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# Can a Photograph Lie? Remedies for an Age of Image Alteration

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Joshua S. Fischer*

## I. Introduction

As a craft, journalism should be held to the most strict standards of professionalism and accuracy. When journalists Jacques Steinberg and Steven Reddicliffe were referred to as "attack dog" and "on the attack," respectively, their photos had been digitally abused, as can be seen in Figure 1 below. In terms of the distortions themselves, "the journalists' teeth had been yellowed, their facial features exaggerated, and portions of Reddicliffe's hair moved further back on his head. Fox News gave no indication that the photos had been altered."[1]

**Figure 1-Fox News Distorts Steinberg and Reddicliffe photos**

[2]

The photos depicted above are exactly the type of photos that need to be prohibited from publication. The distortions, while subtle, certainly show how easily photographs can be manipulated to suit the publisher's needs. As this comment will demonstrate, Steinberg and

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[1] *Fox News Airs Altered Photos of NY Times_Reporters*, MEDIA MATTERS FOR AMERICA (July 2, 2008), *available at* http://mediamatters.org/research/200807020002.

[2] *Id.*

Reddicliffe are not the only victims to have their photos distorted.[3] Today, the use of digital manipulation is increasing exponentially, and it is time to put forth a means of protection for those victims of digital manipulation.

Generally speaking, a photograph is a means to capture a moment in time in its most authentic form.[4] Unfortunately, the desire to capture the truth is being outweighed by a desire to make sure that the photo depicts exactly what the capturer wants the image to depict. As a result, the use of truthful photographs in print and online media is on the decline, and the use of distorted or doctored photographs is on the rise.[5] The prevalence of altered photographs in the media has even prompted a new term that American youth now use frequently: "Photoshop Fail."[6] The means by which photos are manipulated and distributed are as simple as clicking the mouse on a computer or moving your finger on a tablet. Although these photos can be the result of harmless fun, there are those who overstep their boundaries and proceed to distort images so badly that they cause embarrassment and shame to the subject. These victims need better protection, and they should be able to achieve that protection through stronger defamation laws.

The victims of these distorted images should have the opportunity to bring causes of action for defamation because they belong to the group of people which defamation laws were

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[3] *See infra* Section II.A., Figures 2–5.

[4] *See* Joel Snyder & Neil Walsh Allen, *Photography, Vision, and Representation*, 2 CRITICAL INQUIRY 143, 144 (citing Peter Henry Emerson, *Naturalistic Photography for Students of the Art* (1889) Emerson believed that the aim of photography was "naturalistic representation." Emerson believed that photos should be a "representation of a scene in such a way as to be, as much as possible, identical with the visual impression an observer would get at the actual spot from which the photograph was made.")

[5] *See generally Airbrushing*, THE HUFFINGTON POST (examples detailing celebrity "photoshop fails" in various magazines), *available at* http://www.huffingtonpost.com/news/airbrushing.

[6] *Id.*

designed to protect.[7] Originally, the tort of defamation mainly dealt with words, either spoken or written.[8] The Restatement (Second) of Torts states that:

> to create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; *and* (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[9]

Certain doctored or altered photographs should be treated the same as defamatory verbal lies because photos can be extremely damaging, and can subject victims to "hatred, ridicule or contempt." [10] By distorting a picture and making it available for others to see, the publisher easily produces a risk of shame or ridicule on the part of the subject of the photograph. The victims of certain distorted photographs should be able to bring actions for defamation because, according to the Restatement (Second) of Torts, "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[11] The photographs of Steinberg and Reddicliff, as displayed above, undoubtedly damaged the journalists' reputations, not just by words, but by the distortion of their photographs on national television. The Restatement has made an effort to expand the definition of defamation by viewing broadcasters of radio or television media in the same light as newspaper publishers:

> the wide dissemination that results from broadcasting over radio and television, together with the prestige and potential effect upon the public mind of a standardized means of publication that many people tend automatically to accept as conveying truth, are such as to put the broadcaster upon the same footing as the publisher of a newspaper.[12]

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[7] *But see* the landmark decision N.Y. Times v. Sullivan, 376 U.S. 254 (1964), which severely weakened the tort of defamation and perhaps led to the propensity of courts to favor First Amendment rights over the possibility of hurt feelings.
[8] Restatement (Second) of Torts § 558 (1977)
[9] *Id.* (emphasis added).
[10] Restatement (Second) of Torts at § 559 cmt. b (1977).
[11] Restatement (Second) of Torts § 559 (1977).
[12] Restatement (Second) of Torts § 568A cmt. a. (1977).

The Restatement (Second) of Torts lists three potential defenses that could block causes of action for defamation.[13] The most powerful defense to prevent any defamation action is a true statement of fact.[14] Specifically, "[t]here can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him."[15] Some states do offer a cause of action for defamation where a publisher produces a true statement, but with malicious motives.[16] As a result of this defense, this note will only focus on—and differentiate between—images that lie and images that satirize. If the image is objectively satirical or meant to be a parody, a cause of action for defamation by distorted photograph will not be allowed to continue.[17]

The second defense in the Restatement (Second) is consent: "the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation."[18] This comment will delve deeper into the issue of consent by examining the ways in which publishers use releases to ensure that they can use the photos in whichever manner they see fit.[19] One of the policy reasons for stronger defamation laws is to prevent publishers from taking advantage of subjects of photographs.[20] The third defense addresses the issue of

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[13] These defenses include True Statement of Fact (Restatement (Second ) of Torts §582), Absolute Privilege Irrespective of Consent (Restatment (Second) of Torts §§ 585–592A), as well as Conditional Privileges (Restatement (Second) of Torts §§ 593–605A).
[14] *See* Restatement (Second) of Torts § 582.
[15] Restatement (Second) of Torts § 581A cmt. a (1977).
[16] *Id.*
[17] *See generally* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1189 (2008) (concluding that statements of "opinion relating to matters of public concern which does not contain a provably false factual connotation" are "immunized from defamation liability").
[18] Restatement (Second) of Torts §583 (1977).
[19] *See infra* Part IV.
[20] *Id.*

"privilege."[21] An "absolute privilege" is better classified as a type of immunity for those people who have attained a certain status or position to allow them to publish defamatory materials.[22] The Restatement (Second) also addresses conditional privileges in §§ 593–612. This comment will not address the privilege defense.

It is questionable whether the authors of the Restatement (Second) ever envisioned the technological advances that presently exist to subject someone to defamation. In fact, these developments have severely impacted the ways in which photos are digitally altered and shared. Barbara E. Savedoff expresses her concerns regarding digital alteration of photographs:

> When we add to the enhanced ease and power of alteration the possibility of simulating photographically realistic components on computer, it appears that the "photographer" has gained complete control over the image and has acquired the freedom of the painter to depict whatever he or she can imagine.[23]

Savedoff explains that digital alterations have now become seemingly undetectable to the untrained eye: "when we look at the reproduction of what seems to be a straight photograph, it will become more and more difficult to be confident that no manipulation has taken place."[24] Most viewers will not even wonder whether a photo is a true and accurate representation. "Our implicit faith in the veracity of the photographic image is deeply ingrained."[25] Thus, the only person that might be able to discern that their photo has been enhanced is the victim of an already-distorted photograph. These victims need to be afforded the opportunity to bring a cause of action for defamation by distorted photograph when the photo is such an alarming misrepresentation so as to cause that person shame and embarrassment.

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[21] *See generally* Restatement (Second) of Torts §§585–592A (1977).
[22] *Id.*
[23] Barbara E. Savedoff, *Escaping Reality: Digital Imagery and the Resources of Photography*, 55 JOURNAL OF AESTHETICS AND ART CRITICISM 201, 210 (Spring 1997), *available at* http://www.jstor.org/stable/431264.
[24] *Id.* at 211; (*See also* discussion regarding software that can detect photo manipulation discussed in Part II.A, *infra*. This software serves as an important development in the ultimate determination of photo manipulation.).
[25] *Id.* at 212.

