"A Simple, Human Measure of Privacy": Public Disclosure of Private Facts in the World of Tiger Woods

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I. INTRODUCTION

Privacy has been described as the right "to be let alone."[1] Yet the series of global media circuses regarding the private matters of famous individuals prompt one to wonder whether celebrities indeed enjoy such a right. Some argue that the media's broadcasting of traditionally private celebrity issues such as health and family matters is legitimate for a scrutinizing public's consumption, and that, in fact, the public is entitled to know the private details of the famous in many circumstances. When an individual's private matters are involuntarily divulged to a widespread audience, others may ask: *where is the line between the public's entitlement to know and the individual's right to be left alone*?

The increasingly intense spotlight on celebrities is the product of a global information culture fueled by ubiquitous camera phones, paparazzi, social media, and the adulation of the famous, begging the question of whether the doomsday of privacy has arrived.[2] Although technology and tabloid culture have made this question especially germane to our time, it is not a new one. American law has long struggled with the balance between freedom of speech and personal privacy. This struggle has played itself out in the jurisprudence of the American tort of public disclosure of private facts, a civil cause of action redressing the widespread dissemination of truthful, but shameful, personal information.[3] This Article begins with a case study of Tiger Woods, a golfer known for zealously protecting his privacy, who was caught in a vortex of public curiosity and scandal. It concludes with a discussion of the applicability of the public disclosure tort in our modern media and technology environment

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

[2] *See, e.g.*, REG WHITACKER, THE END OF PRIVACY: HOW TOTAL SURVEILLANCE IS BECOMING A REALITY 2 (1999); CHARLES J. SYKES, THE END OF PRIVACY: THE ATTACK ON PERSONAL RIGHTS AT HOME, AT WORK, ON-LINE, AND IN COURT 5–6, 194–95 (1999).

[3] *See infra* pp. 157–58 and notes 35–38.

and an appeal for reinvigorated privacy protection for those who shield their private lives.

II. TIGER WOODS: A CASE STUDY IN PUBLIC DISCLOSURE

At the tender age of two, Tiger Woods appeared with his father on national television to showcase his golf swing.[4] At thirteen, the golf prodigy was already being touted as the future of the sport.[5] Less than ten years later, he became the one-man sports empire who successfully modernized golf by drawing fresh spectators and corporate sponsors while shattering many of the sport's stereotypes regarding race, age, and culture.[6] He was repeatedly named America's most admired athlete. Companies like Nike, Buick, Gillette, Tag Heuer and Accenture, among others, sought to capitalize on his carefully crafted public image by associating their products with him.[7] His multiple endorsements earned him the distinction of becoming the first billionaire athlete.[8]

Despite his successes, Woods was known as one of the world's most private public figures. His interaction with the public was limited. Little was known of his private life other than that he was a symbol of hard work (he had reached the pinnacle of a sport in an unprecedented fashion), ascetic self-control (his father once compared him to Gandhi), multiculturalism (he describes himself as "Cablinasian," a mix of Caucasian, Black, American Indian, and Asian) and strong family values (his family members were often by his side).[9] What personal details he revealed were disclosed in the context of television advertisements, such as a Father's Day commercial featuring home-video footage of him with his deceased father.[10] Details of his wedding to Elin Nordegren were tightly

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[4] *See* Mike Douglas Show, Tiger Woods, *available at* http://www.youtube.com/watch?v=_wHkA_983_s (last visited February 17, 2011).

[5] Jonathan Mahler, *The Tiger Bubble*, N.Y. TIMES, Mar. 24, 2010, (Magazine), at MM30, *available at* http://www.nytimes.com/2010/03/28/magazine/28Woods-t.html?pagewanted=1&_r=1.

[6] *Id.*

[7] *See* Ken Belson, *AT&T Is the Latest to Drop Woods*, N.Y. TIMES, Jan. 1, 2010, at B11, *available at* http://www.nytimes.com/2010/01/01/sports/golf/01tiger.html.

[8] Kurt Badenhausen, *Sports' First Billion-Dollar Man*, FORBES.COM (Sept. 29, 2009, 7:25 PM), http://www.forbes.com/2009/09/29/tiger-woods-billion-business-sports-tiger.html.

