1994) ("Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context.").

[73] *Davis*, 510 U.S. at 1317.

[74] 427 U.S. 539 (1976).

[75] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.").

of 850 people.[76] Local newspapers and television stations quickly sought to cover the sensational story.[77] Three days later, the County Attorney and the defendant's attorney sought a TRO in the Lincoln County Court to prevent "prejudicial news, which would make it difficult . . . [to obtain] an impartial jury and . . . a fair trial."[78] On October 22, 1976, the court granted a broad restriction prohibiting everyone who was present during the preliminary hearing from releasing "*any* testimony given or evidence adduced."[79]

Several press associations and reporters petitioned to the state district court the following day to vacate the TRO.[80] After conducting a hearing, the district court considered newspaper articles and the County Court judge's testimony and substituted the County Court's order with its own TRO.[81] The court stated, "[b]ecause of the nature of the crimes charged in the complaint . . . there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial."[82]

Four days later, the press association and reporters appealed to the Nebraska Supreme Court.[83] The court found that the district court acted properly in issuing the order because, as a result of the intense pre-trial publicity, the defendant's right to a fair trial and an impartial jury was in jeopardy.[84] Further, the court noted that apart from the defendant, society had a vital interest in protecting that right.[85] However, the court modified the district court's TRO to instead prohibit three subjects: (1) the defendant's confession to law enforcement; (2) any third party confessions or admissions, except those statements made to the press; and (3) other facts "strongly implicative of the accused."[86]

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[76] *Stuart*, 427 U.S. at 542.

[77] *Id.*

[78] *Id.*

[79] *Id.* (emphasis added).

[80] *Id.* at 543.

[81] *Stuart*, 427 U.S. at 543-44. The district court's TRO prohibited the petitioners from reporting on five subjects: (1) the confession Simants made to law enforcement; (2) the statements Simants made to other persons; (3) the note Simants had written the night of the murder; (4) medical testimony; and (5) the identities of the victims and the nature of the crime.

[82] *Id.* at 543.

[83] *Id.* at 544.

[84] *Id.* at 545.

[85] *Id.*

[86] *Stuart*, 427 U.S. at 545.

In granting certiorari, the United States Supreme Court considered whether the First Amendment precluded a TRO issued to protect another equally important constitutional right, the Sixth Amendment right to a fair trial.[87] Specifically, the Court focused on the constitutionality of the Nebraska Supreme Court's TRO.[88] Historically, conflicts between First and Sixth Amendment rights were obvious, yet the drafters never addressed how to relieve this tension.[89] Rather, the drafters were more concerned with preventing government intrusion in the "political arena and the dialogue of ideas."[90]

Modern technology and the demand for sensational news stories, however, created a "carnival atmosphere" that almost always resulted in a biased jury.[91] As a result, voluntary standards were developed to impose responsibility on members of the press and the legal profession to prevent Sixth Amendment violations.[92] Consequently, the Court acknowledged that a TRO was the Nebraska Supreme Court's effort to accommodate the long-standing legitimate concern in protecting the defendant's right to a fair trial.[93]

Nevertheless, the Court explained that prior restraints are presumptively unconstitutional.[94] With the heavy burden on the proponent to prove justification of a prior restraint, it is especially difficult to justify when the prior restraint seeks to restrict "truthful reports," such as "news and commentary on current events."[95] In balancing First and Sixth Amendment rights,[96] the Court applied a three-prong test, commonly known as the *Nebraska Press* test, to determine

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[87] *Id.* at 555-56.

[88] *Id.* at 546. The Court noted that although Simants was convicted of murder and sentenced to death, the issue was not moot and should nonetheless be addressed since it was "capable of repetition." *Id.* at 546-47.

[89] *Id.* at 547. The Court discussed the tension between First and Sixth Amendment rights in the trial of British soldiers charged with homicide for shooting into a crowd, the trial of Aaron Burr, and trial of the abduction and murder of the Lindbergh baby. *Stuart*, 427 U.S. at 547-49.

[90] *Id.* at 547.

