

Enjoining Selective Forced Exposure of Figures of Contemporary Society

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[When the social]mask is torn off and the individual's real self bared to a world in which everyone else still wears his mask and believes in masked performances, the individual can be seared by the hot light of selective, forced exposure [O]nly grave social need can ever justify destruction of the privacy which guards the individual's ultimate autonomy.¹

Fidelity to justice and constitutional order requires swift development of effectual means for halting the predatory behaviors commonly attributed to journalists, editors, and photographers. Failure to intervene and introduce appropriate penalties for the level of harassment endured by today's *figures of contemporary society* has profound implications for citizens of Western societies.²

Global fallout from the worst economic crisis in nearly a century has yet to subside. Given the precarious state of world markets, we might legitimately expect public media to resume its role as watchdog and focus upon the criminals and incompetents in government and business who are responsible for the hot mess threatening to engulf our future. Astonishingly, in these incredibly uncertain economic times, the tabloid press continues to make sport of humiliating and disparaging celebrities without due regard for their safety, privacy or family life. Worse, it has invited the mainstream press to join the feeding frenzy, and their owners have acquiesced. These are hardly the conditions under which international jurists have stood guard over freedom of expression, while shielding the press that Edmund Burke deemed the fourth estate.³ Consequently, the sense of community, civic engagement, mutuality and

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¹ ALAN F. WESTIN, *PRIVACY AND FREEDOM* 33–34 (1967).

² See ROBIN D. BARNES, *OUTRAGEOUS INVASIONS: CELEBRITIES' LIVES, MEDIA, AND THE LAW* 280–81 (2010).

³ See *id.* at 54 (“Edmund Burke, an 18th-century British politician, is credited with declaring that although there are three Estates in Parliament, the Reporters Gallery constituted a Fourth Estate. Overnight the term *Fourth Estate* became synonymous with the press. Its popularity is a testament to the notion that the avowed purpose of the press cause in the Constitution was to create a mechanism outside of governmental control as an additional check on the three official branches.”).

respect that once permeated our culture as a matter of necessity for the preservation and facilitation of an engaged citizenry have all but vanished. The recent stripping and branding of Tiger Woods and his family is a prime example of this phenomenon.⁴ Injunctive relief was the only equitable remedy for the harm sustained by the Woods family.

During late fall of 2009, a Florida news station reported that Woods was injured in a serious auto accident.⁵ In reality, Woods's 1.3-ton sport utility vehicle rammed a fire hydrant⁶—the impact of a twenty-seven hundred kilogram SUV upon a sixty-eight kilogram hydrant planted in Florida soil—and the photographic evidence merely raised the question of how much it would cost taxpayers to replace the hydrant.⁷

Next came the nonstop reporting and incessant door-stepping that resulted in media outlets permanently camped outside every possible entry and exit of the places frequented by Woods and those in his inner circle.⁸ A deluge of articles in the weeks that followed featured crude judgments and hyperbole describing his “diabolical cunning,” the “terminal velocity” of his fall from grace, and his inability to “accept himself as a lesser being.”⁹ There was discussion of a widespread respect for his game, coupled with disdain for his arrogance.¹⁰ Lies, half-truths, and innuendo flew about like projectiles from an air-ball machine. In barely three weeks time, Woods's brand supposedly nose-dived from the “cleanest, safest athlete in the world,”¹¹ to that of world-class whore who “slept with every

⁴ Jaime Diaz, *What Happened? Tiger Woods Needs a Heart-to-Heart with Tiger Woods*, GOLF DIGEST at *5 (Feb. 2010), [http://www.golfdigest.com/magazine/2010-02/tiger_woods_diaz_\(discussing_the_impact_of_scandal_on_the_athlete_and_his_family\)](http://www.golfdigest.com/magazine/2010-02/tiger_woods_diaz_(discussing_the_impact_of_scandal_on_the_athlete_and_his_family)).

⁵ *Look Back: WESH Breaks the News of Tiger's Crash*, WESH.COM (Nov. 26, 2009), <http://www.wesh.com/r/25925488/detail.html>.

⁶ *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.

⁷ See, e.g., Christopher Beam, *Stopping by Woods*, SLATE (Dec. 4, 2009), <http://www.slate.com/id/2237394/> (depicting the tree beside the statement “Tiger Woods’ car crash last week caused \$3,200 in property damage—\$3,000 to a fire hydrant and \$200 to a neighbor’s tree”).