[9] Geoffrey Colvin, *What It Takes to Be Great*, CNNMONEY.COM (Oct. 19, 2006, 3:14 PM), http://money.cnn.com/magazines/fortune/fortune_archive/2006/10/30/8391794/index.htm; Robert Wright, *Gandhi and Tiger Woods*, SLATE.COM (July 24, 2000, 11:30 PM), http://www.slate.com/id/86898; Paul Harris, *The Black Community's View of the Tiger Woods Scandal*, THE OBSERVER , Dec. 6, 2009, *available at http://www.guardian.co.uk/sport/2009/dec/06/tiger-woods-scandal-white-black*; *Tiger Woods: Family Values Come First*, CHINADAILY.COM (Sept. 26, 2009, 4:31 PM), http://www.chinadaily.com.cn/sports/2007-09/26/content_6136561.htm.

[10] Nike, Tiger Woods Commercial Father's Day featuring Earl Woods, *available at* http://www.youtube.com/watch?v=_N_VjLmk5c8 (last visited Feb. 9, 2011).

guarded until the day of the secluded ceremony.[11] He was known for demanding confidentiality agreements from those with whom he did business and suing if the agreements were breached.[12] While the public was accustomed to his presence on the golf course, Woods almost never appeared on talk shows, reality shows, or any other forum of modern celebrity cultivation. Even parodies were fiercely defended by the Woods camp. In 2006, an Irish magazine published a nude photo it alleged to be of Woods's wife, Elin, in a satirical context.[13] Woods immediately issued a statement and, with his wife, sought legal action against the magazine, which eventually agreed to apologize and pay 125,000€ ($182,000) to the distraught couple.[14]

Everything changed in late November 2009, when Woods crashed his vehicle at a low speed in front of his Florida home.[15] In the days following the incident, public speculation grew into a frenzy fueled by Woods's characteristic silence. Healthcare workers at the hospital where he was treated after the collision allegedly leaked details of his condition, including the medications that he was taking and the fact that he was admitted to the hospital's intensive care unit.[16] Tabloids and websites suggested every cause from attempted suicide to domestic violence.[17] Days later, Woods apologized for unspecified transgressions on his website and pled for his privacy.[18] He wrote:

> Although I'm a well-known person and have made my career as a professional athlete, I have been dismayed to realize the full extent of what tabloid scrutiny really means

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[11] *Tiger Woods Weds Girlfriend in Barbados*, PEOPLE.COM (Oct. 5, 2004, 10:00 PM), http://www.people.com/people/article/0,,710377,00.html (noting that the Barbados resort where the wedding took place had "something [Tiger] craved: privacy").

[12] *See* Woods v. Christensen Shipyards, Ltd., No. 04–61432–CIV, 2005 WL 5654643, at *1 (S.D. Fla. Sept. 23, 2005).

[13] *Woods Angry at Fake Nude Photos*, BBC.COM (Sept. 20, 2006, 12:56 PM), http://news.bbc.co.uk/sport2/hi/golf/5363958.stm.

[14] Paul Hoskins, *Wife of Tiger Woods Wins Damages After Nude Pictures Slur*, REUTERS.COM (Dec. 7, 2010), http://www.reuters.com/article/idUSL0706205920071209.

[15] *See Tiger Woods Injured in Minor Car Accident*, CNN.COM (Nov. 27, 2009), http://articles.cnn.com/2009-11-27/us/tiger.woods_1_police-chief-daniel-saylor-woods-wife-tiger-woods-foundation?_s=PM:US.

[16] Courtney Hazlett, *Source: Woods Was Treated in Intensive Care*, MSNBC.COM (Dec. 7, 2009 6:12:41 PM), http://www.msnbc.msn.com/id/34315847/ns/entertainment-gossip.

[17] *See, e.g., Tiger Woods Drug Overdose a Suicide Attempt?*, BITTEN AND BOUND (Dec. 8, 2009), http://www.bittenandbound.com/2009/12/08/tiger-woods-drug-overdose-a-suicide-attempt/; *Tiger Woods: Injuries Caused by Wife, Not SUV*, TMZ (Nov. 28, 2009, 5:35 PM), http://www.tmz.com/2009/11/28/tiger-woods-elin-nordegren-fight-accident-suv-lacerations/.