This shame and embarrassment can also degrade reputations. According to David Ardia, "[r]eputation is an emergent property of these interactions. It serves an important signaling function by communicating complex information about the individual and about the individual's place within society. When an individual's reputation is improperly maligned, it degrades the value and reliability of this information and devalues community identity."[26] In a professional world, many people take years to build their name in order to ensure that they project an honest and true image of themselves. It is alarming to think that the media holds that reputation in the palm of their hands, should a distorted photo land in their laps.[27] "Reputation serves an essential function by communicating complex information about individuals and their places within society. By projecting the repercussions of actions into the future, it makes altruistic, cooperative social interactions possible."[28]

This comment will examine the avenues that exist to afford victims specific protection. Allowing these actions to go unheard is in direct conflict with reasonable expectations about the protection of our own images. Part II will differentiate between images that lie and images that satirize in order to demonstrate which causes of action can pass through our court system. Part III will diagnose the First Amendment issues that often arise when discussing defamation issues through analysis of cases in which the First Amendment defense was favored. Part IV will explain the policy reasons for punishing the distribution of lying images, including the self-valuation of our own image, the desire for sensationalism in the media and the use of unfair "authorized" releases. Part V will offer plausible legal solutions to the defamation victims by

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[26] David S. Ardia, *Reputation in a Networked World: Revisiting the Foundations of Defamation Law*, 45 HARV. C.R.-C.L. REV. 261, 262 (2010).
[27] *See generally* Stephanie Rosenbloom, *Got Twitter? You've Been Scored*, N.Y. TIMES, Jun. 26, 2011, SR8 (presenting a new program to determine a person's level of influence. Once this program is put in place, and a score is generated, "your rating could help determine how well you are treated by everyone with whom you interact").
[28] *Id.* at 269.

distorted photograph by calling on the courts to adopt older case precedent and by calling on the legislature to reform the Lanham Act by adding a Right of Publicity claim. Part VI will conclude by explaining that there is hope for those who have suffered damage to their image as a result of distorted photographs.

## II. Images that Lie Versus Images that Satirize

### A. What is a 'Lying Image'?

An image can pierce that objective-observer threshold and become a 'lying image' when it is an untrue or inaccurate representation of who or what it purports to be. The image presented in Part I, *supra* is just one of these egregious examples. The following cases demonstrate how courts have been willing to accept actions for defamation based on altered photographs.

In *Myers v. Afro-American Publishing Co.*, Myers successfully pursued an action for libel against the defendant publisher for publishing photographs of her with touched-up outlines.[29] The outlines accentuated her semi-nudity, which was plainly against her wishes, as well as "deceptive and derogatory of the plaintiff's professional attainments as a dancer."[30] The court held—similar to the rule from the Restatement (Second) of Torts—that "a photograph or pictorial representation tending to expose the subject to public ridicule or contempt is libelous."[31] In *Russell v. Marboro Books*, the plaintiff fashion model participated in a photo shoot to be the face of the defendant bookstore's new educational book section.[32] The bookstore then sent the photos to Springs, a bed sheet manufacturer, where the photos were retouched and altered negatively to juxtapose the plaintiff in an awkward photograph with an elderly man.[33] The court held that plaintiff was defamed by Springs, and Marboro by extension, because "she was

[29] 5 N.Y.S.2d 223, 224 (N.Y. Sup. Ct. 1938).
[30] *Id.*
[31] *Id.*
[32] 183 N.Y.S.2d 8, 16 (N.Y. Sup. Ct. 1959).
[33] *Id.* at 17.

humiliated, distressed, held up to public contempt and exposed to the hazard of loss of clients and earnings."[34]

In *Kiesau v. Bantz*, the defendant created and distributed an altered photograph of the plaintiff in which plaintiff was purportedly "exposing her breasts in front of a squad car."[35] The court held that "[a] person could easily verify the truth or falsity of the altered photograph by a simple inquiry of Kiesau."[36] Also, "Bantz did not publish the altered photograph in any political context. He sent the altered photo to fellow employees without any disclaimer."[37] The plaintiff was entitled to damages because the photograph was libelous per se.[38] In *Morsette v. "The Final Call"*, plaintiff's picture was altered in a newspaper article to make it appear that she was a convict wearing prison attire.[39] The court held that the defendant "was guilty of a gross departure from the standards of responsible journalism when, without plaintiff's permission, it removed her picture from its files and altered it to indicate she was a convict."[40]

*Russell*, *Marboro* and *Kiesau* demonstrate an early recognition of the issues that result from the publication of false photographs. In so holding, it was clear that the courts recognized the danger that attached to the publication of photos that can damage one's reputation. If the courts were able to recognize the damage that can be done without the technological advancements we have today, it should behoove the legislature and the judiciary to protect those affected.[41] The photo in *Morsette* is a prime example of the falsity that should be punished, and the plaintiffs that should be protected, following the publication of an altered photo.

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[34] *Id.*
[35] 686 N.W.2d 164 (Iowa 2004).
[36] *Id.* at 177.
[37] *Id.*
[38] *Id.*
[39] 309 A.D.2d 249, 250 (N.Y. App. Div. 2003).
[40] *Id.* at 253.
[41] *See infra* Part V.

That being said, publishers should have an obligation to put forth true images without any distortions so as to preserve the reputation of their subjects and to maintain integrity in their profession. As noted above, courts have been receptive to causes of actions for certain lying images, but the amount of protection should be greater than past protection due to the expansion of technology and ease of manipulation discussed in Part I, *supra*. In fact, the American Medical Association has adopted a new policy against advertisers that "commonly alter photographs to enhance the appearance of models' bodies", adding that "such alterations can contribute to unrealistic expectations of appropriate body image."[42] Savedoff presents an alarming example of this proposition in the work of photographer Pedro Meyer.[43] She explained that Meyer wanted to show the "striking dignity" of a beauty pageant contestant "who was noticeably overweight in comparison with her rivals."[44] Meyer could not find the correct juxtaposition in his photos, so he chose to create it through digital manipulation.[45] This manipulation would change the way in which the viewer would perceive the pageant contestant, perhaps not in a way she imagined.[46]

Similar examples of manipulation have been found recently in magazines and advertisements. Recently, Julia Roberts was the subject of a Lancome advertisement.[47] Roberts' photo was severely airbrushed, so much so that the advertisement was removed from the campaign following complaints by British politician Jo Swinson.[48]

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[42] *AMA Adopts New Policies at Annual Meeting*, AMERICAN MEDICAL ASSOCIATION (June 21, 2011), *available at* http://www.ama-assn.org/ama/pub/news/news/a11-new-policies.page.
[43] Savedoff, *supra* note 23, at 213
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Mark Sweeney, *L'Oreal's Julia Roberts and Christy Turlington ad campaigns* banned, THE GUARDIAN (July 27, 2011), *available at* http://www.guardian.co.uk/media/2011/jul/27/loreal-julia-roberts-ad-banned#.
[48] *Id.*

**Figure 2. L'Oreal Advertisement Banned to Due to Excessive Airbrushing**

[49]

Although the changes to the photographs are less subtle than in Figure 1, one can certainly understand why the advertisements were banned. The advertisement made Julia Roberts' face appear fake and unrealistic. Although Lancôme is a makeup company, the advertisement should reflect reality of applying their products, not an improbable transformation. A reasonable person can clearly see the differences between the two photos and reach the same conclusion: the doctored photos are easy examples of lying images.

The February 1, 2010 issue of OK! Magazine featured Kourtney Kardashian on the cover in an attempt to display her "too-good-to-be-true" body after she had just given birth.[50] In reality, the Huffington Post reported that "OK! lopped off Kourtney's stomach and replaced her face with a slimmer one to illustrate her speedy weight loss."[51] Kardashian explained the untruthfulness of the cover photo to *Women's Wear Daily*: the "magazine 'doctored and

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[49] *Photoshopped Ads Banned in Britain*, PHOTO DISTRICT NEWS, *available at* http://pdnpulse.com/2011/08/photoshopped-ads-banned-in-britain.html (last visited Mar. 24, 2012).; Second photo *available at* http://www.blogcdn.com/main.stylelist.com/media/2009/12/julia-roberts-lancome-ambassador.jpg (last visited Mar. 23, 2012).

[50] *Kourtney Kardashian: OK! Photoshopped My Post-Baby Body* , HUFFINGTON POST (Jan. 25, 2010), *available at* http://www.huffingtonpost.com/2010/01/25/kourtney-kardashian-ok-ph_n_436008.html.

[51] *Id.*

Photoshopped my body to make it look like I had lost all the weight, which I have not.'"[52] The photograph published in the magazine was indeed false and should not have been published.

**Figure 3. Ok! Magazine Removes Kourtney's Pregnancy Bump**

[53]

Additonally, the egregiously altered image of O.J. Simpson on the cover of Time Magazine following his 'not guilty' verdict in 1994 portrayed Simpson in a much darker light.[54] The image displays Simpson's mug shot, but much darker and more blurry so as to make him appear more sinister, and perhaps guilty.[55] Time changed an already sinister mug shot into a completely inaccurate representation of the actual photograph.