⁸ Doug Ferguson, *Police: 911 Tapes of Woods’ Crash to be Out Sunday*, GOLF.COM (Nov. 29, 2009), http://www.golf.com/golf/tours_news/article/0,28136,1943284,00.html (describing the scene outside of Woods’ gated community which including “more than two dozen media and clusters of TV trucks”).

⁹ James Moore, *To an Athlete Screwing Up Young*, THE HUFFINGTON POST (Dec. 12, 2009), http://www.huffingtonpost.com/jim-moore/to-an-athlete-screwing-up_b_389908.html.

¹⁰ E.g. *id.* (“A part of Tiger’s present problem stems from the fact that his great skills were blended with a kind of off-putting arrogance. There are people pleased to see him fall because they respected the talent but disliked the man.”)

¹¹ Michael Park, *Tigers Woods Loses His First Sponsor*, PEOPLE at *1 (Dec. 14, 2009), <http://www.people.com/people/article/0,,20326975,00.html> (quoting Richard Burton, a professor of sports management at Syracuse University).

cocktail waitress with collagen lips from Las Vegas to Dubai.”¹²

One writer remarked, “This feels like the O.J. thing,” citing the 1995 criminal trial of the famous African American footballer acquitted of murdering his former wife and her companion, both of whom were Caucasian.¹³ The writer explained that the difference between the two situations is that blacks will not defend Woods.¹⁴ In short, this writer averred: there will be no chorus of support “standing firmly and loudly behind . . . *the Cablinasian*” because Woods rejected his Black heritage in 1997 “when he famously took a nine-iron to the face of blacks by telling [Oprah] on her couch that he wasn’t black;” as a result, “people see him for what he really is, a fraud.”¹⁵

After many years of exploring the value of free speech and individual rights in Western democratic nations, and observing the pervasive effects of stereotyping in the U.S., what becomes evident is that Woods’s infidelity and lack of black America’s support were the least of his problems. The assault upon Woods was spearheaded by an unrelenting press corps that invaded his privacy with increasing vengeance and hubris.

This Article proposes a course correction that limits further expansion of the *public figures* doctrine, and posits that if high courts constructed a narrower category of persons and issues to which the doctrine would apply, its doctrinal value would increase as practical matter of law. Under our current system of adjudication, individuals without public duties and responsibilities, who are neither elected nor appointed to public office, routinely suffer sustained and prolonged attacks upon their privacy, reputation, and honor, while their family members are forced to share in those experiences. The media machine, acting in pursuit of goals far different than those envisioned by James Madison as he penned the First Amendment of the U.S. Constitution in 1789, or by the signatories to the Charter of Fundamental Rights in the European Convention on Human Rights in granting Article Ten freedom,¹⁶ trampled upon Woods’s constitutional rights, endangered the safety of his wife and their babies,

¹² Jami Bernard, *Ad Rant: Tiger Woods Fell Victim to His Branding*, WALLETPOP.COM at *1 (Dec. 15, 2009, 12:30 PM), <http://www.walletpop.com/blog/2009/12/15/ad-rant-tiger-woods-fell-victim-to-his-own-branding/>.

¹³ Terence Moore, *Where Are Tiger’s ‘Cablinasian’ Backers?*, GOLF FANHOUSE (Dec. 8, 2009), <http://golf.fanhouse.com/2009/12/08/where-are-tigers-cabalanian-backers/>.

¹⁴ *Id.*

¹⁵ *Id.* (emphasis added).

¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, art. 10, Sept. 3, 1953, 213 U.N.T.S. 222, as amended by Protocol Nos. 3, 5, 8, 11 and 14 (entered into force Nov. 1, 1998) (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”).

and failed to respect his status as a citizen of a free nation.¹⁷ The principle of respect for human dignity is at the core of every national or international text on the protection of fundamental rights. In *von Hannover v. Germany*, the European Court of Human Rights (hereinafter “ECtHR”) held that publication of photos and articles about Princess Caroline of Monaco, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of her private life, could not be deemed to contribute to any debate of general interest to society despite the fact that she is well known to the public.¹⁸

In relation to Tiger Woods, a flock of women in five years,¹⁹ including two porn starlets,²⁰ could not have remotely justified the non-stop media coverage that the information garnered. Over-the-top characterizations and speculations about whether he pursued the supposed sins of his loins with the tacit consent of a woman with whom he shares a home is not and may never become a matter of public concern.²¹ Only one major media personality in the U.S., MSNBC’s Rachel Maddow, openly discussed and demonstrated requisite understanding of the invasive nature of the media frenzy by refusing to cover the story.²² Intrusive tabloid-style reporting denies celebrities the same fundamental constitutional protection enjoyed by average citizens, and dissuades the mainstream press from honest and relevant reporting. According to one point of view, the current proliferation of the yellow-gonzo journalistic mix is a sure signal that the extreme exploitation will not end “until our culture stops its free fall from civility.”²³ In evaluating the cultural milieu that feeds the blood-lust and

¹⁷ See generally BARNES, *supra* note 2, at 153–56.