[18] *See* Tiger Woods, *Tiger Comments on Current Events*, TIGERWOODS.COM (Dec. 2, 2009), http://www.tigerwoods.com/news/article/200912027740572/news/.

> . . . . [N]o matter how intense curiosity about public figures can be, there is an important and deep principle at stake which is the right to some *simple, human measure of privacy* . . . . Personal sins should not require press releases and problems within a family shouldn't have to mean public confessions.[19]

Despite his wishes, the proverbial horse was out of the barn. The *National Enquirer* and several gossip websites had already reported that Woods had engaged in extramarital affairs.[20] A formidable sequence of women began to reveal the details of their alleged affairs with Woods; some even shared his text and voice mail messages with the world.[21] This onslaught proved to be too much for the media-wary athlete, who eventually announced he would take "an indefinite break from professional golf" for personal and familial healing.[22] He subsequently disappeared from the public eye, although he was rumored to be on his yacht, ironically named "Privacy."[23] As one commentator put it, "[i]n just a few weeks, an image that took more than a decade and untold millions to construct was destroyed."[24]

As a result of the scandal, many of Woods's corporate sponsors abandoned him.[25] Economists estimated that the events leading up to his leave from golf cost the shareholders of the companies that Woods endorsed between $5–12 billion in wealth.[26] In February 2010, Woods held a national press conference in which he contritely apologized for "the

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

[20] *See, e.g.*, Russell Goldman, *At Least 9 Women Linked to Tiger Woods in Alleged Affairs*, ABCNEWS.COM (Dec. 7, 2009), http://abcnews.go.com/Entertainment/tiger-woods-women-linked-alleged-affairs/story?id=9270076.

[21] *See, e.g.*, Emily Friedman, *Cocktail Waitress Jamiee Grubbs Claims Tiger Woods Affair*, ABCNEWS.COM (Dec. 1, 2009), http://abcnews.go.com/Entertainment/jaimee-grubbs-claims-tiger-woods-affair/story?id=9216688&page=1.

[22] Tiger Woods, *Tiger Woods Taking Hiatus from Golf*, TIGERWOODS.COM (Dec. 11, 2009), http://www.tigerwoods.com/news/article/200912117801012/news/.

[23] Linda Marx, *Source: Tiger Woods Sets Sail from Florida*, PEOPLE.COM (Dec. 20, 2009, 8:10 PM), http://www.people.com/people/article/0,,20332107,00.html; Paul Harris, *Tiger Woods Disappears into the Bunker*, GUARDIAN.CO.UK (Jan. 10, 2010), http://www.guardian.co.uk/world/2010/jan/10/mystery-of-missing-tiger-woods.

[24] Jonathan Mahler, *The Tiger Bubble*, N.Y. TIMES, Mar. 28, 2010, (Magazine), at MM30, *available at* http://www.nytimes.com/2010/03/28/magazine/28Woods-t.html.

[25] *Tiger Woods Loses Another Sponsor, Gatorade*, LATIMESBLOGS (Feb. 26, 2010, 3:26 PM), http://latimesblogs.latimes.com/sports_blog/2010/02/tiger-woods-loses-another-sponsor-gatorade.html.

[26] *See, e.g.*, Christopher R. Knittel & Victor Stango, *Shareholder Value Destruction Following Tiger Woods Scandal* (Jan. 5, 2010), *available at* http:// faculty.gsm.ucdavis.edu/~vstango/tiger004.pdf.

irresponsible and selfish behavior I engaged in."[27] He returned to golf in April of 2010,[28] amid much media fanfare and public debate about the meaning of privacy.

III. PUBLIC DISCLOSURE OF PRIVATE FACTS: AN IMPOTENT TORT

The Tiger Woods scandal brings to light an age-old debate in American culture: the right to privacy versus the public's right to know. On one hand, Woods and other privacy proponents beg for privacy as a basic human right. On the other, a curious public argues it has a right to opine, gossip, and judge. This tension is at the core of American tort jurisprudence, which is often mistakenly thought to grant a trusted cause of action for the unauthorized disclosure of private information.