**Figure 4. Time Magazine Makes O.J. Simpson Look Guiltier**

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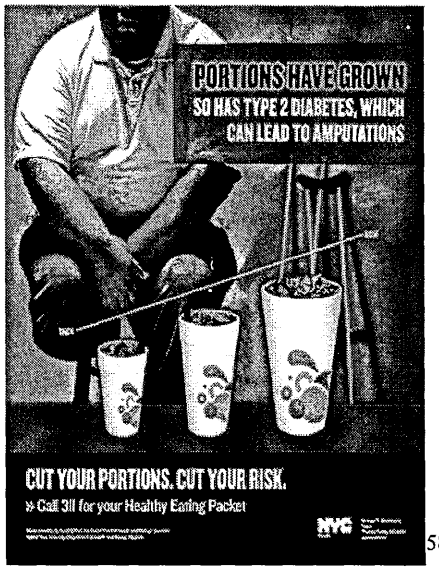
[52] *Id.*
[53] *Id.*
[54] Sherry Ricciardi, *Distorted Picture*, AMERICAN JOURNALISM REVIEW (Aug./Sept. 2007), *available at* http://www.tc.umn.edu/~hick0088/classes/csci_2101/ojcovers.gif.
[55] *Id.*
[56] *available at* http://www.tc.umn.edu/~hick0088/classes/csci_2101/ojcovers.gif.

Lastly, and most recently, the New York City Department of Health digitally altered a photo of Cleo Berry to make it appear as if he had one leg, and subsequently used the photo as part of an anti-diabetes campaign.[57]

**Figure 5. Diabetes Campaign Subject Appears to be Missing a Leg**



[58]

After seeing the photograph, Berry stated that he cried at his computer screen, and was deeply concerned about how it would affect his acting career.[59] Berry further stated that he was "willing to seek professional revenge, offering to lower his usual acting rate to any soda companies who might want to use his unaltered image in one of their campaigns."[60] After viewing the above-mentioned photos, one should begin to understand the types of photos that deserve protection.

Recent technological developments might be able to afford the relief and protection that is so desired by celebrities and average citizens alike. Dr. Hany Farid and Eric Kee, a professor of computer science and a Ph.D. student in computer science at Dartmouth College, respectively,

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[57] Eric Pfeiffer, *Actor "beyond shocked" after seeing leg amputated in altered ad*, Yahoo! News, Jan. 30, 2012, *available at* http://news.yahoo.com/blogs/sideshow/actor-beyond-shocked-ad-altered-leg-appear-amputated-173035069.html.
[58] *Id.*
[59] *Id.*
[60] *Id.*

"are proposing a software tool for measuring how much fashion and beauty photos have been altered, a 1–to–5 scale that distinguishes the infinitesimal from the fantastic."[61] The idea behind this software can extremely beneficial.

> [T]he interests of advertisers, publishers, and consumers may be protected by providing a perceptually meaningful rating of the amount by which a person's appearance has been digitally altered. When published alongside a photo, such a rating can inform consumers of how much a photo has strayed from reality, and can also inform photo editors of exaggerated and perhaps unintended alterations to a person's appearance.[62]

Because of the danger of altering photos "beyond recognition" this software can be helpful in identifying the degree to which the photo has been distorted. Arguably, the most extreme cases can be prime examples for actions based on defamation by photograph should the subject decide to pursue it. Conversely, those victims of slightly altered photos will probably not be able to bring said claim.

### B. What is a Satirical Image?

One of the reasons why courts might be hesitant to favor plaintiffs in distorted-photo cases is because it is difficult to draw the line between what is a lie and what is satirical. In its plainest language, a satirical image is a picture that is not meant to be a truthful representation, but rather a farce.[63] It is an image that ridicules a designated idea or person in society.[64] According to Gilbert Highet, a satire contains three significant parts:

> 1) it describes "a painful or absurd situation or a foolish or wicked person or group as vividly as possible"; 2) it uses sharply critical language including callous, crude, obscene or taboo words in order to shock and disturb the reader;

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[61] Steve Lohr, *Retouched or Not? A Tool to Tell*, N.Y. TIMES, Nov. 29, 2011, at B1.
[62] Eric Kee & Hany Farid, *A Perceptual Metric for Photo Retouching*, Proceedings of the National Academy of Sciences, Early Edition, Oct. 19, 2011, at 1.
[63] *See* Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U.L. REV. 923, 924 (1985) (defining satire as a "potent form of social commentary which attempts to expose the foibles and follies of society in direct, biting, critical and often harsh language—tempered by humor.").
[64] *Id.*

and 3) it attempts to evoke an emotion in the reader which blends amusement and contempt, hatred and laughter.[65]

**Figure 6. Modern Political Satire**

[66]

Satirical images have been around for centuries, and serve as a way for individuals to poke fun at society. These images become problematic, however, when those opinions are attempted to be passed off as real images. One of the most important determinations a court will make in any defamation suit is whether the statement or image is a fact or an opinion.

The original test for determining whether a production was a fact or an opinion was set down in *Ollman v. Evans*.[67] There, two nationally syndicated columnists published an article in The Washington Post about Mr. Ollman, chastising Ollman for his Marxist teaching tendencies.[68] The court held that Professor Ollman was not able to pursue his action for libel because the piece published by the journalists was mere opinion, and not fact.[69] The test for determining whether a published work was a fact or opinion was broken into four separate inquiries:

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[65] *Id.* (quoting Gilbert Highet, *The Anatomy of Satire*, 16, 18–21 (1966)).
[66] Photo *available at* http://www.zazzle.com/justrightwing/gifts?cg=196936148270403642.
[67] 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 2662 (1985).
[68] *Id.*
[69] *Id.*

> (a) What is "the common usage or meaning of the specific language of the challenged statement?"; (b) "Is the statement capable of being objectively characterized as true or false?"; (c) What is the effect of the entire statement, taken in its full context?; (d) In what setting does the statement appear?[70]

Eventually, the court simplified the inquiry into one question: what is a reasonable interpretation of the published image or statement?[71]

In terms of satirical images, Harriette Dorsen presented a case in which a publishing company produced an image of the beloved cartoon character, Eloise.[72] The original story presented Eloise as a five-year-old girl living at the Plaza Hotel.[73] In the image in question, a twenty-six-year-old Eloise was portrayed as an inhibition-less girl, writing graffiti on a mirror at the Plaza Hotel, stating that Mr. Salamone, the manager of the hotel, was a child molester.[74] At the time of the publication, there was a manager of the Plaza Hotel whose last name was Salamone.[75] Eventually the complaint was dismissed because the plaintiff could not prove any damage to his reputation, as required by New York law.[76] Dorsen argued that, more often than not, satire will not cause any reputational injury because most are so farfetched that no objective person would believe it to be true.[77] The logic then follows that if plaintiffs were able to pursue actions for defamation based on hurt feelings, the amount of litigation would skyrocket and the

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[70] *Id.*
[71] Dorsen, *supra* note 63 at 935.
[72] *Id.* at 930 (citing Salamone v. Macmillan Publishing Co., 411 N.Y.S.2d 105 (N.Y. Sup. Ct. 1978), *rev'd,* 429 N.Y.S.2d 441 (1980)).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Dorsen *supra* note 63 at 938; (*See also* Frank Pasquale, *Defamation by PhotoShop?*, Concurring Opinions, Jul. 5, 2008, *available at* http://www.concurringopinions.com/archives/2008/07/defamation_by_p.html (questioning whether the image in Part I, *supra* should be considered damaging, simply because the subjects are depicted as ugly. Pasquale argues that "[t]he closer one looks at it, the more obvious it becomes that the proportions of the face are impossible").

courts would be backlogged for eternity.[78] To add to that notion, courts are often quick to dismiss claims or find in favor of the publisher because images are objectively meant to be opinion and not true or accurate representations.[79] This concept is demonstrated by the following cases.

In *Mink v. Knox*, the student-run internet journal known as *The Howling Pig* published a distorted photo of Professor Junius Peake of the University of Northern Colorado "wearing dark sunglasses and a Hitler-like mustache."[80] The court held that this image was protected because the "crass and vulgar" words and images on the website were satirical. No reasonable person would believe that this article with the accompanying photo was published to be factual.[81] In *McWeeney, M.D. v. Dulan, M.D.*, Dulan created an anti-smoking poster with a "computer-generated 'clip-art' cartoon of a cross-eyed man with dark circles around his eye, smoking eight cigarettes."[82] McWeeney believed the poster to be of him and filed a complaint for defamation against Dulan.[83] The court held that "no reasonable person who saw the cartoon in the poster, assuming they did consider it to be a caricature of McWeeney, would have understood it was being anything other than hyperbole and opinion."[84]

In *New Times, Inc. v. Isaaks*, the *Dallas Observer* published a fake story in response to the actions of District Attorney Isaaks and Judge Darlene Whitten in detaining a child in juvenile hall for a fictional story he had written that involved "terroristic" activities.[85] Accompanying the article was a satirical cartoon of a little girl with the caption "Do they make handcuffs this small?