¹⁸ See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H. R. 41, [8]–[9], [76]–[80]; BARNES, *supra* note 2, at 1–17 (discussing the details and importance of the case). See also Robin D. Barnes, *The Caroline Verdict: Protecting Individual Privacy Against Media Invasion as a Matter of Human Rights*, 110 PENN. ST. L. REV. 599, 606 (2006) (“The *Von Hannover* court recognized the crucial links between human dignity, familial privacy, and the development of the human personality.”).

¹⁹ See *A Comprehensive List of Tiger’s Mistresses*, HOLYTACO.COM (Dec. 8, 2009, 10:38 AM), <http://www.holytaco.com/comprehensive-list-tigers-mistresses>.

²⁰ *Id.* (identifying a “Los Angeles-based porn star Holly Sampson” as one of Tiger’s mistresses); Rita Watson, *Tiger Woods Ex-Mistress Posting Their Porn Photos Midst Sex Addiction Trauma*, EXAMINER (Mar. 27, 2010), <http://www.examiner.com/x-2108-Love-and-Marriage-Examiner~y2010m3d27-Tiger-Woods-sex-addiction-from-a-sex-therapist> (identifying “porn star Joslyn James” as “one of Tiger Woods many mistresses”).

²¹ *Pickering v. Bd. of Educ.* 391 U.S. 563, 574 (1968) (setting the standard for defamation suits against public figures).

²² *The Rachel Maddow Show, World Pauses for Tiger Woods*, MSNBC (television broadcast Feb. 20, 2010) available at <http://www.clicker.com/tv/the-rachel-maddow-show/World-pauses-for-Tiger-Woods-768429/> (explaining the story’s cultural resonance and why she refused to cover it).

²³ Stuart Fischhoff, *Confessions of a TV Talk Show Shrink*, PSYCHOL. TODAY at *9 (Sept. 1, 1995), <http://www.psychologytoday.com/articles/200910/confession-tv-talk-show-shrink>; Andrew Walker, *Bedtime for Gonzo?*, BBC NEWS (Feb. 24, 2005), http://news.bbc.co.uk/2/hi/uk_news/magazine/4291311.stm (describing “Gonzo journalism”).

voyeuristic tendencies of average citizens, psychologist Stuart Fischhoff concluded that shame at outrageous behavior and respect for privacy must “reassert themselves in the pantheon of social values.”²⁴

On a daily basis, we have witnessed wholesale violations of civil and human rights and injuries that cover the entire span of dignitary tort law in our much-touted western democratic traditions. While we wait on the redeeming influences of shame and mutual respect, it is useful to remember that we also have courts of law. A central function of the judiciary in a democracy is to provide redress for harmful and mercenary exploitation of its citizens. A thorough critique of the legal justifications advanced for classifying every artist, athlete, and musician as a general “public figure” is necessary to remedy the violations. Current standards of newsworthiness, limits on privacy, and unbounded press freedom (even the tabloids) place *figures of contemporary society* at an overwhelming disadvantage.

In the U.S., those deemed to be public figures are unlikely to prevail on defamation claims unless they clear the mile-high hurdle of establishing *publisher malice* as defined by the U.S. Supreme Court in *New York Times v. Sullivan*; which requires *knowing* falsity or reckless disregard for the truth.²⁵ Notably, the standard was developed under highly unusual circumstances in order to assist the press in reporting on corrupt public officials in the discharge of their public duties.²⁶ Repositioning celebrities as general purpose public figures effectively bars their recovery for even the most vicious attacks upon their character and dignity. Increasing urgency surrounds the need to look at the damage, diversions, and distortions attending public media’s increased role in undermining democratic principles.²⁷

Thus, this Article calls for the provision of emergency injunctive relief for those whose rights are abridged as their lives are catapulted into turmoil without just cause. Pre-publication interdiction of harmful articles and photographs before they are used to drag the larger public into the nuances of someone else’s personal debacle is extraordinarily beneficial. It has the added bonus of encouraging those self-correcting journalistic efforts that would eventually serve to clarify—rather than distort—global consensus about what characterizes legitimate areas of public interest and concern.