Samuel Warren and Louis Brandeis first introduced the concept of a legal cause of action for disclosure of personal information in 1890.[29] The authors' primary aims were to shed light on what they perceived as the overreaching of their contemporary gossip-mongering press and to advocate for a new cause of action to provide redress for privacy violations.[30] The authors lamented the "numerous mechanical devices" such as "instantaneous photographs" and new "business methods" that "threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[31] They also noted that "[g]ossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."[32]

As recently as 1977, Warren and Brandeis's vision was formally incorporated into the *Restatement (Second) of Torts* (hereinafter "*Restatement*") and became the basis of privacy tort law in most American jurisdictions.[33] The four recognized privacy torts are: invasion of privacy by intrusion, false light privacy, invasion of privacy by appropriation, and public disclosure of private facts.[34] The tort of public disclosure, the focus of this Article, applies when private and highly offensive information is

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[27] CBS, *Tiger Woods on His Marriage*, CBSNEWS.COM (Feb. 19, 2010), http://www.cbsnews.com/video/watch/?id=6223501n&tag=mncol%3Blst%3B1.

[28] Bob Harig, *Tiger Says He'll Play in Masters*, ESPN.COM (Mar. 17, 2010), http://sports.espn.go.com/golf/news/story?id=4999991.

[29] *See* Warren & Brandeis, *supra* note 1 at 193, 195–96.

[30] *Id.* at 196.

[31] *Id.* at 195.

[32] *Id.* at 196.

[33] *See* Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966); Mary T. Powers, *The Right to Privacy in Nebraska*, 13 CREIGHTON L. REV. 935, 935 (1980).

[34] *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

publicly disclosed in an unsanctioned manner.[35] The cause of action requires the plaintiff to show that the defendant: (1) gave publicity; (2) to a private fact; (3) that is not of legitimate concern to the public; where (4) such disclosure is highly offensive to a reasonable person.[36]

More than ever, there is a need for redress of dignitary harms within our intrusive and wired world. However, judicial interpretations of the public disclosure tort's requirements seem to have practically eviscerated Warren and Brandeis's tort.[37] To prevail, a plaintiff must prove that the information disclosed was of a private nature and that it was not newsworthy or of legitimate public concern.[38] In the modern world, the practical impossibility of overcoming these broadly-defined hurdles results in the inapplicability of the tort to public figures—and perhaps even to private ones.

A. Is the Information Disclosed "Private"?

American courts must first determine if the information sought to be protected is private in nature. As one court stated, "[w]ithout private facts, the other three elements of the tort need not be reached. Because the analysis begins with the predicate, private facts, it also ends there if no private facts are involved."[39]

The *Restatement* and subsequent case law have narrowed the formulation of what is "private." Information that is not totally secluded or secret is seldom protectable. For example, an individual cannot enjoy privacy in a public place.[40] More specifically, any activity that is publicly visible or accessible by human or mechanical means is not protected by the public disclosure tort. Courts have found that there is no reasonable expectation of privacy for those on a city street,[41] at a restaurant,[42] or at a church service open to the public.[43] In one case, a family sued Google, alleging the company violated their privacy when it photographed their

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[35] RESTATEMENT (SECOND) OF TORTS § 652D (1977).

[36] *See id. See also* Prosser, *supra* note 34, at 393–94, 396.

[37] *See, e.g.*, Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1123–24 (2000); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983); Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 8–12 (2007).

[38] RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977).

[39] Busse v. Motorola, Inc., 813 N.E.2d 1013, 1017 (Ill. App. Ct. 2004).

[40] *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

[41] *See, e.g.*, Reeves v. Fox Television Network, 983 F.Supp. 703, 709 (N.D. Ohio 1997).

[42] *See, e.g.*, Wilkins v. Nat'l Broad. Co., Inc., 84 Cal. Rptr. 2d 329, 336 (Cal. Ct. App. 1999).