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[78] *Id.*
[79] *See e.g., infra* notes 78, 80, 83.
[80] 613 F.3d 995, 998 (10th Cir. 2010)
[81] *Id.* at 1009.
[82] McWeeney, M.D. v. Dulan, M.D., No. CA2003-03-036, 2004 WL 602306, at *1. (Ohio Ct. App. 2004).
[83] *Id.*
[84] *Id.* at *3.
[85] 146 S.W.3d 144, 148 (Tex. 2004).

Beware of this little girl."[86] The court ultimately held that the article's "general and intentionally irreverent tone, its semi-regular publication of satire, as well as the satire's timing and commentary on a then-existing controversy" would lead a reasonable person to conclude that the article was not fact, but rather, opinion.[87] The court clarified the relevant inquiry as to satirical content by using the case *Pring v. Penthouse Int'l Ltd.*: "whether the publication could be reasonably understood as describing actual facts."[88] The above-mentioned cases demonstrate that, in the eyes of the objective observer, a satirical image could never pass muster for a defamation cause of action because no reasonable person would believe that the image was meant to show fact. In fact, some courts might even go so far as to say that satire is one of the most protected forms of expression under the First Amendment.[89]

## III. The First Amendment Hurdle

Before explaining the constitutional limitations on defamation claims, one needs to distinguish the tort of "false light invasion of privacy." In order to proceed on a false light claim, the plaintiff must prove that the defendant "(1) gave publicity to (2) a matter concerning the plaintiff (3) that placed the plaintiff before the public in a false light (4) that would be highly offensive to a reasonable person, and did so (5) with the reckless disregard of the falsity of the matter and the false light."[90] James Blake points out that, of the five elements required to bring a false light claim, "[o]nly the false light's fourth element (offensiveness) seems materially

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[86] *Id.*
[87] *Id.* at 161.
[88] *Id.* at 157 (citing Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983)).
[89] *See, e.g.*, F.C.C. v. Pacifica Found., 438 U.S. 726, 745–46 (1978) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the *First Amendment* that the government must remain neutral in the marketplace of ideas.").
[90] James B. Lake, *Restraining False Light: Constitutional and Common Law Limits on a "Troublesome Tort"*, 61 FED. COMM. L.J. 625, 639 (June 2009) (citing Restatement (Second) of Torts §625E (1977)).

different from the corresponding element of defamation (defamatory meaning).[91] Blake continues by adding that, "upon closer examination, even that difference largely disappears (at least in any case claiming reputational injury) because a statement that imparts a defamatory meaning is also likely to be found highly offensive."[92] Rodney Smolla agrees with that notion and points out the danger in allowing false light claims to continue: many plaintiffs attempt to "circumvent the strict requirements of the law of defamation, requirements crafted to strike an appropriate balance between protection of individual interests and the free flow of information."[93] In terms of constitutional limitations on false light claims, Blake, as well as many other scholars,[94] asserts that the Supreme Court opinion in *Hustler Magazine v. Falwell*, provides the support for a First Amendment roadblock to so-called "novel theories to bypass constitutional limits on libel law."[95]

As the production of certain false images continues, causes of action for defamation by distorted photograph will continue to enter our legal system. Unfortunately, these actions will most likely be halted by the First Amendment "freedom of speech" clause, which has been expanded to encompass "freedom of expression."[96] The Supreme Court weighed in on the First Amendment issue in the landmark case, *New York. Times Co. v. Sullivan.*[97] There, the Court stated that if a public figure or public official brings an action for defamation, he/she must prove that the publication was made with actual malice, meaning "with knowledge that it was false or

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[91] *Id.* (citing Denver Pub. Co. v. Bueno, 54 P.3d 893 (Colo. 2002), at 899–900; Jensen v. Sawyers, 130 P.3d 325, 3335–36 (Utah 2005).
[92] Lake, *supra* note 90 at 640.
[93] Rodney A. Smolla, *§24:3. Privacy and the First Amendment-False light invasion of privacy*, 3 Smolla & Nimmer on Freedom of Speech §24:3 (October 2011).
[94] *See generally* Lake, *supra* note 90 at 648, n.153 (The constitutional analysis when a plaintiff seeks damages from the defendant resulting from a work of fiction will be the same, regardless of plaintiff's legal theory).
[95] *Id.* at 646 (citing Hustler Magazine v. Falwell, 485 U.S. 46, 46 (1988)).
[96] *See* 16B C.J.S. Constitutional Law §792 ("the primary concern of the free-speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message" (citing Gaylord Entm't. Co. v. Thompson, 958 P.2d 128 (Okla. 1998)).
[97] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

with reckless disregard of whether it was false or not."[98] It is safe to say that images are included within the term "publication."[99] Celebrities will most likely be able to prevail on the reckless disregard claim because the publications (such as those mentioned above) are extremely different from the true photographs.[100]

When it comes to broadcast media, the Supreme Court held that cable operators are the "gatekeepers" for television programming, and "the physical connection between the television set and the cable network gives the cable operator . . . control over most (if not all) of the television programming that is channeled into the subscriber's home."[101] In addition, "the owners of cable television systems select programming for their customers; hence, the Supreme Court has deemed cable operators "speakers," cloaked with some First Amendment protections."[102] This concept is scary for those who wish to keep their reputation intact. If the Supreme Court is willing to afford so much protection to broadcast media, the amount of access given to Internet domains might be even more broad.[103]

An analysis of First Amendment issues would not be complete without fleshing out the complexities that often arise when discussing the Internet. Due to the expansiveness of the Internet and its limitless amount of publications, it will be difficult to control the spread of truly false images.[104] The First Amendment will likely be implicated in this control due to ever-present defense of "freedom of expression." JoAnne Holman and Michael McGregor state that

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[98] *Id.*
[99] *See* Restatement (Second) of Torts, *supra* note 10 at § 559 cmt. b (1977) (any communication is defamatory if it tends to harm another's reputation).
[100] *See e.g., supra* Figures 1–5.
[101] Norman Redlich and David R. Lurie, *First Amendment Issues Presented by the "Information Superhighway"*, 25 SETON HALL L. REV. 1446, 1452 (quoting Turner Broadcasting System Inc. v. FCC, 412 U.S. 622, 623 (1994).
[102] *Id.* at 1450–51. (quoting 412 U.S. at 623).
[103] *Id.* at 1449.
[104] *See generally* Marcus Wohlsen, *Doctored Bin Laden Corpse Photos Go Viral, Global*, ABCNews, May 4, 2011, *available at* http://abcnews.go.com/US/wireStory?id=13528694#.T3CsaDEgd0Z (explaining the speed at which photos surface and are spread throughout the Internet).

domain hosts all rely on the free flow of ideas, and it will be very difficult to restrict what they are allowed to produce.[105] According to Holman and McGregor, "[i]t offers a true opportunity to enable a diversity of voices to be heard. An analysis of the Internet as a commons suggests an innovative framework for communications policy that takes the focus beyond old analogies and existing regulatory regimes."[106] Norman Redlich and David Lurie point out that "the challenge for courts and legislatures will be to recognize and define the rights and responsibilities of both those who own and those who utilize the new 'superhighway.'"[107] Although the difficulties of controlling Internet domains seem daunting, the Internet remains a form of communication and form of speech.[108] It should be treated as such when false images crop up that do not represent opinions, but instead seriously implicate a plaintiff's reputation.

Courts are already inclined to side with broadcast media due to their "gatekeeping" abilities, and they will most likely err on the same side of caution in terms of Internet publications.[109] The logic behind this is that the First Amendment casts a giant blanket over most publications, and it is an easy way for courts to decide whether to let an action continue through the court system.[110] The following cases demonstrate previous court rulings that have struck down defamation by photo actions for First Amendment reasons.

In *Thomas v. New World Communications*, plaintiffs claimed that *The Washington Times*' attempt to smear their anti-nuclear campaign resulted in defamation when the newspaper published distorted photographs of their demonstrations.[111] The court held that the publications

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[105] JoAnne Holman & Michael McGregor, *The Internet as Commons: The Issue of Access*, 10 COMM. L. & POL'Y 286–87.
[106] *Id.* at 287.
[107] Redlich & Lurie, *supra* note 101 at 1459.
[108] Holman & McGregor, *supra* note 105 at 267.
[109] Redlich & Lurie, *supra* note 101 at 1452.
[110] *Id.*
[111] 681 F.Supp. 55, 62 (D.D.C. 1988).

were opinion, and not fact, and thus protected under the First Amendment.[112] The court went further to state that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[113] The court stated that the "harsh descriptions of plaintiffs was 'being used in a metaphorical, exaggerated or even fantastic sense.'"[114] In *Hallmark v. Gaylord*, plaintiffs argued that a close-up camera shot of a hairline masonry crack in one of their houses distorted the crack's actual size, making it appear that the masonry was done poorly.[115] The court held that the close-up accurately represented the appearance of the crack from the distance shown, and it was a part of a broadcast representing a reporter's opinion regarding defects in the houses.[116] The statements and camera close-up were thus protected by the First Amendment.[117]

In both cases, the Court struck down the plaintiff's causes of action because the defendants were simply asserting their opinions.[118] When those opinions are passed off as fact, the courts must step in and rectify the damage done to the victims of the statement.