²⁴ Fischhoff, *supra* note 23, at *6.

²⁵ *New York Times v. Sullivan*, 376 U.S. 254, 280 (1963).

²⁶ *See id.* at 271, 279 & 283.

²⁷ *See* ROBERT MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* 3 (2010) (“This is a deep-seated and long-term crisis that was created by media owners who made the commercial and entertainment values of the market dramatically higher priorities than the civic and democratic values that are essential to good journalism and good society.”).

These stories and headlines could not more effectively divert attention from the important news stories than if they had been purposefully designed to do so.

Consider the following: "As of mid-summer 2009, 20 financial giants each received at least \$2 billion in TARP bailout funding. Together these 20 firms garnered \$283 billion, far more than half the \$487.8 billion TARP had committed to nearly 650 troubled firms."²⁸ Yet while "these same institutions handed out millions in executive bonuses just months after the bailout, we were treated to wall-to-wall network and cable news coverage of Tiger Woods' apology and full blown panels of 'experts'" assembled to discuss his level of sincerity, his spiritual beliefs, his mother's disappointment, and the wife's absence."²⁹ Amid recent reports that some of these same banks effectively cheated taxpayers by presenting the Federal Housing Administration with false claims, the media instead obsessively focused upon former California Governor Arnold Schwarzenegger's sexual proclivities; the media forced the public to endure non-stop coverage of the nuances of his marriage to Maria Shriver, while at the same time, less attention was paid to the fact that national unemployment rates continue to rise and 85 percent of recent grads are moving back home indefinitely.³⁰

Equitable redress for the multiple invasions of privacy and selective exposure of the most intimate and detailed features of a citizen's individual and familial life would be far reaching and beneficial to the great social contract. To that end, Europe's high courts are poised to lead the way.

²⁸ Robin Barnes, *Media Pundits Star in the Theater of the Absurd*, CELEBRITY PRIVACY BLOG, (May 19, 2011), <http://www.professorbarnes.com/celebrityprivacy/?p=104> (last visited May 26, 2011).

²⁹ *Id.* Similarly, in recent news, the media and paparazzi have moved on to tear Arnold Schwarzenegger's family life to shreds. *Id.* At the same time, in mid-May 2011, Citigroup awarded its chief a \$23.2 million retention package that could make him the highest-paid executive on Wall Street. Just three years ago, Citigroup was bailed out twice by the U.S. government, and Vikram Pandit, Citigroup's CEO, survived numerous calls for his firing. Eric Dash, *As Citi Revives, Pandit Wins Big Pay Package*, N.Y. TIMES.COM DEALBOOK, (May 18, 2011, 8:58 PM), <http://dealbook.nytimes.com/2011/05/18/pandits-take-of-citigroups-profits/>.

In addition, a May 16, 2011 *Huffington Post* exclusive likewise reported that: five separate investigations were conducted by the Department of Housing and Urban Development's inspector general, examining Bank of America, JPMorgan Chase, Wells Fargo, Citigroup and Ally Financial. Federal audit reports accuse the nation's five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government-backed loans. The banks effectively cheated taxpayers by presenting the Federal Housing Administration with false claims: They filed for federal reimbursement on foreclosed homes that sold for less than the outstanding loan balance using defective and faulty documents. See Shahien Nasiripour, *Confidential Federal Audits Accuse Five Biggest Mortgage Firms Of Defrauding Taxpayers*, HUFFINGTON POST (May 16, 2011 4:42 PM), http://www.huffingtonpost.com/2011/05/16/foreclosure-fraud-audit-false-claims-act_n_862686.html.

³⁰ See *supra* note 29 and accompanying text. See also Jessica Dickler, *Boomerang Kids: 85% of College Grads Move Home*, CNN MONEY (November 15, 2010: 10:02 AM), http://money.cnn.com/2010/10/14/pf/boomerang_kids_move_home/index.htm

When rumors about deal-making for an exposé of nude photos of Tiger Woods surfaced, Woods's counsel applied for an injunction against publication.³¹ The UK's High Court Justice David Eady granted the injunction.³²

As the most appropriate form of redress in such cases, injunctive relief holds the promise that development of measured and meaningful transnational uniformity in the application of a general public figure doctrine may be on the horizon. In light of the harms attending the unlawful invasions, it now stands as the only effective means of remedy for the denial of equal protection under law for those subject to unconstitutional privacy invasions, defamation of character, and the loss of familial dignity produced by public media assaults.