[43] *See* Creel v. I.C.E. & Assocs., Inc., 771 N.E.2d 1276, 1281 (Ind. Ct. App. 2002).

property from an unpaved private road and later made those images widely available to its users.[44] The court did not agree, reasoning that privacy had not been breached, in part because the allegedly private information was already publicly available through other sources, and the plaintiffs had not taken any steps to make such information more private.[45]

American courts also routinely deny privacy protection to information that is not kept absolutely secret. Once a person communicates personal information to another, such information may not be protectable as a matter of law. The court in the oft-cited *Nader v. General Motors Corporation* concluded that information must be completely secret to sustain a privacy claim.[46] In this famous case, Ralph Nader, a well-known consumers' rights activist, sued General Motors (hereinafter "GM"), alleging the car company violated his privacy in an effort to embarrass him publicly in retaliation for his outspoken criticism of GM's safety record.[47] GM's agents had allegedly interviewed Nader's acquaintances about his racial and religious views, his sexual proclivities, his personal habits, and his political beliefs.[48] The court refused to grant Nader relief because, presumably, Nader had previously revealed the personal information gathered by GM to his friends, thus destroying the absolute secrecy of the information.[49]

The requirements of seclusion and secrecy severely limit the protection of privacy: generally speaking, once information is visible or disclosed to *someone, somewhere*, it can legally be gathered and disclosed to *everyone, everywhere*.

B. Is the Information of "Legitimate" Public Concern?

The First Amendment of the U.S. Constitution generally prohibits the government from silencing the expression of truthful information "either by direct regulation or through the authorization of private lawsuits."[50] Legal scholars have argued that the tort of public disclosure threatens freedom of expression, rendering it unconstitutional.[51] Although some states have refused to recognize the public disclosure tort for this reason,[52]

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[44] Boring v. Google, Inc., 598 F. Supp. 2d 695, 699 (W.D. Pa. 2009).

[45] *Id.*

[46] *See* Nader v. Gen. Motors Corp., 255 N.E.2d 765, 770 (N.Y. 1970).

[47] *See id.* at 767.

[48] *Id.*

[49] *Id.* at 770.

[50] Volokh, *supra* note 37, at 1051.

[51] *See, e.g.*, Zimmerman, *supra* note 37, at 293; *contra* Volokh, *supra* note 37, at 1049.

[52] *See, e.g.*, Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988).

the *Restatement* commentary maintains that the public disclosure tort solely protects information that is not newsworthy or "of legitimate public concern."[53] It defines these flexible concepts as follows:

> Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term . . . . Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal.[54]

The *Restatement* contrasts the above detailed reporting of purportedly "legitimate" information with non-newsworthiness, defined as that which "becomes a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public, with decent standards, would say that he had no concern."[55]

In 1989, the U.S. Supreme Court limited the public disclosure tort by applying a broad public concern test in *Florida Star v. B.J.F.*[56] In that case, a non-celebrity rape victim had sued a Florida newspaper after it disclosed her name in its reporting of the rape, in contravention of a state statute making it unlawful to publish the names of rape victims.[57] The trial court directed a verdict in favor of the plaintiff and awarded her damages.[58] On appeal, the Supreme Court reversed, holding that the award was inconsistent with the First Amendment.[59] The Court held that in order to constitute an actionable tort, the information's privacy protection had to "further a state interest of the highest order."[60] A matter of public

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[53] *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

[54] *Id.*

[55] *Id.* at cmt. h.

[56] Florida Star v. B.J.F., 491 U.S. 524, 535 (1989).

[57] *Id.* at 524.

[58] *Id.*

[59] *Id.* at 526.

[60] *Id.* at 541.

significance or newsworthiness could not be hushed.[61] The Court interpreted "public significance" extremely broadly, focusing on the general subject matter of the story (violent crime) rather than on the nature of the information itself (the victim's name) and its importance in conveying the news story.[62] As such, the Court signaled that otherwise private information becomes legitimately "newsworthy" when it bears a connection—no matter how tenuous—to a matter of public interest.

Subsequent courts have struggled with the contours of "public significance," "public concern," and "newsworthiness," particularly in the context of celebrities.[63] A judgment of the legitimacy and social value of information is often circular, as it can be determined by the market's demand and curiosity regarding the subject at hand. For example, in 1998, celebrities Pamela Anderson and Bret Michaels brought a public disclosure claim against the Dutch website that widely disseminated a video depicting the two actors having sex.[64] The website argued that the plaintiffs' fame alone rendered the video newsworthy.[65] A California court determined that the fact that the two famous plaintiffs were romantically involved, the existence of the tape, and the ongoing legal disputes pertaining to the video were newsworthy.[66] However, the aural and visual elements of the video were protectable, since these were the subject of "morbid and sensational prying."[67]

IV. THE VIABILITY OF THE PUBLIC DISCLOSURE TORT *VIS-À-VIS* MODERN MEDIA AND TECHNOLOGY: REVISITING TIGER WOODS

Given the formidable legal obstacles a plaintiff must face in asserting a privacy claim, it is not surprising that the public disclosure doctrine currently stands on dubious ground, especially for celebrities. This section discusses the viability of the tort in its current form in light of the sociological and technological onslaughts endemic to today's media environment. To do so, we revisit the Tiger Woods case study, applying those facts to each of the elements of the public disclosure tort.