[91] *Id.* at 548-49.

[92] *Id.* at 549-50. The American Bar Association adopted voluntary guidelines in 1965 in an attempt to balance First and Sixth Amendment rights. *Id.* at 549. In addition, members of the press adopted their own voluntary guidelines to deal with the reporting of crimes and criminal trials. *Stuart*, 427 U.S. at 550-51.

[93] *Id.* at 550.

[94] *Id.* at 558.

[95] *Id.* at 558-59.

[96] U.S. CONST. amend. VI (guaranteeing trial by an impartial jury in federal criminal prosecutions).

whether the pre-trial record justified issuing a TRO.[97] The test considers:

> (1) the nature and extent of pre-trial news coverage; (2) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (3) how effectively a restraining order would operate to prevent the threatened danger.[98]

In *Stuart*, the Court found no issue with the first prong of the test. The pre-trial record convinced the Court that the nature and extent of the pre-trial news coverage was intensive and likely to affect prospective jurors.[99]

The Court, however, took issue with the second and third requirements of the test. The findings were insufficient to determine that the Nebraska Supreme Court considered alternative measures to prior restraint.[100] The test requires the lower court to institute various alternatives to mitigate unrestrained pre-trial publicity short of an injunction, such as a change of trial venue, postponement of the trial, questioning prospective jurors about potential bias, providing clear jury instructions to narrow the scope of what the jury could decide, and limiting what court officers may say to anyone.[101] Since the court failed to consider any of these alternatives, the second prong of the test was not met.[102]

Lastly, in determining the effectiveness of the TRO in protecting the defendant's Sixth Amendment right, the Court acknowledged the problems that arise in managing and enforcing an injunction.[103] For example, territorial jurisdiction and lack of in personam jurisdiction make enforcing a restraining order problematic because petitioners may not be within reach of the court, allowing them to simply ignore the restraining order.[104] Equally important, because of the difficulty of determining in advance what will be prejudicial pre-trial publicity, in issuing an injunction, the trial judge may create a "gray zone [where] circumstances may not violate the restrictive order and

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[97] *Stuart*, 427 U.S. at 562.
[98] *Id.*
[99] *Id.* at 562-63.
[100] *Id.* at 565.
[101] *Id.* at 563-64.
[102] *Stuart*, 427 U.S. at 565.
[103] *Id.*
[104] *Id.* at 565-66.

yet be prejudicial."[105] Furthermore, sensational news stories are inevitable in a town of 850 people, where rumors spread quickly, inevitably affecting possible jurors.[106] For these reasons, the Court found that issuing the TRO would not have protected the defendant's Sixth Amendment right to a fair trial.[107]

Moreover, the Court found the Nebraska Supreme Court's TRO was too broad because it prohibited reporting any testimony or evidence in open court, which violates the well settled principle that "there is nothing that proscribes the press from reporting the events that transpire in the courtroom."[108] Ultimately, the respondent failed to meet the high barriers to prior restraints and the Court reversed the judgment.[109]

Nearly forty years after *Stuart*, the Second Circuit Court of Appeals in *United States v. Quattrone*[110] similarly balanced the scales of equity between the plaintiff's First Amendment right to freedom of speech and press and the defendant's Sixth Amendment right to a fair trial, illustrating the long-standing difficulty in resolving these tensions.[111] The defendant, Frank Quattrone, was indicted for witness tampering and obstruction of justice in connection with an investigation related to the fraudulent practices of certain Wall Street investment-banking firms.[112] After the defendant's trial resulted in a hung jury, he was retried six months later.[113] Shortly before his second trial, the defendant requested that the judge empanel an "anonymous jury" in order to prevent a mistrial during this highly publicized and controversial trial.[114] The judge denied Quattrone's request, but nonetheless ordered the press to refrain from publicly publishing any juror's name.[115]

The appellant media organization appealed the district judge's order prohibiting the publication of jurors' names.[116] Ultimately, the

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[105] *Id.* at 566-67.
[106] *Id.* at 567.
[107] *Stuart*, 427 U.S. at 567.
[108] *Id.* at 568.
[109] *Id.* at 570.
[110] *Quattrone*, 402 F.3d 304.
[111] *Id.* at 310-11.
[112] *Quattrone*, 441 F.3d 153, 161 (2d Cir. 2006).
[113] *Quattrone*, 402 F.3d at 307.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 308.

