Panel 4 — *"Deep Fakes": Trust Not What Your Eyes Perceive*

In just over 18 months, a small subculture on Reddit, focused on combing and superimposing images and videos with realistic and believable results, has exploded on to the national scene. The development of artificial intelligence-based human image synthesis techniques combined with rapid advances in machine learning has allowed creators to introduce fake videos which are increasingly difficult to distinguish from authentic videos. Issues of interest include the current state of Deep Fake technology, the impact such fake videos may have on media organizations, legal implications of such video creations, whether they enjoy any legal protections, and to provide guidance on a generally accepted way forward through these muddy waters.

Issues include:

- What is a Deep Fake?
- Where did Deep Fakes come from and how does the technology work? Why is the "off the shelf" nature of that technology dangerous? How is it different from doctored photographs?
- How can a news organization identify altered footage, and what new procedures should be adopted to protect them from being fooled?
- What defamation risks are posed by Deep Fakes, and is it different if they involve public versus private figures?
- What exposure to invasion of privacy/right of publicity or copyright infringement can be embodied in Deep Fakes published by news organizations?
- How could Deep Fakes alter the national debate of issues of the day?

I. Deep Fakes

A. Examples

1. Ryan Whitwam, *Buzzfeed Created a 'Deepfake' Obama PSA Video*, ExtremeTech (April 18, 2018). ***See the video*** at:

https://www.extremetech.com/extreme/267771-buzzfeed-created-a-deepfake-obama-psa-video.

or at The Verge

https://www.theverge.com/tldr/2018/4/17/17247334/ai-fake-news-video-barack-obama-jordan-peele-buzzfeed.

2. Mikael Thalen, *Jennifer Buscemi is the deepfake that should seriously frighten you*, The Daily Dot (January 30, 2019). ***See the video at:***

https://www.dailydot.com/debug/jennifer-buscemi-deepfake/.

or at Time magazine:

http://time.com/5521276/steve-buscemi-jennifer-lawrence-deepfake/.

B. Artificial intelligence and Deep Fakes

● **Excerpt from:** ***You thought fake news was bad? Deep fakes are where truth goes to die / Technology can make it look as if anyone has said or done anything. Is it the next wave of (mis)information warfare?***

By Oscar Schwartz, The Guardian (November 12, 2018)

Fake videos can now be created using a machine learning technique called a "generative adversarial network", or a GAN. A graduate student, Ian Goodfellow, invented GANs in 2014 as a way to algorithmically generate new types of data out of existing data sets. For instance, a GAN can look at thousands of photos of Barack Obama, and then produce a new photo that approximates those photos without being an exact copy of any one of them, as if it has come up with an entirely new portrait of the former president not yet taken. GANs might also be used to generate new audio from existing audio, or new text from existing text – it is a multi-use technology

The use of this machine learning technique was mostly limited to the AI research community until late 2017, when a Reddit user who went by the moniker "Deepfakes" – a portmanteau of "deep learning" and "fake" – started posting digitally altered pornographic videos. He was building GANs using TensorFlow, Google's free open source machine learning software, to superimpose celebrities' faces on the bodies of women in pornographic movies.

See the complete article at:

https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth.

● **Excerpt from:** ***Seeing Isn't Believing: This New AI System Can Create "Deep Fake"Videos / Sophisticated image processing technology threatens to swamp the internet with next-generation fake news.***

By Glenn McDonald, Group Nine Media, Inc., Seeker Media, Inc., See (September 28, 2018)

Researchers at Carnegie Mellon University have developed a new technique that can generate deepfakes automatically, with no need for human intervention. Powered by artificial intelligence and machine learning, the system can copy the facial expressions of a subject in one video and then map the data onto images in another. Barack Obama can be easily transformed into Donald Trump, or John Oliver can suddenly become Stephen Colbert.

See the complete article at:

https://www.seeker.com/artificial-intelligence/this-new-ai-system-can-create-convincing-deep-fake-videos.

● **Excerpt from:** ***Deepfakes Explained: The AI That's Making Fake Videos Too Convincing***

By Megan Ellis, MakeUseOf (November 21, 2018)

Machine learning makes life easier, but in this case, it makes fakery significantly easier. Firstly, the software is widely and freely available. FakeApp, for example, is a popular choice for creating deepfakes. You don't need advanced skills to apply a face-swap, the software will do it for you….

The rise of deepfakes is also taking place at a time when AI voice synthesis is advancing quickly too. Not only can AI generate fake videos, but it can also generate voice models for people.