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[61] *Id.* at 533.

[62] Florida Star v. B.J.F., 491 U.S. 524, at 536–37 (1989).

[63] *See generally* ROBIN D. BARNES, OUTRAGEOUS INVASIONS: CELEBRITIES' PRIVATE LIVES, MEDIA, AND THE LAW (2010).

[64] Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 828, 841 (C.D. Cal. 1998).

[65] *Id.* at 840.

[66] *Id.* at 842. *See also id.* at 839 ("Newsworthiness is defined broadly to include not only matters of public policy, but any matter of public concern, including the accomplishments, everyday lives, and romantic involvements of famous people.").

[67] *Id.* at 840.

A. "Public" versus "Private" Facts

Modern technology, including the low cost of widespread information dissemination and its resultant cultural shifts, has eroded the already-elusive boundaries between private and public. While American law has never recognized privacy in public places, privacy violations are no longer limited by the human eye or memory. Anyone with a camera phone can surreptitiously snap and profit from photographs of individuals in public (or private) settings. Anyone with a computer can widely search and disseminate information. Even public records are more accessible than ever. The ability to search and capture information and infinitely disseminate it makes everyone particularly susceptible to unwanted intrusions. The ability to memorialize it electronically aggravates the dignitary damage suffered by victims of privacy violations.

Perhaps as a result of the democratization of information dissemination, modern celebrity has been redefined, and a premium has been put on achieving it. As Andy Warhol augured in 1968, everybody can indeed become "world-famous for fifteen minutes."[68] In a recent survey conducted by the Pew Research Center, more than half of eighteen to twenty-five-year-olds surveyed reported being "famous" as their generation's primary or secondary goal in life.[69] For many, gaining fame is an end goal justifiable by any means and not necessarily linked to talent or achievement; often the widespread disclosure of private facts on the Internet is a means to achieving notoriety. Consider the cases of the voluntary release of homemade sex videos, often credited with giving a boost of fame to celebrities and quasi-celebrities alike;[70] consider also the cases of bloggers who memorialize every sordid or mundane detail of their lives online. The ubiquity of such information changes the public's expectations regarding information and creates an appetite for more. For some, norms governing what was once unquestionably private have been relaxed, leaving many social groups struggling to define what is "too much information," or "TMI," as the phenomenon is colloquially known.

Given the landscape of "TMI," one would be hard pressed to argue that the information surrounding the Tiger Woods scandal is private in nature. Despite Woods's attempts to keep his accident under wraps, the police report, the transcript of the neighbor's 911 call, and pictures of Woods's

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[68] *See, e.g., Fifteen Minutes of Fame*, THE PHRASE FINDER, http://www.phrases.org.uk/meanings/fifteen-minutes-of-fame.html (last visited Feb. 9, 2011).

[69] THE PEW RESEARCH CENTER, HOW YOUNG PEOPLE VIEW THEIR LIVES, FUTURES AND POLITICS: A PORTRAIT OF "GENERATION NEXT" (Jan. 9, 2007), *available at* http://people-press.org/reports/pdf/300.pdf.

[70] Lola Ogunnaike, *Sex, Lawsuits, and Celebrities Caught on Tape*, N.Y. TIMES, Mar. 19, 2006, *available at* http://www.nytimes.com/2006/03/19/fashion/sundaystyles/19tapes.html.

wrecked SUV on a public street were all legitimately within public purview. The public and press were free to speculate on the potential causes of the accident. Although displaying a lack of professional ethics, the healthcare workers who leaked his medical information technically did not violate federal medical privacy statutes if they were not directly involved in the golfer's treatment. Assuming they were not bound by confidentiality agreements, the women who came forward with lurid details of their affairs with Woods were similarly not restricted by U.S. law in their ability to disclose what they came to know about him in intimacy. These disclosures were risks that Woods assumed by living his daily life in the U.S.