Second Circuit found that the district court failed to meet the required elements of the *Nebraska Press* test rendering the injunction unconstitutional.[117] The court began its discussion by acknowledging that freedom of speech is not absolute, and there are circumstances where trial news coverage must be restricted in order to prevent a mistrial.[118] In those cases, the court must review the record, the "precise terms" of the TRO, and consider the *Nebraska Press* test.[119]

First, the Second Circuit determined that the district court failed to examine whether extensive publicity would impair the defendant's Sixth Amendment right.[120] Specifically, the judge admitted that Quattrone was not harassed in his first trial.[121] Furthermore, the district court issued the restrictive order on incidents that occurred in an entirely separate and unrelated trial.[122] Second, the district court failed to consider alternative measures to prior restraints.[123] As discussed in *Stuart*, the district court could have changed the trial venue, postponed the trial, or sequestered the jury to mitigate the effects that trial publicity would have on Quattrone's Sixth Amendment right to a fair trial.[124] Third, the court found it significant that the restriction barred the petitioners from publicly publishing any juror names despite their being read aloud in open court.[125] Therefore, anyone present in the courtroom would have known the jurors' names, which would render the restrictive order unenforceable.[126] Ultimately, the Second Circuit vacated the TRO as an unconstitutional prior restraint on speech.[127]

The United States Supreme Court made it clear that a prior restraint is unconstitutional when issued to prevent the communication of news and commentaries in a *public* proceeding.[128] However, the

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[117] *Id.* at 312.

[118] *Quattrone*, 402 F.3d at 310.

[119] *Id.* at 311. The *Nebraska Press* test considers: (1) whether the nature of the news coverage in question would impair the defendant's right to a fair trial; (2) whether measures other than a prior restraint on publication exist to mitigate the effects of unrestricted publicity; and (3) the likely efficacy of a prior restraint to prevent the threatened danger. *Id.*

[120] *Id.*

[121] *Id.* at 311.

[122] *Quattrone*, 402 F.3d at 311.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 312.

[126] *Id.*

[127] *Quattrone*, 402 F.3d at 312.

[128] *Id.* at 308.

Court found the scales of equity continued to tip in favor of a media defendant's First Amendment rights in communicating news of a *private* facility, although it was obtained through "calculated misdeeds."[129] In *CBS v. Davis*,[130] the Supreme Court considered whether an injunction prohibiting the broadcasting of a South Dakota meatpacking factory's unsanitary practices was a prior restraint on the petitioner's First Amendment right.[131]

CBS News had obtained footage of the inner operations of a meatpacking plant through the use of a hidden camera, and sought to broadcast the videotape in an investigative news segment exposing unsanitary practices.[132] As a result, the Federal Beef Processors, Inc. ("Federal") sought an emergency TRO in the Seventh Circuit Court of Appeals to prevent the release of the footage on the ground that it would suffer irreparable economic harm.[133] The Seventh Circuit agreed with Federal and granted the TRO by applying the traditional preliminary injunction test.[134] Furthermore, the court held that the prior restraint doctrine was inapplicable because the appellant had obtained the footage through "calculated misdeeds."[135]

The United States Supreme Court disagreed with the Seventh Circuit.[136] The Court found that the balance of equities did not clearly weigh in Federal's favor because more harm would come to CBS News if its First Amendment rights were violated.[137] In addition, the United States Supreme Court stated that the wait-and-sue approach, rather than a prior restraint, was the appropriate sanction.[138] The Court stated, "If CBS has breached its state law obligations, the First Amendment requires that Federal remedy its harms through a damages proceeding rather than through suppression of protected

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[129] *Davis*, 510 U.S at 1318.