## IV. Policy Reasons for Punishing Publication of Distorted Images

Despite these First Amendment hurdles, there are still many policy reasons to permit the punishment of distorted images. They include psychological implications, the desire for "sensational" news stories outweighing the desire to produce the truth, and unfair advantage by creators of releases for photographs.

### A. Psychological Implications of Distorted Photographs

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[112] *Id.*
[113] *Id.*
[114] *Id.* at 63
[115] 733 F.2d 1461, 1464 (11th. Cir. 1984).
[116] *Id.*
[117] *Id.*
[118] *See* Thomas, *supra* note 111 at 61; Hallmark, *supra* note 115 at 1464.

Imagine you are a famous fashion model and you have just completed your first photo shoot for a magazine spread. In the best case scenario, your agent properly handled all of the proceedings and your photo will only be used for the magazine. In the worst case scenario, the publisher just emailed your photos to all the major editors. Within seconds, your photo was completely manipulated to make it appear as though you are wearing a fur coat, walking down Hollywood Boulevard. In a matter of moments, your proud reputation of standing up against animal slaughter is ruined. Your good name is being besmirched by the papers and your career is almost over as soon as it began. This all could have been prevented if your photo was not altered or retouched to change how you look.

Consider the case of *Braun v. Flynt*.[119] There, the plaintiff worked at an amusement park in San Marcos, Texas where she starred in a novelty act with "Ralph, the Diving Pig." "Pictures and postcards were made of Ralph and Mrs. Braun's act . . . and Mrs. Braun had signed a release authorizing the use of the picture."[120] In that release, the amusement park agreed to use the photos in good taste and without embarrassment to her and her family.[121] In 1977, an editor of *Chic*, whose dominant theme is female nudity, called the amusement park's public relations director and retrieved the negatives of the photographs.[122] He received the negatives only by lying and telling the public relations director that *Chic* was a men's "fashion magazine."[123] Later, Mrs. Braun would find out that her picture wound up in the "*Chic Thrills*" section of the magazine.[124] Although the magazine did not juxtapose her picture in a lewd fashion, it was found alongside various obscene photographs and lewd articles.[125]

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[119] 726 F.2d 246, 246 (5th Cir. 1984).
[120] *Id.* at 247; *See* policy implications of unfair releases *infra,* Part IV.C.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] Braun, 726 F.2d at 247.
[125] *Id.* at 248.

Although her photo was not distorted, she was still terrified at the thought of being associated with the magazine to begin with.[126] In her testimony, she stated:

> I was raised in a private Catholic school and I had never seen anything like this. And I was terrified, I didn't know what he had in mind. I thought something horrible was going to happen to me. He flipped through that book and my picture was in that book. I didn't believe it.[127]

The court ultimately found that this invasion of privacy was not warranted and that defamation did indeed occur.[128] Although this is not a lying image case, it applies to the overall "defamation by lying image" theme because, as the court explained, "publications alleged to constitute invasions of privacy merit the same constitutional protections as do publications alleged to be defamatory"[129] The court went on to explain that a

> "false light" invasion of privacy action will often arise from the same circumstances which yield a cause of action for defamation. Federal courts have frequently noted the similarities between the two causes of action and have often carried over elements of state defamation law into their consideration of false-light invasion actions.[130]

As if damage to reputation was not enough, the subject of a distorted photograph would most likely endure the awful embarrassment that comes from being judged by peers and the surrounding community. As Andre Modigliani points out, "[a]t the psychological level the capacity for embarrassment indicates that an individual's sense of adequacy can be sharply affected by an awareness of how others in his immediate presence perceive him."[131] In the above case, Mrs. Braun found out that her photo was featured in the magazine because a stranger

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[126] *Id.*
[127] *Id.*
[128] *Id.* at 249.
[129] *Id.* at 249 (citing Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) and Cantrell v. Forest City Publishing Co., 419 U.S. 245, 245 (1974).
[130] *Id.* at 250 (citing Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983); Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1088 (E.D.Pa. 1980); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 766 (D.N.J. 1981)).
[131] Andre Modigliani, *Embarrassment and Embarrassability*, 31 SOCIAL SOCIOMETRY 313, 314 (1968).

identified her on the street.[132] She was most likely overcome with embarrassment at that very moment, and her anxiety most likely continued as she pondered how many other people had seen her and associated her with *Chic* magazine.[133] As Modigliani points out, it is a "sense of vulnerability, of foolishness—as if negative attributes were "leaking out" through nonconscious, deficient aspects of behavior and appearance."[134]

B. Media Sensationalism and the Hunt for the Next Great Exclusive

Although reputations can slowly be rebuilt and mended within the community, the moment that a distorted photograph is placed on a national media platform, no amount of mending can help.[135] Today, television shows are glamorized so as to entertain and keep us interested, and the more viewers equal more profit for the networks.[136]

As an example, consider the media portrayal of juvenile violence in the 1990s.[137] In what seemed to be a "moral panic," newscasters started using very strong language to dramatize the events surrounding any case of juvenile violence, with special emphasis on juveniles "of color."[138] The media portrayal of juvenile violence made it seem as though violence was on the rise, when instead it was declining dramatically.[139] This example demonstrates the effect that media can have on the general public. Moriearty states that, astoundingly, as a result of these media portrayals, "white Americans substantially overestimated the likelihood of being

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[132] Braun, 726 F.2d at 248.
[133] *Id.*
[134] Modigliani, *supra* note 130 at 316.
[135] *See generally* John H. Fuson, *Protecting the Press from Privacy*, 148 U. PA. L. REV. 629, 655 (arguing that "[t]he glamour that the public attaches to events depicted on television is significant. . . In the public conception, television is a home for stars; newspapers, on the other hand, report news.").
[136] *Id.* at 643 ("We are amused (and occasionally outraged) by the foibles of public figures. We are transfixed when the protective screens are ignominiously stripped away from heretofore mighty wizards (or presidents) of Oz. And we are delighted, touched, and captivated by stories that reveal the all-too-human qualities of media personalities who live in far away and exotic places like New York, Hollywood, or Washington, D.C.").
[137] Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 850 (2010).
[138] *See generally id.* at 851 (Journalists described violent youths as "wilding," "Godless," "deviant," and eventually began describing them as "superpredators").
[139] *Id.* at 852.

victimized by a person of color" and "nearly twice as many . . . believed that they were more likely to be victimized by a minority than a white perpetrator."[140] This led to an unnecessary rise in public panic. "In its coverage of juvenile offending, the news media overwhelmingly relied on a technique called 'episodic' framing - instead of placing an individual incident in its broader statistical, political, or socioeconomic context, the news media frequently reported juvenile offenses as discrete events."[141]

As another example, consider the media portrayal of the insanity defense, as described by Christopher J. Rauschera.[142] "[T]he media tends to portray the criminally insane as violent and vicious characters who get 'off scot free.'" Studies of the media show that the public is most aware of the use of the insanity defense when invoked by high-profile murder defendants."[143] Rauschera argues that media portrayal of the insanity defense garners more media attention than necessary due to the fact that the defense is used more rarely than the public believes.[144] In addition the defense is often pleaded quietly, which demonstrates the amount of media influence on a particular story.[145]

Although the above-mentioned stories do not center on media manipulation of photographs, they show how media bias can sway public perception of various topics. Media tools of over-emphasizing irrelevant facts and attaching pernicious labels to various subjects will immediately trigger opinions in the minds of viewers. Until those viewers see something to persuade them in the opposite direction, a majority of first impressions will stand. The danger is

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[140] *Id.* at 872.
[141] *Id.* at 866.
[142] Christopher J. Rauschera, *"I Did Not Want a Mad Dog Released"—The Results of Imperfect Ignorance: Lack of Jury Instructions Regarding the Consequences of an Insanity Verdict in State v. Okie*, 63 ME. L. REV. 593, 602 (2011).
[143] *Id.*, citing Eric Silver, Carmen Cirincione & Henry J. Steadman, Demythologizing Inaccurate Perceptions of the Insanity Defense, 18 LAW & HUM. BEHAV. 63, 65 (1994).
[144] Rauschera, *supra* note 142, at 602.
[145] *Id.*

that "[e]lements of news and entertainment thus become inextricably intertwined, making it impossible to draw a distinction that will protect private individuals from the risk of becoming involuntary subjects of 'reality' television without impeding First Amendment protections for the press."[146] The examples listed in Part IIA *supra* indicate how easy it is to manipulate photos and place them in the public spotlight. One of the ways that these distorted photos can reach the public eye is through the use of unfair releases to obtain the photo, which the subject of the photo authorizes.