This means that you wouldn't need an impersonator to make it sound like a politician is making an outrageous statement. You can train AI to mimic their voice instead.

See the complete article at:
https://www.makeuseof.com/tag/what-are-deepfakes-explained/.

II. Uses and effects of Deep Fakes

● *A "deep fake" is a high-tech forgery, using a machine learning technique called a "generative adversarial network" (or GAN). It's a realistic computer-generated replication of a person saying or doing whatever the "puppet master" software user wants them to say or do. Think "Photoshop on steroids."*

- Danny Tyre, 'Deep fakes' the next big threat?, New Jersey Herald (January 25, 2019), https://www.njherald.com/20190125/deep-fakes-the-next-big-threat#.

● Generative Adversarial Networks (GANs) "are powerful and flexible tools." For example, in response to samples of cat pictures, a GAN "actually learns about 'cat-ness' from the samples, and learns to generate images that meet this standard." GANs can have a variety of uses, including generation of "robot behavior." See Arthur Juliani, *Generative Adversarial Networks Explained with a Classic Spongebob Squarepants Episode*, Medium (Sep 23, 2016), https://medium.com/@awjuliani/generative-adversarial-networks-explained-with-a-classic-spongebob-squarepants-episode-54deab2fce39

A. Women as targets of malicious fake videos.

Excerpt from: *Fake-porn videos are being weaponized to harass and humiliate women: 'Everybody is a potential target' / 'Deepfake' creators are making disturbingly realistic, computer-generated videos with photos taken from the Web, and ordinary women are suffering the damage*,
By Drew Harwell, The Washington Post (December 30, 2018)

Supercharged by powerful and widely available artificial-intelligence software developed by Google, these lifelike "deepfake" videos have quickly multiplied across the Internet, blurring the line between truth and lie.

But the videos have also been weaponized disproportionately against women, representing a new and degrading means of humiliation, harassment and abuse. The fakes are explicitly detailed, posted on popular porn sites and increasingly challenging to detect. And although their legality hasn't been tested in court, experts say they may be protected by the First Amendment — even though they might also qualify as defamation, identity theft or fraud.

The complete article is posted at:

https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/?noredirect=on&utm_term=.42a25b61da80.

B. A satirical Web site taken by visitors as real

Excerpt from: *'Nothing on this page is real': How lies become truth in online America*

By Eli Saslow, The Washington Post (November 17, 2018)

Christopher Blair, 46, …launched his new website on Facebook during the 2016 presidential campaign as a practical joke among friends — a political satire site started by Blair and a few other liberal bloggers who wanted to make fun of what they considered to be extremist ideas spreading throughout the far right. In the last two years on his page, America's Last Line of Defense, Blair had made up stories about California instituting sharia, former president Bill Clinton becoming a serial killer, undocumented immigrants defacing Mount Rushmore, and former president Barack Obama dodging the Vietnam draft when he was 9. "Share if you're outraged!" his posts often read, and thousands of people on Facebook had clicked "like" and then "share," most of whom did not recognize his posts as satire. Instead, Blair's page had become one of the most popular on Facebook among Trump-supporting conservatives over 55.

"Nothing on this page is real," read one of the 14 disclaimers on Blair's site, and yet in the America of 2018 his stories had become real, reinforcing people's biases, spreading onto Macedonian and Russian fake news sites, amassing an audience of as many 6 million visitors each month who thought his posts were factual. What Blair had first conceived of as an elaborate joke was beginning to reveal something darker. "No matter how racist, how bigoted, how offensive, how obviously fake we get, people keep coming back," Blair once wrote, on his own personal Facebook page. "Where is the edge? Is there ever a point where people realize they're being fed garbage and decide to return to reality?"

See the complete article in The Washington Post at:

https://www.washingtonpost.com/national/nothing-on-this-page-is-real-how-lies-become-truth-in-online-america/2018/11/17/edd44cc8-e85a-11e8-bbdb-72fdbf9d4fed_story.html?noredirect=on&utm_term=.2106e0f0fcf1.

III. Detection of Deep Fakes

The Wall Street Journal regards deep facts as such a series threat to journalism that it has launched a Media Forensics Committee, which serves as "an internal deepfakes task force."

The group comprises "video, photo, visuals, research, platform, and news editors who have been trained in deepfake detection."