[130] 510 U.S. 1315 (1994).

[131] *Id.* at 1315.

[132] *Id.* at 1315-16.

[133] *Id.* at 1316.

[134] *Id. See supra* note 34.

[135] *Davis*, 510 U.S. at 1316. The Seventh Circuit determined that CBS News obtained footage through "calculated misdeeds" when it trespassed, breached a duty of loyalty, aided and abetted, and violated the Uniform Trade Secrets Act, Comp. Laws Ann. § 37-39-1. *Id.*

[136] *Id.* at 1318.

[137] *Id.*

[138] *Id.* at 1318 ("Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context.").

speech."[139] As a result, the injunction was vacated.[140]

Federal courts have remained consistent in their analytical framework to determine prior restraint issues in applying the traditional preliminary injunction test.[141] When an injunction seeks to restrict speech, a federal court will presume that the injunction is unconstitutional and place a heavy burden on the moving party to prove otherwise. In addition, federal courts have afforded greater protection to speech that reports or publishes news and commentaries on public criminal trials. Rather than issue an injunction, federal courts have preferred the wait-and-sue approach.

VI. THE NEW YORK STATE APPROACH

The New York State Constitution provides, "Every citizen may freely speak, write, and publish his or her sentiments on all subjects . . . ; and no law shall be passed to restrain or abridge the liberty of the speech or of the press."[142] Although the New York State Constitution affords more specific protection for speech and press, it fundamentally provides the same rights as the United States Constitution, and is therefore, applied similarly.[143]

A. New York's View of Prior Restraint

Consistent with the federal approach, New York discourages censoring speech before its actual expression. In their attempts to prevent an unconstitutional prior restraint on speech, New York courts generally apply the same traditional preliminary injunction test as the federal courts do, irrespective of their authority to do otherwise.[144] An injunction will be issued once the moving party is able to meet the strict scrutiny standard.[145] However, similar to the federal courts, even if the standard could be met, New York courts remain

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[139] *Davis*, 510 U.S. at 1318.

[140] *Id.*

[141] *See supra* note 34.

[142] N.Y. CONST. art. I, § 8 (McKinney 2014) ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

[143] *See* People v. P.J. Video, Inc., 501 N.E.2d 556, 560 (N.Y. 1986) ("Although State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them.").

[144] *See supra* Part IV for a discussion on prior restraints.

[145] *Id.*

reluctant, encouraging the wait-and-sue approach.[146]

The prior restraint analysis, however, becomes problematic for a plaintiff who is alleging invasion of privacy due to an impending unauthorized biography or docudrama. As a result, since New York courts do not recognize a common law right to privacy, the legislature enacted a statute to narrowly protect that right.[147] However, even in light of the narrow statute, vagueness on how and when the statute should be applied and the courts' reluctance to issue an injunction have minimized privacy rights for public figures.

B. New York's Right of Privacy Statute

New York State recognizes that although there may be legitimate public curiosity about a public figure's life, he or she may still have a right to privacy and its invasion may give rise to a cause of action for an injunction and damages.[148] New York Civil Rights Law section 51 provides injunctive relief to an individual who successfully alleges the use of his or her "name, portrait, or voice . . . for advertising purposes or for the purposes of trade without written consent."[149] In addition, New York Civil Rights Law section 50 provides that it is a misdemeanor for "a person, firm, or corporation" to use a person's name or likeness for purposes of trade without written consent.[150]

Although New York Civil Rights Law section 51 is considered a privacy statute, the term "privacy" is nowhere mentioned in the text.[151] Instead, the statute is more concerned with protecting an individual's name and picture from misappropriation in the commercial context, such as for advertisement purposes.[152] Throughout the years, New York courts have applied the statute broadly to remain consistent with its overall purpose, but this has raised constitutional

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[146] *Id.*

[147] N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009).

[148] *Id.*

[149] *Id.* ("Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without . . . written consent . . . may maintain an equitable action . . . to prevent and restrain the use thereof.").

[150] N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009) ("[a] person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained . . . written consent . . . is guilty of a misdemeanor.").