Injunctive relief allows cases to be resolved in an open system of comparative valuation using methods that are likely to reduce harassment, preserve respect for family life, and shield development of personality for the young. It is precisely the kind of court order needed to prevent continuing irreparable harm. Preliminary injunctions issued on behalf of *figures of contemporary society* would take immediate effect and would stand until final evaluation of the law and facts pursuant to a motion for permanent injunction.

Injunctions are the remedy of last resort because of long-standing rhetoric about the dangers of prior restraint.³³ The Supreme Court placed injunctions squarely within the purview of prior restraints on free speech in *Near v. Minnesota*, making it more difficult to obtain injunctive relief.³⁴ Courts have acknowledged that "prior restraints do often take the form of injunctions."³⁵

The interest in maintaining and fiercely protecting laws and policies against prior restraints originates from well over two hundred years ago in the early years of the nation. The U.S. government sought to protect speech in a time in which governmental licensing of publications could have effectively squashed it.³⁶ When publishers disseminate private or

³¹ Pascal Fletcher, *Woods Wins UK Court Ban Against Nude, Sex Photos*, REUTERS (Dec. 11, 2009), <http://www.reuters.com/article/idUSTRE5BA31F20091211>.

³² Woods v. X & Y, [2009] Q.B. 1 at 2 (Eng.) (order granting injunction), available at <http://file.wikileaks.info/leak/tiger-woods-injunction-2009.pdf> (last visited Feb. 26, 2011) [hereinafter Woods Injunction]; Jason Lewis, *Tiger Woods' Lawyers Act Over Nude Pictures That Don't Exist*, DAILY MAIL (Dec. 13, 2009), <http://www.dailymail.co.uk/news/article-1235251/Tiger-Woods-lawyers-act-nude-pictures-dont-exist.html>.

³³ See *Lassalle v. Daniels*, 673 So. 2d 704, 709 (La. Ct. App. 1996) ("Courts are generally reluctant to issue an injunction to restrain torts such as defamation or harassment. An injunction is a harsh, drastic and extraordinary remedy. . .").

³⁴ *Near v. Minnesota*, 283 U.S. 697, 721 (1930).

³⁵ *Madsen v. Women's Health Cent.*, 512 U.S. 753, 763 n.2 (1994).

³⁶ See *Near*, 283 U.S. at 714 (discussing the Founders' views on prior restraints of the press).

defamatory material, the given remedy, although not always adequate, is not usually provided in the form of injunctive relief before (or even during) publication, but in the damages and remedies that follow.³⁷

In *New York Times Company v. United States*, a case involving significant matters of public concern, the Supreme Court denied the government application for injunctive relief by rejecting the alleged national security interests.³⁸ In June 1971, a reporter for *The New York Times* obtained a leaked copy of government documents that were classified at the time and known to contain details of the U.S. government's decision-making process regarding the war in Vietnam, which became known as the Pentagon Papers. The *Times* published a series of articles detailing how the government misled the American people about the war.³⁹ The newspaper published its first report on June 13, 1971; on June 14, the paper received a telegram from U.S. Attorney General John Mitchell warning that publication of classified information was a violation of the Espionage Act and that further publication would cause "irreparable injury to the defense interests of the U.S."⁴⁰ The most interesting part of the case is the shared sense, among news editors, of a unifying mission regarding the responsibilities of a free press in a democracy. Once the Justice Department obtained a temporary injunction against *The New York Times*,⁴¹ in a lower court, *The Washington Post* published information from the Pentagon Papers the following day.⁴² "As the government sought to enjoin the *Post*, *The Boston Globe* published its take on the documents."⁴³

In contrast to the U.S., high courts in the UK issue several kinds of injunctions. Those that contain very specific orders as well as prohibitions upon dissemination of the content or existence of the order itself have been dubbed "super-injunctions."⁴⁴ Eady's order banning publication in Britain

³⁷ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418–19 (1971); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Smith v. Daily Mail Publ'g*, 443 U.S. 97, 100–01 (1979); *Lowe v. SEC*, 472 U.S. 181, 188 (1985).

³⁸ *N.Y. Times Co. v. United States*, 403 U.S. 713, 718–19 (1971) (Black, J., concurring) (per curiam).

³⁹ *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 326 (S.D.N.Y. 1971).

⁴⁰ Hedrick Smith, *Mitchell Seeks to Halt Series on Vietnam, but Times Refuses*, NYTIMES.COM at *2 (June 15, 1971), <http://nytimes.com/books/97/04/13/reviews/papers-mitchell.html>. The most interesting part of the case is the shared sense, among news editors, of a unifying mission regarding the responsibilities of a free press in a democracy.