See the full account of the WSJ's task force: Francesco Marconi and Till Daldrup, *How The Wall Street Journal is preparing its journalists to detect deepfakes / "We have seen this rapid rise in deep learning technology and the question is: Is that going to keep going, or is it plateauing? What's going to happen next?"*, NiemanLab (November 15, 2018), at https://www.niemanlab.org/2018/11/how-the-wall-street-journal-is-preparing-its-journalists-to-detect-deepfakes/.

IV. Legal Assessments of Deep Fakes

A. To what extent may victims of deep fakes find remedies in existing law?

Excerpt from: *Deepfakes: False Pornography Is Here and the Law Cannot Protect You*
By Douglas Harris, Duke L. & Tech. Rev. (January 5 2019),
p. 113-111 and 128

> In addition to any inadequate copyright infringement claims, the Victim may attempt to bring a bevy of tort claims. They too are subject to their own flaws and limitations. The Victim may pursue legal action by bringing a state tort claim of Intentional Infliction of Emotional Distress ("IIED"). …
>
> Only a limited subset of Victims will succeed because of an inability to show that their mere embarrassment or even mortification rises to the level of emotional distress necessary to satisfy the second element…. Victims will also have trouble showing the first element, the *mens rea* requirement. The Producer must "know[] that such distress is certain, or substantially certain, to result from his conduct" or that the reckless conduct was "in deliberate disregard of a high degree of probability that the emotional distress will follow." The majority of the Producers who share a video online with friends or the general public will likely not know that any emotional distress is imminent because they do not expect that the Victim will watch the video or that the Victim will even learn of its existence. This high standard will prevent many Victims from succeeding on this cause of action when they stumble upon the video online or are made aware of the video by a third party. IIED claims, thus, appear to be limited to instances where the Producer intentionally sends the deepfake to the Victim or informs her of its circulation on the internet. The threat of IIED claims will

not effectively diminish publications of deepfakes. The Victims of deepfakes will also have to deal with the Producer using the First Amendment's Free Speech Clause as a defense. Freedom of speech can act as a defense in state tort suits like IIED in the same way it can to defamation claims. [[See *Snyder v. Phelps*, 562 U.S. 443, 450−51 (2011) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988))]]. The Court set aside a jury verdict imposing IIED tort liability on *Westboro Baptist Church in Snyder v. Phelps*, where a deceased soldier's father brought action against Westboro for picketing his son's funeral. Whether the First Amendment protects this type of conduct depends on whether the speech is of public concern—in other words, whether it is deserving of substantially more protection than matters of private concern. The Court reiterated language from *New York Times Co. v. Sullivan* about the Constitution's commitment to maintaining debates on public issues to be "uninhibited, robust, and wide-open." [[See *Snyder* at 452 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).]]….

Life-like personal deepfakes are here, and the law does not currently protect individuals who have not consented or participated in the production and publication of false pornography….

See the complete article by Douglas Harris at:
https://dltr.law.duke.edu/2019/01/05/deepfakes-false-pornography-is-here-and-the-law-cannot-protect-you/.

B. Deep fakes and the First Amendment

Excerpt from: Washington fears new threat from 'deepfake' videos
By Olivia Beavers, The Hill (January 20, 2019)

Hany Farid, a computer science professor at Dartmouth College, said many forces are coming together to create a "perfect storm" to facilitate the rapid spread of fake content.

"We have the ability to create misinformation. We have the ability to easily distribute it widely. And then we have a welcoming public that is going to consume what is circulating around without giving it a second thought," Farid told The Hill….

There is also the question of legal recourse, which remains a gray area. Some argue there should be a way for victims to push back, while others will say the content is protected under the First Amendment.

"You could regulate commercial speech and fraudulent speech — there may be areas where the A.I. technology is used for parody that are protected. But if the intent is to deceive, there is nothing that I think that protects that type of abusive practice," Rep. Adam Schiff (D-Calif.), chairman of the House Intelligence Committee, told The Hill.

Farid said First Amendment speech must be balanced with the new, emerging challenges of maintaining online security.

"What do we want to do about the people creating pornographic videos with Scarlett Johansson's face superimposed on other people? Is that something we want to allow legally in society. We need to think about that," he said.

Those legal questions are certain to grow as more sophisticated deepfakes go online.

See the complete article in The Hill at:
https://thehill.com/policy/national-security/426148-washington-fears-new-threat-from-deepfake-videos.

1. Deep fakes in light of precedents regarding parody

a. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).
See Appendix 1, below.

b. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004)
See Appendix 2, below.