B. Newsworthiness and Legitimate Public Concern

The increasingly important role of fame and the accessibility of tools of information dissemination have led to compelling questions regarding the degree to which the public is entitled to meddle in those areas of life the famous would prefer to shield. In order for tort law to protect an individual's privacy in the U.S., the individual seeking redress must prove that the information disclosed was non-newsworthy—or that its reporting was "a morbid and sensational prying into private lives for its own sake—with which a reasonable member of the public, with decent standards, would say that he had no concern."[71] This standard is quite a slippery one, as evidenced by the lack of consistency of the public disclosure tort's jurisprudence.[72] The dictionary defines "newsworthy" as "of sufficient interest to the public or a special audience to warrant press attention or coverage."[73] Is "newsworthiness" properly defined by the editors who decide what to publish, or is it defined by the "reasonable" public's appetite for information? If the former, who are these editors today? If the latter, who is the "reasonable" public?

The newsworthiness standard was cemented in tort jurisprudence in the mid-twentieth century.[74] During this time, the predominant media players were traditional print and television media. Editorial decisions regarding newsworthiness were bound by both journalistic ethics and the constraints of time, space, and cost. Newsgathering technology (such as the camera

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[71] RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

[72] *See* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1040–42 (2009). *See also* Abril, *supra* note 37, at 10–12.

[73] *Newsworthy Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/newsworthy (last visited Feb. 14, 2011) (defining "newsworthy").

[74] *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (categorizing, synthesizing, and formalizing privacy law into four distinct torts).

phone) was not ubiquitous. These normative and technological limitations acted as a filter, sorting the legitimate news from the overly prurient.

Today, we enjoy a bounty of media sources, thanks to the Internet. Publication outlets are no longer bound by time, space, and cost, and those who make publication decisions are not necessarily professional journalists. The market, fueled by the public's craving for gossip, drives disclosures of celebrities' private matters. The gossip industry and the paparazzi are evidence that the public tolerates—and indeed pays for—a high level of intrusion into celebrity lives. This hunger for celebrity news is not the creation of the press alone, but rather of the system of celebrity cultivation and reward that society promotes.[75] Celebrity status—even when divorced from actual merit or talent—offers its possessor power, respect, and money. As the Tiger Woods case illustrates, public image and reputation are highly-valued assets with the revered power to sway public sentiment and sell products. To maintain celebrity status, some celebrities affirmatively seek to promote a relationship with their audience by living their lives very publicly.[76] The more personal information they release, the more they pique public curiosity, thereby gaining more fame, money, and success. Other celebrities, such as Tiger Woods, prefer to selectively disclose some aspects of their lives while shielding others. Given the appetite for celebrity news propagated by the market, and the lavish rewards granted to celebrities by the public, is *every* aspect of *every* celebrity's life "newsworthy" today?

Tiger Woods is an undisputed public figure who has voluntarily attained fame and all of its trappings. American courts often assume that once an individual becomes a household name, all of the aspects of his life are legitimately newsworthy and therefore open to the public.[77] This "all or nothing" formulation of privacy is too simplistic for a civilized society. A clearer conception of "legitimate public concern" must be defined. It must take into account human dignity as well as freedom of speech, instead of giving way to the poorly defined and circular concept of "newsworthiness." One possible solution is to require that there be a nexus between the private information disclosed and the public activity that makes the person a celebrity. A celebrity's character may be inextricably linked to the subject of the private information disclosed in cases where the celebrity has affirmatively leveraged his image to induce the public to

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[75] *See* ELLIS CASHMORE, CELEBRITY/CULTURE 258 (2006).

[76] *See generally* P. DAVID MARSHALL, CELEBRITY AND POWER: FAME IN CONTEMPORARY CULTURE (1997).

[77] BARNES, *supra* note 63, at 126 ("That celebrities and public figures have to endure excessive amounts of personal scrutiny is evidence of the extent to which the lives of public figures have been unfairly converted to public property.").

action (to vote for him, etc.) or is the champion of a moral cause. Woods's intimate life and sexual escapades bear a tenuous connection to the subject of his fame: golf. It is only under such a rubric that Tiger Woods may have been able to guard his personal life from an indiscriminate public gaze.