⁴¹ Robin D. Barnes, *How Civil Rights and Pro-Peace Demonstrations Transformed the Press Clause through Surrogacy*, 34 WM. MITCHELL L. REV. 1021, 1054 (2008).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Adrian Zuckerman, *Super-Injunctions: Curiosity-Suppressant Orders Undermine the Rule of Law*, 29 CIV. JUST. Q. 131, 131 (2010). See also James Robinson, *How Super-Injunctions are Used to Gag Investigative Reporting*, THE GUARDIAN, (Oct. 13, 2009).

of any photos or videos showing Woods in the nude or having sex did not prohibit the disclosure of the injunction's existence; however, it did contain specific provisions limiting the disclosure of the contents of the injunction, making it more restrictive than a typical U.S. injunction.⁴⁵ A key question involved with the super-injunction is whether courts should have the power enjoin the publication of statements made during parliamentary proceedings.⁴⁶

Justice David Eady's injunctive order favoring Tiger Woods would have been unlikely to generate controversy at the historic May 4, 2010, meeting, headed by Master of the Rolls David Neuberger.⁴⁷ Neuberger formed a committee of judges and lawyers charged with examining the use of injunctive relief, including special gag-orders which limit reporting on the injunction itself.⁴⁸ *The Guardian*, one of the UK's leading newspapers, complained about a super-injunction in favor of the privately-held oil-trading firm Trafigura.⁴⁹ The paper gained access to information contained in the Minton report, commissioned by Trafigura, which allegedly proves that Trafigura knew they were dumping toxic waste along the Ivory Coast.⁵⁰ In 2006, *The Guardian* sought to report the details of arrangements to dump oil waste in West Africa that made thousands of people ill.⁵¹

An injunction issued on September 11, 2009, prohibited publication of reports from parliamentary proceedings related to the corporation's role in the public health scandal.⁵² Lawyers for the Guardian argued against the injunction asserting three grounds:

The Guardian's arguments against the injunction included assertions that:

The practice offends the time-honoured rule against

⁴⁵ Woods Injunction, *supra* note 32, at 2; Lewis, *supra* note 29.

⁴⁶ Woods Injunction, *supra* note 32, at 2; *see, e.g.*, David Leigh, *Guardian Gagged from Reporting Parliament*, THE GUARDIAN at *1 (Oct. 12, 2009), <http://www.guardian.co.uk/media/2009/oct/12/guardian-gagged-from-reporting-parliament>; James Dean, *'Super-Injunction' Not Able to Gag Parliament, Says Prentice*, THE LAW GAZETTE (Oct. 22, 2009), <http://www.lawgazette.co.uk/print/52856>.

⁴⁷ Lord Neuberger Sets up 'Super Injunctions' Committee, SOLICITORS JOURNAL (Apr. 6, 2010), <http://www.solicitorsjournal.com/story.asp?sectioncode=2&storycode=15978&c=1&eclipseaction=getsession>.

⁴⁸ *Id.*

⁴⁹ David Leigh, *Trafigura Drops Bid to Gag Guardian Over MP's Question*, THE GUARDIAN (Oct. 13, 2009), <http://www.guardian.co.uk/media/2009/oct/13/trafigura-drops-gag-guardian-oil>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Alan Rusbridger, *Trafigura: Anatomy of a Super-Injunction*, THE GUARDIAN (Oct. 13, 2009), <http://www.guardian.co.uk/media/2009/oct/20/trafigura-anatomy-super-injunction/print>.

prior restraint, which safeguards freedom of expression. . .

It also fails to protect whistleblowers acting in the public interest. The huge legal bills involved in fighting cases, too, have a chilling effect on legitimate investigative journalism.

[When] the beneficiaries are big corporations. The fact that the press is also barred from reporting the existence of these gagging orders is doubly pernicious.⁵³

The news publisher protests included allegations that it was “prevented from identifying [MP] Farrelly, reporting the nature of his question, where the question could be found, which company had sought the gag, or even which order was constraining its coverage.”⁵⁴ As the story was leaked throughout the publishing industry and made its way to the internet, they clearly replicated the actions of the *Times*, the *Globe* and the *Post* in the case of the Pentagon Papers.⁵⁵