C. Authorizing Release of Photographs Without Knowing Their Intended Use

As noted above, the fate of our photographs are in danger if they land in the wrong hands. The question then becomes: what happens when the subjects of distorted photographs intend to hand the photos over to a specific person, and that person betrays them by producing an untrue reproduction? This demonstrates an important public policy question that can possibly result in punishment for those that use distorted photographs following the authorization of such releases. The following cases demonstrate examples of courts finding against plaintiffs due to the broad context of their respective releases.

In *Sharman v. C. Schmidt & Sons, Inc.*, an athlete filed an action against the defendant manufacturer and seller of beer and malt beverages.[147] There, the plaintiff was photographed in a red shirt, holding a bowling ball, and without any other backdrop or props.[148] Eventually, the picture was used for a beer commercial.[149] This caused plaintiff to suffer ridicule at games and caused him to be worried about losing endorsements.[150] According to the court, Sharman signed two releases, in which it permitted the company to use his picture in a "distorted character or

[146] Fuson, *supra* note 135 at 643.
[147] 216 F. Supp. 401, 402 (E.D. Pa. 1963).
[148] *Id.* at 403.
[149] *Id.*
[150] *Id.* at 403–04.

form" and gave unrestricted rights to the use of the pictures."[151] The court went on to state that "it was contemplated by all parties concerned that the picture would eventually be used for commercial purposes."[152] The court ruled in the defendant's favor despite the plaintiff's differing beliefs on what he and the defendant assented to.[153]

In *Spiegel v. Schulmann*, plaintiff discovered that "an altered photograph of his torso was being used in an unflattering manner in advertisements for defendant's 'Evolve' nutrition program."[154] Plaintiff claimed that after the photo had been released, his colleagues mocked him, and he therefore sought damages for defamation due to the publication of the photograph.[155] Plaintiff claimed that he anticipated that his photo would be used, but did not anticipate the extent to which it would be altered.[156] The release that he signed contained no such limitations.[157] The release stated

> [t]hat he . . . may be photographed, cast, involved and/or portrayed in what is defined below as Promotional Material, to be broadcast and/or otherwise disseminated into the public domain by TSK. The undersigned hereby agrees and consents for all purposes, to the sale, reproduction and/or *use in any manner* of any and all photographs, videos, films, audio, or any depiction or portrayal of the undersigned or his ... likeness and/or voice whatsoever, with or without the use of the undersigned's name (hereinafter, "Promotional Material") by TSK and by any nominee or designee of TSK, including without limitation, any agency, client, periodical or other publication, in all forms of media and in all manners, including without limitation advertising, trade, display, editorial, art and exhibition.[158]

The court ultimately held that "[s]ince there is no question as to very broad scope of Spiegel's written consent, there is no genuine issue of material fact to be determined by a jury. Spiegel is

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[151] *Id.* at 404–05.
[152] Sharman, 216 F. Supp. at 406.
[153] *Id.* at 408.
[154] 2006 WL 3483922, No. 03-CV-5088, at *2 (E.D.N.Y. Nov. 30, 2006).
[155] *Id.*
[156] *Id.* at *18.
[157] *Id.*
[158] *Id.*

not entitled to relief."[159]

In *Doe v. Young*, Plaintiff received plastic surgery from defendants.[160] Defendants took "before" and "after" photos, and some of the after photos depicted Plaintiff in "full frontal and posterior naked poses."[161] Plaintiff executed a release in which she "authorized a doctor" or a representative to take photographs, slides, or videos" of her "for the following procedure(s) for medical purposes to be used for my care, insurance predeterminations, medical presentations and/or articles."[162] She declined to allow the defendants to use the photos for such things as an office photo album or seminar, their website, in print advertisements or on television without compensation. [163] Defendant attempted to use plaintiff's photos in the chapter of a text and in a PowerPoint presentation, but Plaintiff threatened to sue each time.[164] Eventually, Plaintiff's photos were used in an article in the *Riverfront Times,* which featured defendant plastic surgeon.[165] Upon notice of the present suit by the plaintiff for invasion of privacy and unfair use of her likeness, defendants filed for summary judgment.[166] The court found that defendants could not prevail at the summary judgment phase because a genuine issue of material fact existed as to the wrongness of defendant's use of plaintiff's photos.[167]

In *Miller v. Anheuser Busch*, Plaintiff claimed that the "Defendant used and exploited the image of Plaintiff in its nationwide commercial advertising campaign for Budweiser Beer"

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[159] Spiegel, 2006 WL 3483922, No. 03-CV-50882, at *18.
[160] 2009 U.S. Dist. LEXIS 101781, No. 4:08CV197 TIA, at *6 (E.D. Mo. Feb. 6, 2009).
[161] *Id.* at *6–7.
[162] *Id.*
[163] *Id.* at *8.
[164] *Id.* at *9.
[165] *Id.* at *12.
[166] 2009 U.S. Dist. LEXIS 101781, at *22.
[167] *Id.* at *32. (The court in Doe v. Young, 2009 U.S. Dist. LEXIS 101781, No. 4:08CV197 TIA, at *6 (E.D. Mo. Feb. 6, 2009) noted that "on November 9, 2009, a jury returned a verdict in favor of Plaintiff in the amount of $100,000 for her claim . . . for invasion of privacy and returned verdicts in favor of Defendants for remaining claims").

without her consent.[168] Plaintiff signed three separate releases, surrounding five separate photos.[169] In the 2000 and 2001 Model Release, Plaintiff granted defendant "the absolute right and permission to use my likeness and photograph, in whole or in part."[170] In the 2002 Model Release, Plaintiff granted defendant "the right to use, publish and copyright my name, picture, likeness and on-camera performance or portrayal with or without my name and/or fictitious name in all forms of advertising and promotion."[171] The court held that "plaintiff undisputedly provided express consent for Defendant to use the five images at issue."[172]

The above-stated cases demonstrate how courts often defer to the language of the authorized releases, most likely due to the constitutional freedom of contract.[173] In *Spiegel* and *Scharmann*, however, the courts should have been more deferential to the impact that these photos caused on the respective plaintiffs. The courts offered no solace or sympathy for these plaintiffs, and basically further articulated the rule: "always read before you sign." Despite this, however, the *Doe* court clearly recognized the need to protect plaintiffs when the drafters of the releases stepped out of line.[174] The law recognizes a valid contract when there is manifestation of mutual assent.[175] When a victim of a false image sees that image in public, and the context in

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[168] 591 F. Supp. 2d 1377, 1382 (S.D. Fl. 2008).
[169] *Id.* at 1378–80.
[170] *Id.* at 1383.
[171] *Id.*
[172] *Id.*
[173] *See* US. CONST., art 1, § 10, cl. 1 ("No state shall . . . pass any Bill . . . or Law impairing the obligation of Contract").
[174] *See generally* Doe v. Young, 2009 U.S. Dist. LEXIS 101781 at *27 (E.D. Mo. 2009).
[175] *See generally* Daniel P. O'Gorman, *Expectation Damages, the Objective Theory of Contracts, and the "Hairy Hand" Case: a Proposed Modification to the Effect of Two Classical Contract Law Axioms in Cases Involving Contractual Misunderstandings*, 49 KY. L.J. 327, 342 (2010–2011). (O'Gorman, in citing Lawrence Friedman and Restatement (Second) of Contracts § 201, stated that "[t]he so-called objective theory of contracts . . . insisted that the law enforce only objective manifestations of agreement and rejected the notion that the essence of an enforceable contract was a subjective 'meeting of the minds' of the parties.' Therefore, unless the parties attach the same unreasonable meaning to a contract term, the term will be interpreted objectively. In other words, 'the question of meaning in cases of misunderstanding depends on an inquiry into what each party knew or had reason to know.'" Therefore, in those cases where there is a clause in the release allowing the photographer unlimited ability to manipulate the photograph, it can be argued that the subject of the photograph had no reason to know that their

which it is presented is in direct contravention the authorized release, it is difficult to say that there was mutual assent. The author proposes that if a release is drafted correctly, it should only afford the use of a photograph for a limited window. The logic continues that, if the photo is published in any way outside what is allowed in the release, the offended party should be allowed to sue for breach of contract. Even if the release expressly allows the recipients of photographs to grossly distort the photographs, the clause allowing such distortion should be stricken from the agreement due to the objective standard of contracts.[176] Generally, no reasonable person would agree to have their photo distorted without their consent.[177]

## V. Plausible Legal Solutions: Judicially and Legislatively

### A. Reduce Recent Supreme Court Over-Protection of First Amendment Rights

The *Roberts* Court has been moving in a direction that would seem to deflate the general proposition that publishers ought to be punished for producing distorted photographs.[178] Two recent Supreme Court decisions come to mind that demonstrate a proclivity towards a stronger protection of First Amendment rights:

In *Snyder v. Phelps*, members of the Westboro Baptist Church picketed near a soldier's funeral service.[179] The picketers "displayed signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses."[180] Their message was that "the United States is overly tolerant of sin and that God kills American soldiers as punishment."[181] In an attempt to grapple with the Synder family's emotional distress and the constitutional rights of the Westboro

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photo would be manipulated in such a way. Following this notion, either the whole contract should fail, or the clause allowing the manipulation should fail.)