2. Artificial intelligence, used to generate deep fakes, and expressive freedom

Excerpt from: *Why Robots Deserve Free Speech Rights / It's not about protecting them. It's about protecting us.*
By John Frank Weaver, Slate (January 16, 2018)

[]t is still unclear what local, state, and federal governments can do to autonomous speech from A.I.-enabled bots….

[T]here are essentially four different models of governing A.I. free speech:

1. Speech produced by A.I. is not protected by the First Amendment. Under this model, the federal government and states can regulate and prohibit speech from A.I. however they want, with none of the constitutional limits that have historically applied to speech produced by human beings….

2. A.I. is only capable of producing speech based on code from a human programmer. Therefore, speech from A.I. is merely another form of human speech….

3. Speech produced by A.I. is only protected by the First Amendment when that speech represents the speech of its human programmer. Otherwise, speech from A.I. is not protected….

4. Speech produced by A.I. is protected by the First Amendment. This leaves us with the final and most compelling model for applying the First Amendment to speech produced by A.I. and robots: a literal reading. The

actual text of the First Amendment suggests this is the correct model to apply to machine speech, as the text simply states that the government "shall make no law … abridging the freedom of speech, or of the press." Nothing there specifically suggests freedom of speech is limited to people….

See the complete article by John Frank at:
https://slate.com/technology/2018/01/robots-deserve-a-first-amendment-right-to-free-speech.html.

C. Deep fakes and Congress

Can the U.S. Government Prohibit Deepfake Videos Intended to Deceive Voters?

By Edward Lee, The Free Internet Project (February 19, 2019)

As the United States nears closer to the 2020 presidential election, lawmakers, policymakers, and activists are raising increasing concern about the possible deployment of "deepfake" videos that falsely depict political candidates, news broadcasters, or other people to deceive voters and influence their votes. Deepfake videos rely on artificial intelligence (AI) programs that use neural networks to replicate faces based on accessing a database of images of faces of the person being depicted. The neural network can swap the faces of different people in videos (now popular in deepfake pornographic videos that falsely depict famous celebrities having sex) to alter the face or voice of the same person to make them say or do things they, in fact, did not say or do.

For example, filmmaker Jordan Peele created the below deepfake video of President Obama as a public service announcement to warn voters of the use of deepfake videos in the next election. The video shows how easily an unsuspecting viewer could be duped into believing the deepfake is a real video of President Obama.

[See the video at:
https://www.youtube.com/watch?v=cQ54GDm1eL0&feature=youtu.be.]

The Defense Advanced Research Projects Agency (DARPA) in the Department of Defense is working on "deepfake" detection technology, but it is not clear whether it will be ready for full deployment before the 2020 election. Even if it is deployed, detection of deepfakes doesn't necessarily guarantee that deepfakes won't still affect voters during the time they videos are online and accessible to the public.

Lawmakers have begun sounding the alarm about deepfake videos intended to interfere with U.S. elections. But can Congress restrict or outright prohibit deepfake videos in a way that does not run afoul of the First Amendment's guarantee of speech? Difficult question. Below I offer some preliminary thoughts.

1. Deepfake videos from foreign sources outside the U.S.

Congress has wide latitude to enact laws to protect U.S. elections from foreign interference. Current federal election laws already prohibit a range of foreign activities related to U.S. elections, including "a foreign national ... mak[ing]... an expenditure ... for an electioneering communication" (i.e., "An electioneering communication is any broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary or 60 days of a general election and is targeted to the relevant electorate."). Congress probably could prohibit foreign deepfake videos originating from abroad but disseminated in the U.S. if the foreign national knowingly and intentionally designed the video to deceive the public that the contents are true, in order to affect an election in the United States. At least outside the U.S., foreign nationals do not have any First Amendment rights.

2. Deepfake videos from sources within the U.S.

The more difficult question is whether deepfake videos that are created by citizens or legal residents of the United States could be restricted or prohibited, consistent with the First Amendment. Imagine Congress enacted the following law: "It shall be unlawful for any person to knowingly create and disseminate to the public, in connection with a federal election, a deepfake video falsely depicting a political candidate, reporter, or other public figure, with the intent to influence the election by deceiving the public that such video is a truthful or accurate depiction of such person." Would this law survive First Amendment scrutiny? Potentially, yes. The Supreme Court has recognized that fraud, such as in advertising, can be proscribed as a category of "unprotected speech." *See United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 448, 771 (1976); *Donaldson v. Read Magazine, Inc*., 333 U.S. 178, 190 (1948). In *Illinois ex rel. Madigan v. Telemarketing Assoc., Inc.*, 538 U.S. 600 (2003), the Court unanimously ruled that a state fraud claim may be maintained against fundraisers for making false or misleading statements intended to deceive donors on how their donations will be used. Writing for the Court, Justice Ginsburg explained:

• The First Amendment protects the right to engage in charitable solicitation. *See Schaumburg*, 444 U.S., at 632, 100 S.Ct. 826 (“charitable appeals for funds ... involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of *612 causes—that are within the protection of the First Amendment”); *Riley*, 487 U.S., at 788–789, 108 S.Ct. 2667. But the First Amendment does not shield fraud. *See, e.g., Donaldson v. Read*

Magazine, Inc., 333 U.S. 178, 190, 68 S.Ct. 591, 92 L.Ed. 628 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"); *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (the "intentional lie" is "no essential part of any exposition of ideas" (internal quotation marks omitted)). Like other forms of public deception, fraudulent charitable solicitation is unprotected speech. *See, e.g., Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155 (1939) ("Frauds," including "fraudulent appeals ... made in the name of charity and religion," may be "denounced as offenses and punished by law."); *Donaldson*, 333 U.S., at 192, 68 S.Ct. 591 ("A contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public.").

By analogy, one can argue that the proposed federal law can prohibit persons who make deceptive deepfake videos intended to deceive voters on the political candidates in the election.

On the other hand, the Supreme Court during Chief Justice Roberts' tenure has been very protective [of] speech in a variety of cases finding unconstitutional federal laws that made illegal (i) virtual child pornography that depicted sex with minors via computer-generated technology, *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234 (2002); (ii) a false statement of receiving a medal by Congress, *United States v. Alvarez*, 567 U.S. 709 (2012); (iii) depictions of animal cruelty, *United States v. Stevens*, 559 U.S. 460 (2010); and (iv) independent expenditures by corporations to create speech expressly advocating the election or defeat of a political candidate, *Citizens United v. FEC*, 558 U.S. 310 (2010).

These latter cases did not involve defrauding or deceiving the public, however. The potential harm with a deepfake video of or about a political candidate, intended to deceive the public, is not merely the falsehood (as was the only harm at issue in the Stolen Valor Act, *Alvarez*, 567 U.S. at 719). It is also the potential impact the falsehood may have on voters who cast their ballot in the election--and thus on their constitutional right to vote. Given the fundamental importance of the right to vote, the Court has recognized that states can prohibit campaigning, such as campaign posters, near polling places, consistent with the First Amendment. *See Burson v. Freeman*, 504 U.S. 191, 209-10 (1992).

Yet even if Congress can prohibit fraudulent deepfake videos, some deepfake creators may attempt to argue that they only intended to make a parody and not anything deceptive. The First Amendment would likely protect parodies, so assuming parody deepfakes must be permitted, then wouldn't that open a whole Pandora's box, making it very difficult to differentiate between fraudulent and parody deepfakes--in which case the Court's overbreadth doctrine might make a prohibition unconstitutional? It

raises at least a potential concern. If Congress drafted a clear exemption for parody deepfakes, perhaps that would mitigate the problem. However, even an effective parody might be deceiving to some audiences, who might believe it to be accurate or real. Just imagine someone watching a video without audio, but closed-captioning. Or, imagine that the video stated, only at the end, that it was a parody, but audiences did not watch the entire video or the ending disclaimer.

Of course, tech companies such as Facebook, Twitter, and YouTube are not state actors, so, whatever their own users' policies, they can restrict deepfake videos without First Amendment scrutiny. What a federal criminal law, as proposed above, adds is the greater potential deterrence of dissemination of fraudulent deepfake videos in the first instance.

This article by Edward Lee, The Free Internet Project (February 19, 2019), is available at: https://thefreeinternetproject.org/blog/can-us-government-prohibit-deepfake-videos-intended-deceive-voters.