The ethical dilemma is that most newspapers and tabloid magazines are guilty of the same charges leveled against Trafigura. They accused the company of endangering human lives, safety, and well-being in exchange for share-holder profits. When the media chased Tiger Woods and his family all over the globe demanding constitutional cover for the publication of sexually explicit photos, without his consent, it became guilty of the same offense. The primary goal of protecting the public’s interest is on a firm footing when the press seeks to expose the illegal dumping of toxic waste and attempts to hide the same. The exploitation of circumstances that literally strip an individual bare and offer elements of his private life and genitalia for mass consumption on that same alter of corporate greed is nothing short of a violation of civil and human rights. Thus, it was entirely appropriate that former Fédération Internationale de l’Automobile President Max Mosely received £60,000 in damages for invasion of privacy after a newspaper merely exposed his participation in an orgy.⁵⁶

Copies of Eady’s injunction against publication of nude photos of Woods were leaked to the press.⁵⁷ In direct violation of the injunction, the

⁵³ Leigh, *supra* note 49.

⁵⁴ *Id.*

⁵⁵ *Id.* (“An unprecedented attempt by a British oil trading firm to prevent the Guardian reporting parliamentary proceedings has collapsed following a spontaneous online campaign to spread the information the paper had been barred from publishing.”)

⁵⁶ Ben Farmer *et al*, *Max Mosley Wins Record Privacy Damages Over News of the World Nazi Orgy Slur*, THE TELEGRAPH (Jul. 24, 2008), <http://www.telegraph.co.uk/news/majornews/2455092/Max-Mosley-wins-record-privacy-damages-over-News-of-the-World-Nazi-orgy-slur.html>.

⁵⁷ See Woods Injunction, *supra* note 32 (containing the full text of the order).

order was leaked for the purpose of recruiting journalists and commentators in the U.S. to rally against the so-called unlawful *prior restraint*.⁵⁸ Casting the debate over injunctive relief as one of chilling reporting on contentious topics that have the effect of stifling the media and derailing investigative journalism, those who would elevate speech rights and corporate greed above human rights have sounded the wrong alarm, while conveniently ignoring other equally important individual rights. Access to information delivered or requested in public hearings about corruption present fundamentally different questions related to the public's interest, versus the wholesale stripping of the dignity of another who just happens to be rich or famous. However, one need not be sacrificed on the altar of the other.

As signatories to the European Convention on Human Rights (hereinafter "ECHR"), European courts are bound to enforce the right to respect for individual privacy and family life articulated in Article Eight.⁵⁹ The right to privacy afforded by Article Eight not only protects individuals against interference by public authorities, but also against private persons or institutions, including the mass media.⁶⁰ Injunctions issued pursuant to Article Eight should clearly ban invasive or demeaning reports and photographs with explicit notice of what material is prohibited from publication. Appellate review of permanent injunctions is warranted to provide an adequate safety net for legitimate areas of public concern.

The ECtHR has risen in international stature for its lucid articulation of invaluable speech-related principles, while setting rational boundaries when members of the press abuse that freedom.⁶¹ The over-inclusive nature of the public figures doctrine in the U.S. is ripe for constitutional overhaul. Injunctive relief is the course-correction needed for preservation of equality under law, and to revive journalism and reinvigorate its muckraking traditions. Transnational uniformity in the application of a general public figure doctrine may become indispensable to that process. Such an alignment would require a substantial shift away from hostile reaction to a notion of prior restraint, but would otherwise remain consistent with Supreme Court's analysis of questions involving mitigation

⁵⁸ Lewis, *supra* note 32.

⁵⁹ Convention for the Prot. of Human Rights and Fundamental Freedoms art. 8, Sept. 3, 1953, 213 U.N.T.S. 222, as amended by Protocol Nos. 11 and 14 (entered into force Nov. 1, 1998) [hereinafter Article 8] available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> (last visited Feb. 16 2011).

⁶⁰ European Parliamentary Assembly, Resolution 428, *Declaration on Mass Communication Media and Human Rights*, (1970) available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta70/eres428.htm>.

⁶¹ BARNES, *supra* note 2, at 193 (discussing and quoting from *Douglas v. Hello! Ltd.* [2001] 1 Q.B. 967, 1004, para. 135[2]).

of irreparable harm.

In the U.S., injunctive relief against the media is rare.⁶² Operating on the theory that damages are an adequate remedy to libelous publications does not fully account for the nature of the injuries involved. Although U.S. courts have ruled that equity will not enjoin libel, slander, or defamation claims unless a *continuing irreparable harm* is shown,⁶³ such findings ought to become the *rule* rather than the exception.