[151] Time, Inc. v. Hill, 385 U.S. 374, 381 (1967).

[152] *Id.*

issues.[153] Therefore, New York courts have limited the statute's application to avoid conflicts with a media organization's freedom of commercial speech.[154]

Courts have defined a public figure as someone who by his own voluntary efforts and through his "accomplishments, fame, or mode of living" has placed himself in the public eye.[155] In addition, similar to Porco, a private person who does not voluntarily place himself in the public eye, but participates in a newsworthy event such as a highly publicized criminal trial, is considered a public figure under the privacy statute.[156] Therefore, the use of a criminal defendant's name or likeness is not considered for "purposes of trade"[157] because his personal life has now become a matter of public record.[158]

However, the newsworthy exception[159] must involve matters of public interest by factually reporting on events and people; the exception does not protect fictional reporting.[160] Ultimately, the statute provides very little protection to a public figure featured in a newsworthy publication.[161] This narrow exception recognizes the importance of protecting freedom of speech rights under the New York State Constitution by balancing the important role of the news media with an individual's privacy rights.[162]

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[153] *Id*.

[154] *Id.* at 382.

[155] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 410 (1960) (citing Cason v. Baskin, 30 So. 2d 635, 638 (Fla. 1947)).

[156] N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009).

[157] Edme v. Internet Brands, Inc., 968 F. Supp. 2d 519, 528 (E.D.N.Y. 2013) (defining "[p]urposes of trade" as "attract[ing] customers to the defendant or help[ing] the defendant make a profit.").

[158] *See generally Stuart*, 427 U.S. 539.

[159] *Internet Brands, Inc.*, 968 F. Supp. 2d at 528 (citing N.Y. CIV. RIGHTS LAW § 51 (McKinney 2014) ("The concept of 'newsworthiness' is applied broadly, and includes 'not only descriptions of actual events, but also articles concerning political happenings, social trends or any subject of public interest.' ")).

[160] Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 545 (N.Y. 1966).

[161] *See* Binns v. Vitagraph Co. of Am., 103 N.E. 1108, 1110 (N.Y. 1913); *Internet Brands, Inc*., 968 F. Supp. 2d at 528-29 (citing Alfano v. NGHT, Inc., 623 F. Supp. 2d 355, 359 (E.D.N.Y. 2009)). The New York Court of Appeals also acknowledged a second exception when there is no relationship between the use of plaintiff's pictures to illustrate an article of public interest or if "the article is an advertisement in disguise." *Internet Brands, Inc*., 968 F. Supp. 2d at 528-29 (quoting Messenger v. Gruner Jahr Printing & Publ'g, 727 N.E.2d 549, 551 (2000)).

[162] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); N.Y. CONST. art. I, § 8 (McKinney 2014) ("Every citizen [has

In addition, New York Civil Rights Law section 51 is vague as to whether it authorizes a court to issue an injunction as an absolute right to prevent the continued violation of the statute or whether the court must continue to apply the traditional preliminary injunction test.[163] Or, in the alternative, even if an injunction is granted as an absolute right, the statute does not indicate when it shall be issued, whether before or after applying the traditional preliminary injunction test.[164] Consequently, New York courts have conflicting interpretations of the statute.[165]

Spahn v. Julian Messner, Inc.[166] illustrates a classic invasion of privacy issue for which the New York Civil Rights Law section 51 provides a remedy. The New York Court of Appeals considered whether an author and his publisher's unauthorized biography about Warren Spahn, a famous professional left-handed pitcher, violated New York Civil Rights Law section 51 on the ground that the biography was substantially fictitious.[167]

The court affirmed the lower court's decision because it found that the defendant had, in fact, violated New York Civil Rights Law section 51 by publishing a fictitious biography without the plaintiff's prior written consent.[168] The court discussed the statute's purpose in protecting an individual's picture or name from commercial exploitation without his or her consent.[169] Although New York courts applied the statute liberally to remain consistent with the legislative intent, they have limited the statute to protect First Amendment rights.[170]

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the right to] freely speak, write and publish his or her sentiments on all subjects . . . ; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

[163] *See supra* note 34.