Appendix 1

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)

Syllabus*

Respondent, a nationally known minister and commentator on politics and public affairs, filed a diversity action in Federal District Court against petitioners, a nationally circulated magazine and its publisher, to recover damages for, *inter alia,* libel and intentional infliction of emotional distress arising from the publication of an advertisement "parody" which, among other things, portrayed respondent as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. The jury found against respondent on the libel claim, specifically finding that the parody could not "reasonably be understood as describing actual facts . . . or events," but ruled in his favor on the emotional distress claim, stating that he should be awarded compensatory and punitive damages. The Court of Appeals affirmed, rejecting petitioners' contention that the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, must be met before respondent can recover for emotional distress. Rejecting as irrelevant the contention that, because the jury found that the parody did not describe actual facts, the ad was an opinion protected by the First Amendment to the Federal Constitution, the court ruled that the issue was whether the ad's publication was sufficiently outrageous to constitute intentional infliction of emotional distress.

Held: In order to protect the free flow of ideas and opinions on matters of public interest and concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature such as the ad parody at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. The State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. Here, respondent is clearly a "public figure" for First Amendment purposes, and the lower courts' finding that the ad parody was not reasonably believable must be accepted. "Outrageousness"[p47] in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression, and cannot, consistently with the First Amendment, form a basis for the award of damages for conduct such as that involved here. Pp. 50-57.

797 F.2d 1270, reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, post, p. 57. KENNEDY, J., took no part in the consideration or decision of the case.

Appendix 2
Excerpts from: *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004)

Factual Background

In November 1999, thirteen-year-old Christopher Beamon, a Ponder, Texas seventh grader, was arrested and detained for five days in a juvenile detention facility after the Halloween story he wrote as a school assignment was deemed to contain “terroristic threats.” According to Beamon, his teacher assigned students the task of writing a scary story about being home alone in the dark and hearing noises. Beamon penned a tale that described shooting a teacher and two classmates. He received a grade of 100, plus extra credit for reading it aloud in class. The school principal read the story and called juvenile authorities, who sent sheriff's deputies to remove Christopher from school. Denton County Juvenile Court Judge Darlene Whitten ordered Christopher detained at the Denton County Juvenile Detention Facility for ten days. She later approved an early release after five days, and Denton County District Attorney Bruce Isaacks declined to prosecute the case. He commented, “It looks like to me the child was doing what the teacher told him to do, which was to write a scary story. But this child does appear to be a persistent discipline problem for this school, and the administrators there were legitimately concerned.” Brenda Rodriguez & Annette Reynolds, *Boy Freed After Story Lands*

Him in Cell; Ponder Seventh–Grader Wrote of Shooting Teacher, Students When Told to Pen Horror Tale, DALLAS MORNING NEWS, Nov. 3, 1999, at 1A.

The widely-reported Beamon incident received national and international attention. *See, e.g., id.;* John Kass, *Fear of School Violence Getting Best of Common Sense,* CHICAGO TRIBUNE, Nov. 4, 1999, at 3; Josh Romonek, *Scary Halloween Essay Puts Student, 13, in Jail,* CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, Nov. 4, 1999, at A2; Vin Suprynowicz, *So Simple, Even a Child Could Figure it Out,* LAS VEGAS REVIEW JOURNAL, Nov. 7, 1999, at 2D; Greg Torode, *Boy Jailed 6 Days for Essay on Massacre,* SOUTH CHINA MORNING POST, Nov. 4, 1999, at 1.

The *Dallas Observer,* a self-described "alternative newsweekl[y]" that focuses on reporting "in context and with perspective and sometimes with an individual's voice," published a satirical article lampooning the officials involved in the Beamon incident. The satire, written by Observer staff writer Rose Farley, ran in the *Observer's* November 11, 1999 print and online editions.[1]

Entitled "Stop the madness," the fictitious article described the arrest and detention of "diminutive 6 year-old" Cindy Bradley, who was purportedly jailed for writing a book report about "cannibalism, fanaticism, and disorderly conduct" in Maurice Sendak's classic children's book, *Where the Wild Things Are.*[2] Adjacent to the article was a picture of a smiling child holding a stuffed animal and bearing the caption, "Do they make handcuffs this small? Be afraid of this little girl." The article states that Bradley was arrested "without incident during 'story time' " at Ponder Elementary School and attributes fabricated words and conduct to Judge Darlene Whitten, District Attorney Bruce Issacks, and others.