In the U.S., questions surrounding suitability of injunctive relief require evaluation of one or more of seven general factors: "the character of the interest to be protected," the relative adequacy of an injunction versus other remedies, timeliness of the request, contributory negligence and the plaintiff's own misconduct, the relative hardship to the defendant if the injunction is granted, and to the plaintiff if denied, the interests of third persons and of the public, and the ability to both frame and enforce the court order.⁶⁴ The invasions experienced by today's figures of contemporary society are of sufficient seriousness as to overwhelmingly justify this course of relief.⁶⁵

The rule that accounts for exceptional circumstances applies in these cases. Permitting forced selective exposure of certain individuals, while protecting those who inflict real social harm, is to tacitly condone multiple injuries to the target and members of his or her family. Some courts grant injunctions when the publication of false information is part of a conspiracy to injure, and the use of intimidation and coercion is deployed, and a prior restraint of publication is the only means of curtailing tortious conduct.⁶⁶ To date, however, the press has not been restrained for its tacit approval and exploitation of individuals, the incessant stalking, harassment, unlawful detention, and infliction of emotional distress, which is a clear indication that U.S. publishers believe there to be virtually no boundaries to what can be printed. It would be a critical step for the

⁶² *Lassalle v. Daniels*, 673 So. 2d 704, 709 (La. Ct. App. 1996) (noting that "[c]ourts are generally reluctant to issue an injunction to restrain torts such as defamation and harassment" and referring to injunctive relief as "harsh, drastic and extraordinary").

⁶³ *See id.* (noting that injunctive relief requires a showing of irreparable harm); *Packard Elevator v. Interstate Commerce Comm'n*, 782 F.2d 112, 115 (8th Cir. 1986) (holding that the plaintiff failed to establish a showing of irreparable harm).

⁶⁴ *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1307 (S.D. Iowa 1997). *See also* *Kratze v. Indep. Order of Oddfellows*, 500 N.W.2d 115 (Mich. 1993).

⁶⁵ *See Women Prisoners of D.C. Dept. of Corr. v. District of Columbia*, 899 F. Supp. 659, 666 (D.D.C. 1995) ("In negligence actions where irreparable injury is threatened, a court may act by injunction to prevent harm before it occurs."); *Berrien v. Pollitzer*, 165 F.2d 21, 22 (D.C. Cir. 1947) ("No one can seriously contend that money is an adequate remedy for all sorts of personal wrongs. Clearly 'injunctions and similar flexible remedies of equity are much better suited than a speculative action for damages to protect [personal] interests.'").

⁶⁶ *Cochran v. Tory*, No. B159437, 2003 WL 22451378, at *2-*3 (Cal. Ct. App. Oct. 29 2003) *aff'd*, *Tory v. Cochran*, 544 U.S. 734 (2005).

Supreme Court to grant injunctive relief against publication of scandal photos.

A party seeking injunctive relief against publication in this circumstance should not be saddled with the seemingly infamous burden of guilt that greets those accused of *destroying the very foundation* of the prior restraint doctrine⁶⁷ and all of its First Amendment implications.⁶⁸ Instead, simple acknowledgement that the publication itself threatens an interest higher than unfettered speech should suffice.

While the U.S. legal standard for injunctive relief is appropriate with respect to *irreparable harm*, courts must acknowledge that true avoidance requires something more substantive than misplaced loyalty to 18th Century doctrine that has failed to evolve in accord with near universal standards of mutuality, respect and common human decency, especially in light of the power that mass media now wields.⁶⁹ We run the risk of allowing publications that destroy careers and lives simply because of an antiquated legal standard. The current standard has been set to a level beyond reach and should better accommodate the situations that warrant it. The social impact of the injuries caused warrants injunctive relief.

Injunctions must be weighed carefully when examining speech rights under the First Amendment, as such, it is critical to note that injunctions can be tailored in such a specific and narrowly-focused manner so as to avoid over-breadth, which remains a secondary concern with respect to speech. Injunctions can be restricted with respect to content and duration, and they can remain in effect until the restrained party has met certain conditions to ensure their narrow but effective use. It is time for the U.S. to follow suit. Europe's helpful models provide the foundation upon which the U.S. can establish additional protections against such severe harm.

⁶⁷ The prior restraint doctrine excludes government-imposed restraints with respect to the publication of speech. See *Near v. Minnesota*, 283 U.S. 697 (1930).

⁶⁸ See William M. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982) (arguing that subsequent punishment is the ultimate form of prior restraint and comes at a significantly higher cost than injunctive relief). See also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963) (barring prior restraint as imposed by state legislation).

⁶⁹ Mayton, *supra* note 68, at 272.