[164] *See supra* note 7.

[165] *See* Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 258 (Sup. Ct. N.Y. County 1984) ("Once the violation is established, the plaintiff may have an absolute right to injunction, regardless of the relative damage to the parties."). Not surprisingly, the vagueness of the statute has similarly caused a split in federal courts. *See* Marshall v. Marshall, No. 08 CV 1420(LB), 2012 WL 1079550, at *30-31 (E.D.N.Y. Mar. 30, 2012). The court applied the traditional test to issue a preliminary injunction to be "both cautious and consistent." *But see* ASA Music Prods. v. Thomsun Elecs., No. 96 Civ 1872 (BDP)(MDF) 1998 WL 988195, at *12 (S.D.N.Y. Sept. 29, 1998) ("Injunctive relief is mandated under Section 51").

[166] 221 N.E.2d 543 (N.Y. 1966).

[167] *Id.* at 544.

[168] *Id.* at 546.

[169] *Id.* at 544.

[170] *Id.* at 544-45 (explaining that the legislative body intended to prohibit the use of a name or picture for "advertising purposes without his consent").

Therefore, the statute's remedy is limited to a voluntary or involuntary public figure whose life is of legitimate public interest and whose career depends on that publicity.[171] However, although the law provides a public figure with very little professional privacy, that privacy is not completely lost.[172] Specifically, fictional reporting of a newsworthy event or person is not an exception to the statute.[173]

The defendant, author, Milton Shapiro ("Shapiro"), and his publisher, Julian Messner, Inc. ("Messner"), conceded that the biography, *The Warren Spahn Story*, was largely fictionalized.[174] However, they argued that such literary technique is customary in children's books to captivate a youthful audience; the biography "[had] to be a lively story."[175] Nevertheless, Shapiro and Messner failed to prove that they had done sufficient research on Spahn.[176] Rather, Shapiro had derived most of his facts from inaccurate newspaper and magazine clippings.[177]

Next, Shapiro and Messner argued that applying New York Civil Rights Law section 51 would "run afoul of the freedoms of speech and the press guaranteed by the First and Fourteenth Amendments of the Federal Constitution" because Spahn failed to establish that the fictionalized biography was created with knowledge of falsity or reckless disregard for the truth, as required by *New York Times Co. v. Sullivan*.[178] However, the court held that the test was inapplicable here because, contrary to *New York Times Co*., this case did not involve public officials and the publication of official conduct.[179] The court stated:

> The free speech, which is encouraged and essential to the operation of a healthy government, is something quite different from an individual's attempt to enjoin

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171 *Spahn*, 221 N.E.2d at 544-45.

172 *Id.*

173 *Id.* at 545.

174 *Id.*

175 Spahn v. Julian Messner, Inc., 233 N.E.2d 840, 843-43 (N.Y. 1967).

176 *Id.* at 843 (stating "he never interviewed Mr. Spahn, any member of his family, or any baseball player who knew Spahn. Moreover, the author did not even attempt to obtain information from the Milwaukee Braves, the team for which Mr. Spahn toiled for almost two decades.").

177 *Id.*

178 *Spahn*, 221 N.E.2d at 545. This standard was articulated by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

179 *Id.*

> the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect.[180]

Ultimately, the court affirmed the lower court's decision to grant damages and an injunction because it found that the fictitious biography was an unauthorized commercial exploitation of Spahn's personality, which was prohibited by New York Civil Rights Law section 51.[181]

One year later, the New York Court of Appeals vacated the affirmance and reconsidered the appeal, after the United States Supreme Court's decision in *Time, Inc. v. Hill*.[182] There, the Court held that in order for New York's privacy statute to be constitutional, a public figure who states a claim under section 51 must prove that the work was published with knowledge of falsity or reckless disregard for the truth.[183] After reconsidering *Spahn*, the New York Court of Appeals re-affirmed its previous order, finding that the unauthorized biography was published with knowledge of its falsity.[184]