[176] *Id.*

[177] *Id.*

[178] *See e.g.,* Snyder v. Phelps, 131 S. Ct. 1207 (2011); Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2731 (2011); Citizens United v. FEC, 130 S. Ct. 876 (2010).

[179] 131 S. Ct. 1207, 1213 (2011).

[180] *Id.*

[181] *Id.*

Baptist Church, the Court held that "[g]iven that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the *First Amendment*."[182]

In *Brown v. Entertainment Merchants Ass'n*, the Supreme Court determined the validity of a California law that restricted the "sale or rental of violent video games to minors."[183] The Court held that the law did not serve a compelling state interest that was narrowly tailored to achieve that same interest.[184] "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium."[185]

In *Citizens United v. Federal Election Commission*, "appellant Citizens United, a nonprofit corporation, released a documentary . . . critical of then-Senator Hillary Clinton, a candidate for her party's Presidential nomination."[186] The documentary mention[ed] Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton.[187] Citizens United released the film on DVD and other similar mediums, but wanted to increase the availability of the video via "video-on-demand."[188] Citizens United then produced advertisements to promote the film.[189] The question before the Court was whether the ban on corporate independent expenditures violated the First Amendment.[190] The Court held that the ban violated the First Amendment because the

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[182] *Id.* at 1219.
[183] 131 S. Ct. 2729, 2731 (2011).
[184] *Id.* at 2738.
[185] *Id.* at 2732.
[186] Citizens United v. FEC, 130 S. Ct. 876, 881 (2010).
[187] *Id.* at 887.
[188] *Id.*
[189] *Id.*
[190] *Id.* at 886.

Government could not suppress political speech on the basis of the speaker's identity as a nonprofit or for-profit corporation.[191]

As demonstrated by the examples in Part II.B *supra*, publishers in print and online media seem to be getting away with too much. Although many publishers are forced to take the advertisements or articles down, it still does not solve the actual problem of the publishing of the distorted photos themselves. Since *Myers v. Afro-American Publication Co.*, many cases have allowed plaintiffs to pursue actions for defamation based on images that are outright lies.[192] But the moment that an intervening factor is introduced, such as a potential First Amendment issue or an executed release authorizing the use of plaintiff's photographs, courts, more often than not, will find in favor of the publishers.

Although freedom of speech and expression are fundamental rights, the altered photos being produced can arguably be classified as "low-value" speech. If defamation laws were extended to include distorted images that project a falsity, it would most likely be upheld because false statements are categorically unprotected.[193] Perhaps one of the reasons why false statements are considered to have such a low value is because of societal values in general.[194] The question then becomes: how can a person work towards a good reputation if there are doctored or distorted pictures in view of the public that seriously harm that reputation? David S.

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[191] *Id.* at 919.

[192] *See generally supra* Section II.A and accompanying cases allowing causes of action for defamation by photograph to continue.

[193] *See generally* Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that the individual who falsely shouts "fire" in a crowded theatre may not "freedom of speech" under the First Amendment).

[194] Lying images can be compared to the 'obscenity' that the Supreme Court has historically struck down as unprotected by the First Amendment. False images have no place in society other than to be used for satirical purposes. The photos in Figures 1–5 have no redeeming social quality because they are false representations of truly original photos. The only palpable result that is felt from false photographs are hurt feelings and damages reputations. False photographs, therefore, should be held in the same light as obscenity that the Supreme Court has struck down. *See* Roth v. United States, 354 U.S. 476, 484 (1957) (holding that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance"); Miller v. California, 413 U.S. 15, 20–21 (1973) (finding that defendant's mailing of explicit material is not protected by the First Amendment due to its obscene nature); *see also* Chaplinsky, *infra* note 195.

Ardia points out that defamation law "faces practical impediments stemming from the law's failure to account for how reputational information actually flows through our networked society and to provide remedies that are embedded within these flows."[195] As of now, there has been little to no relief for those that have suffered from a distorted and false photograph. False statements have been considered categorically unprotected by the Supreme Court in the past, and false images ought to be held in the same light.[196] Photographs often speak louder than words, and therefore should carry on the ability to harm as well.

The current Supreme Court has made First Amendment protection a priority.[197] The privilege of freedom of speech is lost, however, when words, or in this case, photos, are false.[198] Today, the threat of photos being manipulated, cropped, airbrushed, or altered are more prevalent due to the advent of the use of Photoshop by publishers of print and online media.[199] The Supreme Court should lower their First Amendment shields and look closely at the ease in which overly-doctored photographs have spread throughout the country and how they damage the reputation of their respective subjects.

If the Supreme Court has misgivings over this new tort of defamation by photograph, perhaps the Court will consider a disclosure remedy as an alternative. In *Cervantes v. Time*, the defendant published a salacious article about the then-mayor of St. Louis, Missouri, Alfonso

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[195] Ardia *supra*, note 26 at 304.
[196] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942) (holding that "it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words —those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").
[197] *See generally supra* note 178.
[198] *See* Schenk, *supra* note 193.
[199] *See generally Airbrushing*, *supra* note 5.

Cervantes, who in turn sued for libel.[200] The mayor sought "an order to compel disclosure of the identity of the informant[s]" who stated that the mayor had ties to gangsters that operated in St. Louis.[201] His reasons behind the compulsion of the order were as follows:

> A disclosure enables the plaintiff to scrutinize the accuracy and balance of the defendant's reporting and editorial processes; [b] through disclosure it is possible to derive an accurate and comprehensive understanding of the factual data forming the predicate for the news story in suit; [c] disclosure assists successful determination of the extent to which independent verification of the published materials was secured; and [d] disclosure is the sole means by which a libeled plaintiff can effectively test the credibility of the news source, thereby determining whether it can be said that the particular source is a perjurer, a well-known libeler, or a person of such character that, if called as a witness, any jury would likely conclude that a publisher relying on such a person's information does so with reckless disregard for truth or falsity.[202]

Although the court found in favor of the defendant,[203]a disclosure remedy, revealing the source of the manipulated photo would be beneficial because it would allow for the defendant to see if there is a pattern of photo manipulation. Several courts have held that the First Amendment does not grant reporters a privilege to withhold news sources,[204] but there still must be a proper inquiry into the source of the photos themselves before claiming that the photo was manipulated in a way that could cause reputational harm.[205]

Disclosure is important as a matter of public policy because if "an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure . . . should

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[200] 464 F.2d 986, 989 (8th Cir. 1972).
[201] *Id.*
[202] *Id.* at 991.
[203] *Id.* at 995.
[204] *Id.* at 992 (citing Garland v. Torre, 259 F.2d 545, 548-549 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958); State v. Buchanan, 436 P.2d 729 (Or. 1968), cert. denied, 392 U.S. 905 (1968); In re Taylor, 193 A.2d 181 (Pa. 1963); and In re Goodfader, 367 P.2d 472 (Haw. 1961)).
[205] *Id.* at 993.

become more compelling."[206] The software discussed in notes 59 and 60, *supra* might be able to lend a hand in this regard.[207] If the software is developed successfully, it will provide a relatively easy way to determine if the publisher is responsible for such alterations and if the publisher continues to do so without regard to the reputation of the victims. For these reasons, disclosure should be a fallback remedy for those victims that cannot find relief in the courts or through the legislature.

B. Potential Legislative Impact

If the courts are less willing to adopt precedent that suggests protection of distorted and lying images of private individuals, then it might be more beneficial to seek refuge in the legislature. Rebecca Tushnet points out that "[b]ecause courts don't like to think about images, and have few tools to deal with them, the temptation is to treat them as not requiring (or being able to sustain) the interpretive energy the law devotes to words."[208] Today, the Trademark Act of 1946—more commonly known as the Lanham Act—does not include a separate right of publicity that would afford victims of distorted images protection for their true images.[209] It does, however, provide a "cause of action against any person who falsely implies an 'affiliation, connection or association' with a trademark holder, or causes confusion 'as to the origin, sponsorship, or approval of his or her goods, services or commercial activities.'"[210] This principle should be extended to include images that were distorted and passed off as the truth.

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[206] Cervantes v. Time, 464 F.2d at 994.