V. A "SIMPLE, HUMAN MEASURE OF PRIVACY"

Despite his fame, Tiger Woods seemed to believe he could construct privacy via contract and seclusion.[78] However, as his case illustrates, even the celebrity with the most guards, lawyers, fences, and money is defenseless against the ravenous tabloid industry.[79]

The existence of a public disclosure tort in American jurisprudence creates the false impression that the law confers a right to a private personal life. In reality, the tort's two formidable hurdles—the requirements of secrecy and non-newsworthiness—vitiate the tort's applicability in our modern world, even for non-celebrities. U.S. tort law provides virtually meaningless redress for those harmed by the mass disclosure of personal, yet truthful, information. First, only the most guarded and secret information is protectable.[80] By interacting with others, appearing in public, and participating in the public record, individuals disclose bits and pieces of personal information. Technology today allows for the aggregation of each of those bits of information into a permanent, searchable, and infinitely distributable digital dossier, resulting in secrets being harder to keep and easier to prove. Celebrities are particularly affected, since the paparazzi's cameras put them in the spotlight at all times, whether they are on stage or not. Second, only information that does not warrant press coverage or is not of legitimate public concern can be shielded by the tort.[81] This standard is impracticable and overly broad. Contemporary norms suggest a public that is interested in just about anything regarding the private lives of others and media outlets must cater to public demands in an increasingly competitive market for information.

When Tiger begged for "a simple, human measure of privacy,"[82] he was appealing to privacy as a fundamental human right to freely develop one's personality, consciousness, and family life away from public scrutiny and intrusion. Such is the conception of privacy found in the European

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[78] *See supra* notes 11–12 and accompanying text.

[79] *See supra* notes 15–28 and accompanying text.

[80] *See supra* notes 40–49 and accompanying text.

[81] *See supra* note 53 and accompanying text.

[82] Tiger Woods, *Tiger Comments on Current Events*, TIGERWOODS.COM (Dec. 2, 2009), http://www.tigerwoods.com/news/article/200912027740572/news/.

Human Rights Convention[83] and upheld vis-à-vis celebrities in courts throughout Europe.[84]

Unlike these jurisdictions, U.S. law currently fails to protect this simple, human measure of privacy. No civilized society should promote an all-or-nothing system of privacy, or all-or-nothing protection of dignity. It is prejudicial to conclude, as one commentator famously did, "[y]ou have zero privacy . . . . Get over it."[85] U.S. tort law must adapt to the changing reality of the media and technological landscape by introducing a more nuanced rubric for redressing privacy violations of celebrities and non-celebrities alike.

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[83] Charter of Fundamental Rights of the European Union, Art. 7, 2000 O.J. (C 364/01), *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf ("Everyone has the right to respect for his or her private and family life, home and communications.").

[84] *See* Mosley v. News Grp. Newspapers Ltd., [2008] EWHC 1777 (QB), [1], [232]–[236] (deciding that Max Mosely, President of the Federation Internationale de l'Automobile, had a reasonable expectation of privacy in relation to sexual activities carried on between consenting adults on private property); Douglas v. Hello! Ltd., [2003] EWHC 786 (Ch), [2003] 3 All E.R. 996, [1]–[3], [227], [229], [279]–[280] (finding that unauthorized photos published by Hello! of the wedding of Michael Douglas and Catherine Zeta Jones were an illegal breach of confidence, but dismissing a privacy claim); Campbell v. MGN Ltd., [2004] UKHL 22, [2004] 2 A.C. 457 [1] –[10], [125], [158]–[160], [171] (finding that Naomi Campbell's privacy had been violated by misleading articles in *Mirror* regarding her drug rehabilitation); Von Hannover v. Germany, 2004-VI Eur. Ct. H. R. 41, [9]–[10], [76]–[80] (finding that photos of the private life of the daughter of Prince Rainier III of Monaco published in *Bunte* magazine in Germany violated her right to privacy under Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

[85] Polly Sprenger, *Sun on Privacy: "Get Over It"*, WIRED.COM (Jan. 26, 1999), http://www.wired.com/politics/law/news/1999/01/17538.