In like manner, the Supreme Court of New York County in *Weil v. Johnson*[185] considered whether to issue an injunction preventing the release of a documentary that allegedly violated the plaintiff's privacy rights under New York Civil Rights Law section 51.[186] The defendant, heir to the Johnson & Johnson fortune, created a documentary following the lives of young people who had been born into wealth.[187] The plaintiff, who was the heir to the Autotote fortune, had signed three different release forms to participate in the documentary, acknowledging that his name and likeness would be used in the film.[188] The plaintiff subsequently sued the defendant, arguing that the release of the film would violate his privacy rights under

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[180] *Id.*

[181] *Id.* at 546.

[182] *Spahn*, 233 N.E.2d at 841.

[183] *Id.* at 842.

[184] *Id.* (finding "the defendants' own admission that 'in writing this biography, the author used the literary techniques of invented dialogue, imaginary incidents, and attributed thoughts and feelings' clearly indicates that the . . . test has been met here.").

[185] Weil v. Johnson, No. 119431/02, 2002 WL 31972157 (Sup. Ct. N.Y. County Sept. 27, 2002).

[186] *Id.* at *3.

[187] *Id.* at *1.

[188] *Id.*

New York Civil Rights Law section 51 by portraying the plaintiff in an embarrassing light.[189]

The court began its analysis by recognizing that although there is no common law right to privacy in New York, the 1903 Legislature enacted Civil Rights Law sections 50 and 51 to protect that right.[190] It held that the plaintiff's claims did not meet the requirements of the statute because the plaintiff had signed three release forms to participate in the documentary, which in essence gave the defendant consent to use the plaintiff's name and picture in connection with the documentary.[191] However, assuming that the plaintiff was able to establish a claim under sections 50 and 51, the court found that the documentary fell within the newsworthy exception stating, "[i]ndeed, what the plaintiff seeks here is a prior restraint on defendant's First Amendment right to distribute an informative sociological documentary of considerable 'public interest.' "[192]

Further, the court held that since prior restraints are presumptively unconstitutional, in applying the traditional preliminary injunction test, the plaintiff would fail to demonstrate imminent danger or irreparable damage, other than embarrassing his family.[193] Similar to the federal courts' wait-and-sue approach, the New York Supreme Court explained that the plaintiff's only option is to wait for the film's release to sue civilly for monetary damages.[194]

VII. DISCUSSION

Porco v. Lifetime Entertainment Services, LLC raises serious questions on whether an involuntary public figure participating in a highly publicized criminal trial, may seek a TRO to preserve his or her limited right to privacy in an unauthorized biography or docudrama without violating the doctrine of prior restraint. Based on the federal and New York courts' analytical frameworks, it is unlikely that a judicial injunction will overcome the doctrine's heavy burden.

The federal courts' analytical framework is clear and predictable. In applying the *Nebraska Press* test, the Court in *Stuart* and

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189 *Id.* at *3.
190 *Weil*, 2002 WL 31972157, at *3.
191 *Id.* at *4.
192 *Id.* at *5.
193 *Id.* at *5.
194 *Weil*, 2002 WL 31972157, at *5.

Quattrone determined that a highly publicized criminal defendant's right to a fair trial did not clearly outweigh the opposing party's First Amendment right to free speech.[195] Further, in *Davis*, the Court remained reluctant to enjoin an impending investigative news broadcast because it held that more harm would result from violating the media organization's right to commercial speech.[196] As a result, the TROs in *Stuart*, *Quattrone*, and *Davis* were vacated as unconstitutional prior restraints on speech.