Other false quotes and bogus factual assertions were strewn throughout the piece. Judge Whitten was said to have ordered Bradley detained for ten days at the Denton County Juvenile Detention Center while prosecutors contemplated whether to file charges. Whitten purportedly said: "Any implication of violence in a school situation, even if it was just contained in a first grader's book report, is reason enough for panic and overreaction.... It's time for you to grow up, young lady, and it's time for us to stop treating kids like children." Cindy was placed in ankle shackles "after [authorities] reviewed her disciplinary record, which included reprimands for spraying a boy with pineapple juice and sitting on her feet." The article noted that Isaacks had not yet decided whether to prosecute Cindy and quoted him as saying, "We've considered having her certified to stand trial as an adult, but even in Texas there are some limits." Yet another fictional quote was attributed to Dr. Bruce Welch, the Ponder ISD Superintendent: "Frankly, these kids scare the crap out of me." The article claimed that school representatives would soon join several local faith-based organizations, including "the God Fearing Opponents of Freedom (GOOF)," in asking publishers to review content guidelines for children's books.

In describing Sendak's 1964 Caldecott Medal winning book, the article offered the only true quote in the entire piece:

The most controversial aspect of the book is contained in an early exchange between Max and his mother. It reads:

His mother called him 'WILD THING!'
and Max said 'I'LL EAT YOU UP!'
so he was sent to bed without eating anything.

The article asserts that although he had not read the book, then-governor George W. Bush purportedly "was appalled that such material could find its way into the hands of a Texas schoolchild. This book clearly has deviant, violent sexual overtones. Parents must understand that zero tolerance means just that. We won't tolerate anything." The article concludes with Cindy "scoff [ing] at the suggestion that *Where the Wild Things Are* can corrupt young minds. 'Like, I'm *sure,*' she said. 'It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French.' "

Isaacks and Whitten demanded an apology, requested a retraction, and threatened to sue. In response, the *Buzz* column in the *Observer's* next edition (published November 18, 1999, one week after "Stop the madness") explained that the piece was a satire:

Buzz hates being one of those guys—commonly known as "losers" or "dateless"—who laboriously explains jokes. Unfortunately, some people—commonly known as "clueless" or "Judge Darlene Whitten"—did not get, or did not appreciate, the joke behind the news story "Stop the madness," which appeared in last week's *Dallas Observer.*

(146 S.W.3d 144, 147–49)

Here's a clue for our cerebrally challenged readers who thought the story was real: It wasn't. It was a joke. We made it up. Not even Judge Whitten, we hope, would throw a 6–year–old girl in the slammer for writing a book report. Not yet, anyway.
Patrick Williams, *Buzz,* DALLAS OBSERVER, November 18–24, 1999, at 9.

Even if the article were reasonably understood as stating actual facts about the respondents…, respondents could proceed with their claim only if they raised a fact issue on actual malice. Public figures cannot recover for defamatory statements made about them absent proof of actual malice.

(146 S.W.3d 144, 161)

Isaacks and Whitten—and the court of appeals—relied on the respondents' deposition testimony. In fact, the court's actual malice finding appears to have been based largely on evidence that the Dallas Observer intended to ridicule those officials. *See* 91 S.W.3d at 863–64 (noting that Farley "admitted the article was intended to hold Isaacks and Whitten up to public ridicule"; that Williams "agreed the article was meant as satire or scathing commentary"; and that Lyons "agreed that the story would hold these public officials up to public ridicule"). But, while the statutory definition of libel under Texas law includes a statement that exposes a person to ridicule, *see* TEX. CIV. PRAC. & REM.CODE § 73.001, evidence of intent to ridicule is not evidence of actual malice. Rather, actual malice concerns the defendant's attitude toward the truth, not toward the plaintiff. *See Prozeralik v. Capital Cities Communications, Inc.,* 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34, 42 (N.Y.1993) (distinguishing between actual malice, which "focuses on the defendant's state of mind in relation to the truth or falsity of the published information," and common-law malice, which "focuses on the defendant's mental state in relation to the plaintiff"); *Hoppe v. Hearst Corp.,* 53 Wash.App. 668, 770 P.2d 203, 208 (1989) ("The standard for finding actual malice is subjective, and focuses on the declarant's belief in, or attitude toward, the truth of the communication at issue.").