[207] The court in Cervantes v. Time went on to state that "[t]he point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice." *Id.* The software discussed above may be able to assist in preliminary examinations of photographs in order to determine the degree of distortion. This will lead to more thorough investigations, and perhaps allow for greater punishments for those who decide to manipulate photographs in such a harmful and damaging manner.

[208] Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, Georgetown Public Law and Legal Theory Research Paper No. 11-115, at 5 (HARV. L. REV. *forthcoming* 2012).

[209] *See generally* 15 U.S.C. § 1051–1141n (2006).

[210] § 1125(a) (2006).

The Lanham Act is focused on protecting reputations, consumers, and the public from lies, and that purpose should continue to hold through a right of publicity claim.

A right of publicity claim is based on a person's desire to control the use of their identity and likeness in the public forum.[211] Stacey L. Dogan and Mark A. Lemley argue that those who use a name as a brand may not be entitled to protect other aspects of their personality, such as their image or voice, under trademark law.[212] They go on to state that "noncelebrities, foreign celebrities, and celebrities who refuse to trade on their name ought equally to be able to prevent confusing or diluting uses of their names and likenesses."[213] The question then becomes: what needs to be produced before this claim can be brought forth? David Tan points out that "[s]ome courts are prepared to find that the identity requirement is satisfied as long as a clear reference to a celebrity has been evoked by an advertisement from which the defendant may gain a clear commercial advantage."[214] Tan continues by arguing that "[i]f the predominant purpose was to make economic profits by exploiting the celebrity's fame, then the presence of artistic expression—no matter how significant or transformative—should not be permitted to defeat a right of publicity claim."[215]

It is clear from the depicted examples that advertisements and magazine covers will use a celebrity's fame in order to draw consumers and readers, respectively.[216] The danger here, as presented by Laura A. Heyman, is that "[b]y purporting to speak or act on behalf of the plaintiff

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[211] *See* Stacey L. Dogan and Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN L. REV. 1161, 1162 (2006).
[212] *Id.* at 1211 (2006) (citing Condit v. Star Editorial, 259 F. Supp. 1046, 1054 (E.D. Cal. 2003), and Estate of Presley v. Russen, 513 F. Supp. 1339, 1363–64 (D.N.J. 1981)).
[213] *Id.*
[214] David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn From Cultural Studies*, 25 Cardozo Journal of Arts and Entertainment Law 913, 922 (citing Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992)).
[215] *Id.* at 991(*But see* Brown v. Electronic Arts, No. 2:09-cv-1598, slip op. at 8 (C.D.Cal. Sept. 23, 2010) (holding that Brown's likeness was protected by First amendment because "the mere use of [the plaintiff's] likeness in the game, without more, is insufficient to make the use explicitly misleading.")).
[216] *See generally* Figures 2–5 *supra*.

(by, for example, associating her with a particular product or service against her wishes), the defendant in a right of publicity case provides information to the plaintiff's audience that can shape its perception of the plaintiff."[217] For example, in the Lancôme advertisement depicting Julia Roberts, Ms. Roberts is seen by the public as endorsing Lancôme's line of beauty products.[218] When Roberts saw the advertisement, she immediately demanded that it be taken down because it was an unfair manipulation of her identity.[219] The photo in the advertisement was so greatly exaggerated that Ms. Roberts could no longer be a part of it.[220] Her reputation most likely was damaged because the public would see the advertisement and think that Ms. Roberts would be a part of the advertisement campaign, regardless of her appearance. Heyman adds that "the reputational interest is stronger where there is an implied assertion of at least willful participation, if not endorsement, on the part of the plaintiff."[221] A right of publicity claim added to the Lanham Act, will afford the protection that many plaintiffs need in actions for defamation by photo.

In terms of the commercial importance of this legislation, one of the requirements for plaintiffs to bring a right of publicity claim is that the defendant has employed that person's name or likeness in order to sell a product.[222] Today, most celebrities are happy to endorse many products due to the lucrative contracts that most likely follow said endorsement.[223] The problem, as mentioned above, is when the corporations that produce such products adopt a free license in

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[217] Laura A. Heyman, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1408 (2011).
[218] *See supra* Figure 2.
[219] *See* Sweeney, *supra* note 46.
[220] *Id.*
[221] *Id.* at 1408.
[222] *See* Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 KAN. L. REV. 329, 443 (1997).
[223] *See generally* Steve Seepersaud, *5 of the Biggest Athlete Endorsement Deals*, ASK MEN (last visited Mar. 27, 2012), *available at* http://www.askmen.com/sports/business_100/101_sports_business.html.

changing the photographs attached to the advertisements.[224] If the photograph is so grossly distorted to appear to be a false representation of the person depicted, the subject should still be allowed to bring a right of publicity claim, even after agreeing to endorse the product.

The First Amendment "freedom of expression" clause might be raised as a possible defense if the above-mentioned proposed legislation is passed into law. According to the case *ETW Corp. v. Jireh Publishing, Inc.*

> [t]here is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment. This tension becomes particularly acute when the person seeking to enforce the right is a famous actor, athlete, politician, or otherwise famous person whose exploits, activities, accomplishments, and personal life are subject to constant scrutiny and comment in the public media.[225]

Most defendants would claim that the work that they produced was merely their way of displaying their product to the public. "According to the Restatement, such uses are not protected, however, if the name or likeness is used solely to attract attention to a work that is not related to the identified person, and the privilege may be lost if the work contains substantial falsifications."[226] This legislation would carry forward if it were solely allowed when there was a blatantly false image produced by the offending party. As noted above, the forthcoming software that can determine whether an image has been doctored can be of great help to any plaintiff who wishes to bring a right of publicity claim due to an unwanted use of their likeness. In the meantime, an objective standard of reasonableness can be used to determine whether there are "substantial" falsifications in the photos presented in view of the public.[227]

## VI. Conclusion: There is Hope for Victims of Distorted Images

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[224] *See supra* Figures 2–5; *Airbrushing*, *supra* note 5.
[225] 332 F.3d 915, 931 (6th Cir. 2003).
[226] *Id.* at 930–931 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION, §47, ch. 4, cmt. c (2006)).
[227] *See supra* Figures 2–5.

As the above sections demonstrate, there is case law on point which will afford protection to those whose images are grossly manipulated.[228] However, there are roadblocks which will not allow certain plaintiffs to bring these actions.[229] Before the tort of defamation by photograph is adopted, it needs to be reconciled with two very prominent areas of law: contract law and constitutional law.

For those aspiring to place themselves into the limelight, there is an ever-present pressure to sign at the dotted line when someone promises to make you famous. The potential for injury here is limitless if someone truly does not understand what they are signing. If the contract states that the photographer will be given broad discretion in handling the photographs, it is a cause for concern. There should be room for negotiation in terms of what the photographer or publisher can do with your photographs. A clause should be inserted into the contract detailing the limited use of the photograph and how it will be inserted into the finished product. In terms of legal implications of this issue, it is often difficult to escape the constitutional protection of contracts. As stated above, one argument against the court's desire to err on the side of the contracting parties is to state a lack of mutual assent. As a foundation of contract law, it is essential that there be mutual assent before any agreement is reached. Arguably, when subjects of manipulated or doctored photographs see the opposite of what was expected when they signed the contract, it can be part of a claim for lack of mutual assent, or a breach of contract.

In terms of First Amendment protection, if the image is an absolute lie, the publishers should not be able to claim "freedom of expression."[230] False statements and false publications are categorically unprotected speech.[231] As stated above, categorically unprotected speech is

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[228] *See, e.g., supra* Part II.B.
[229] *See generally supra* Sections III and V.A.
[230] *See* Holman and McGregor, *supra* note 104.
[231] *See generally* Chaplinsky, *supra* note 191.

often considered "low-value" because it is antithetical to what society values most. Defamation laws were designed to protect the reputations of those implicated in the statement or publication. Because society values reputations, the protection often given to statements ought to be extended to photographs because of the similar potential impacts that both forms of communication carry. The Supreme Court should relieve the grip that it has protecting the First Amendment and allow a new type of defamation to enter the legal community. Photographs that are false can be defamatory as long as they are not objectively meant to be satirical.

Public figures, such as celebrities need to prove that the picture was published with a reckless disregard for the photo's possible falsity.[232] The author believes that this should be easily proven by a simple side-by-side comparison. Airbrushing is rampant now in the celebrity world.[233] Most celebrities that see that their photos are airbrushed ask that they be taken down. They need to take this a step further because more often than not, it is too late. The victims should either demand damages for destroying their reputation, or demand injunctive relief in the form of an apology, one that is preferably larger than a footnote on the inside-back cover.

[232] *See* N.Y. Times v. Sullivan, *supra* note 7.
[233] *See generally Airbrushing*, *supra* note 5.