However, contrary to federal law, New York State provides a narrow privacy statute, which seems to grant an injunction as an absolute right.[197] In applying New York Civil Rights Law section 51, New York State courts in *Spahn* found that the unauthorized biography and documentary did not fall under the newsworthy exception to the statute.[198] For that reason, the plaintiff in *Spahn* succeeded in obtaining an injunction because the purported biography was substantially fictional.[199] Nevertheless, the court continued to apply the traditional preliminary injunction test to reach its ultimate decision, even though the statute seems to authorize an injunction as of right.[200]

As a result of the statutes' vagueness on the issue of the applicability of the traditional preliminary injunction test, inconsistent applications of the statute can result in injustice for a public figure.[201] A court that is reluctant to issue an injunction as of right, but applies the traditional preliminary injunction test to balance the equities is ultimately minimizing the public figure's limited right to privacy, because the scales will usually tip in the defendant's favor.

New York Civil Rights Law section 51 should be amended with clear language as to whether the statute authorizes an injunction without balancing the equities. Alternatively, when a court undertakes a balancing test between the defendant's freedom of speech and a public figure's right to privacy, it could distinguish between commercial and non-commercial speech to avoid minimizing a public figure's privacy right. For example, as the plaintiff in *Spahn* prevailed in seeking to enjoin commercial speech, a plaintiff should sim-

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[195] *See Stuart*, 427 U.S. at 570; *see also Quattrone*, 402 F.3d at 313-14.

[196] *See Davis*, 510 U.S. at 1318.

[197] *See* discussion *supra* Part VI.B.

[198] *See Spahn*, 221 N.E.2d at 545; *see also Weil*, 2002 WL 31972157, at *5.

[199] *Spahn*, 221 N.E.2d at 546.

[200] *See* discussion *supra* Part VI.B.

[201] *Onassis*, 472 N.Y.S.2d at 258 ("Once the violation is established, the plaintiff may have an absolute right to injunction, regardless of the relative damage to the parties.").

ilarly prevail because the statute's purpose outweighs the defendant's first amendment right to freedom of commercial speech.[202] On the other hand, if the alleged infringement is non-commercial speech or falls within an exception, as in *Weil*, the defendant should prevail against an injunction—with the wait-and-sue approach as an option.[203]

Under this proposed solution, the holding in *Porco v. Lifetime Entertainment Services, LLC* would yield the same result. The Appellate Division would have identified Porco's alleged violation to his privacy as commercial speech. However, the docudrama, Romeo Killer, would have continued to fall within the statute's newsworthy exception rendering the TRO as an unconstitutional prior restraint on Lifetime's freedom of speech. Ultimately, Porco's right to sue civilly for monetary damages would remain upon the film's broadcast.

However, this proposed solution might continue to impose an unconstitutional prior restraint on an individual's freedom of speech. Therefore, clarifying New York's privacy statute is the best recourse to prevent conflicting interpretations.

VIII. CONCLUSION

The federal and New York approaches reflect the importance of the doctrine of prior restraint. Although there is no federal right of privacy, a federal court's preliminary injunction analysis is consistent, favoring freedom of speech rights and preferring the wait-and-sue approach.[204] Conversely, New York State recognizes that protecting an individual's right to privacy is extremely important, but not at the cost of restricting an individual's free speech. Instead, similar to federal courts, New York prefers the wait-and-sue approach.

Nonetheless, section 51 seemingly grants an injunction to narrowly protect a public figure's privacy.[205] As a result of the statute's vagueness, the courts continue to apply the standard preliminary injunction test to prevent an unconstitutional prior restraint when the statute authorizes otherwise.[206] What results is a vexing situation for an individual who fears that a purported biography or docudrama will

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[202] *Spahn*, 221 N.E.2d at 546.
[203] *See Weil*, 2002 WL 31972157.
[204] *See* discussion *supra* Part IV.A.
[205] *See supra* note 147.
[206] *See* discussion *supra* Part IV.A.

unfairly expose harmful and dramatized details about his or her life—the individual has no choice but to wait and sue. At this time, although New York's privacy statute should be amended to provide clearer interpretation, the wait-and-sue approach, or a subsequent criminal or civil sanction, is the only appropriate option to reconcile freedom of speech rights with privacy rights. This analysis could attempt to balance the doctrine of prior restraint with the right to privacy and support the long-standing principle that freedom of speech is a fundamental constitutional right in the United States and any attempt to restrict it will not be tolerated.

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