Equating intent to ridicule with actual malice would curtail the "uninhibited, robust, and wide-open" public debate that the actual malice standard was intended to foster, particularly if that debate was expressed in the form of satire or parody. *Sullivan,* 376 U.S. at 270, 84 S.Ct. 710; *cf. id.* at 273, 84 S.Ct. 710 ("Criticism of [government officials'] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."). Moreover, relying on such evidence ignores the Supreme Court's repeated admonitions that ill will, spite, and bad motive are not the same as actual malice. Indeed, the very purpose of satire is ridicule, but this does not make it a sort of second-class speech under the First Amendment. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2017(1961) (defining "satire" as "a usu. topical literary composition holding up human or individual vices, folly, abuses, or shortcomings to censure by means of ridicule, derision, burlesque, irony, or other method sometimes with an intent to bring about improvement").
In fact, reliance on intent to ridicule as evidence of actual malice contravenes *Falwell* itself. In that case, Falwell's evidence that Flynt intended to cause him distress rested on Flynt's deposition testimony that he had intended to "upset" Falwell, that he had wanted "[t]o settle a score" because Falwell had labeled Flynt's personal life "abominable," and that Flynt wanted to ***166** "assassinate" Falwell's integrity. Deposition Testimony of Larry Flynt, *reprinted in* Joint Appendix at 113, 136, 141, *Hustler Magazine v. Falwell,* 485 U.S. at 56, 108 S.Ct. 876). Despite this evidence, the Supreme Court held that Falwell could not recover for intentional infliction of emotional distress without proof of actual malice, and the Court reversed the Fourth Circuit's judgment. As one commentator has noted, "the regulation of improper intentions, although important for the civil law of torts, is constitutionally inappropriate 'in the area of public debate about public figures.' " Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell,* 103 HARV. L.REV.. 603, 613 (1990)(quoting *Falwell,* 485 U.S. at 53, 108 S.Ct. 876).

(146 S.W.3d 144, 165–66)

As further evidence of the *Observer's* purported malice, the court of appeals pointed to editor-in-chief Julie Lyons's actions: "She never considered labeling the article as parody or satire. She later realized that some readers thought that the article was real and she changed the heading of the on-line version to satire." 91 S.W.3d at 864. Lyons also responded to each reader query she received about the story and explained that it was a satire. Additionally, the court gave weight to Patrick Williams's testimony that he wrote a response in his "Buzz" column, calling readers who believed the report "cerebrally challenged" and "clueless," and that "he never considered the possibility that someone might not be able to tell that the article was fictional satire." *Id.* at 863.

But contrary to the court of appeals' opinion, New Times's prompt labeling and clarification in the next edition's *Buzz* column, as well as its explanatory responses to readers, evidence a lack of actual malice. *See, e.g., Washington Nat'l Ins. Co. v. Adm'rs,* 2 F.3d 192, 196 (7th Cir.1993) (holding that "subsequent statements negating any defamatory implications may show the absence of malice by demonstrating that the speaker did not contemplate the defamatory reading in the first place"); *Zerangue v. TSP Newspapers, Inc.,* 814 F.2d 1066, 1071 (5th Cir.1987) (noting that "[r]efusal to retract an exposed error tends to support a finding of

actual malice [and][c]onversely, a readiness to retract tends to negate 'actual malice' ") (citations omitted); *Hoffman v. Washington Post Co.,* 433 F.Supp. 600, 605 (D.D.C.1977) ("[I]t is significant and tends to negate any inference of actual malice on the part of the [publisher] that it published a retraction ... in the next day's edition ...."), *aff'd,* 578 F.2d 442 (D.C.Cir.1978); *see also* Sack on Defamation § 11:1; John C. Martin, *The Role of Retraction in Defamation Suits,* 1993 U. Chi. Legal F. 293, 296 (1993) (noting that some courts "regard retraction as sufficiently probative of an absence of malice to warrant summary judgment in suits involving public figures").

The *Buzz* column was certainly crude and provocative, but the First Amendment does not police bad taste.

(146 S.W.3d 144, 166)

Finally, in finding a fact issue on actual malice, the court of appeals relied "[m]ost significantly" on Julie Lyons's testimony that, after the article was published, she agreed that even intelligent, well-read people could have been misled by the story. 91 S.W.3d at 864. The actual malice inquiry focuses on the defendant's state of mind at the time of publication, however. *See Forbes Inc. v. Granada Biosciences, Inc.,* 124 S.W.3d 167, 173 (Tex.2003) (citing *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 512, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). When asked what she thought at the time of publication, Lyons answered that she did not know or suspect *at that time* that the satire would be misinterpreted. Her hindsight acknowledgment that some people could have been fooled is not evidence that the reasonable reader could have understood the satire to state actual facts, nor is it evidence of actual malice at the time of publication.

We hold that New Times negated actual malice as a matter of law. In light of our disposition of this issue, we do not reach the *Observer's* request that we revisit our holding in *Huckabee* to require clear and convincing evidence of actual malice at the summary judgment stage.

(146 S.W.3d 144, 168)