To be argued by
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New York Supreme Court

Appellate Division - First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

RAPHAEL GOLB,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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INTRODUCTION

Defendant Raphael Golb appeals from a November 18, 2010 judgment of the Supreme Court, New York County (Carol Berkman, J.), convicting him, after a jury trial, of two counts of Identity Theft in the Second Degree (Penal Law §190.79[3]), fourteen counts of Criminal Impersonation in the Second Degree (Penal Law § 190.25[1]), ten counts of Forgery in the Third Degree (Penal Law § 170.05), three counts of Aggravated Harassment in the Second Degree (Penal Law § 240.30[1][a]), and one count of Unauthorized Use of a Computer (Penal Law § 156.05). The court sentenced defendant to six months in jail and five years of probation on the identity theft counts and to concurrent lesser terms on the remaining counts. The Honorable Roslyn H. Richter granted defendant's application for a stay of execution of the judgment, and defendant remains at liberty on bail.

Defendant's conviction arises from his relentless impersonation and harassment of scholars who disagreed with his father's unpopular theory about the origins of the Dead Sea Scrolls. In 2006, the Dead Sea Scrolls became the subject of a series of museum exhibits in the United States, and in defendant's opinion, the exhibits did not pay sufficient homage to his father's theory. Defendant countered by sending emails under pseudonyms to museum administrators, academics, and reporters and by publishing internet blogs criticizing the exhibits. Eventually, defendant turned to impersonation, sending emails impersonating his father's adversaries in an effort to benefit his father and harass his adversaries by that deception.

First, with respect to the Dead Sea Scrolls exhibit that opened in San Diego in June 2007, defendant harassed graduate student Robert Cargill in retaliation for Cargill's production of a video about the Scrolls that omitted mention of defendant's father. Defendant used multiple aliases to send repeated emails to dozens of Cargill's superiors and colleagues complaining about Cargill and encouraging skepticism of his worthiness to receive his degree, thereby falsely giving the impression that a veritable community of credentialed critics were condemning Cargill. Cargill had to endure inquiries from his superiors and feared that defendant's relentless onslaught would damage his career. Meanwhile, defendant expressed to his family his satisfaction that his campaign must be "truly maddening" to Cargill and other scholars who disagreed with his father, and he boasted that his father's rivals should regard him as "a

dedicated, in-the-know adversary who is out to get them, and there's simply nothing they can do about it."

In July 2008, when the Scrolls exhibit moved to North Carolina, defendant targeted Doctor Stephen Goranson, a Duke University library clerk who was an outspoken opponent of defendant's father's theory and whom defendant had long hated. Pretending to be a disinterested academic who was merely concerned that Goranson was committing misconduct, defendant repeatedly emailed Goranson's boss and university officials to complain that Goranson was misusing Duke's name or its computers to engage in unprofessional online discussions. Defendant's persistence led the university's provost to assure defendant that someone would address Goranson's conduct.

At around the same time, defendant created an email account in the name of retired Harvard Professor Frank Cross, a seminal Dead Sea Scrolls scholar. Defendant used that account to contact several North Carolina scholars, ridiculing the professor who would be speaking at the exhibit and inviting the email recipients to click on links that would promote the popularity of defendant's blog. He signed the emails "Frank Cross."

Later in July 2008, the entire Golb family turned their attention to the Jewish Museum in New York City, whose Dead Sea Scrolls exhibit was slated to open in October 2008 with New York University Professor Lawrence Schiffman as a lecturer. The family hoped to get Professor Golb invited to speak at the exhibit as well, but all

their legitimate efforts failed. As a result, under assumed names, defendant published articles accusing Schiffman of plagiarizing defendant's father some 15 years before, even though he admitted to his brother that "whether someone plagiarized" his father was not his true "concern." Then, using computers at New York University's Bobst Library, defendant created an email account in Schiffman's name and sent subtle confessions of plagiarism to Schiffman's students and colleagues as if from Schiffman himself. Defendant thereafter responded to their replies in Schiffman's persona. Simultaneously, defendant sent the published accusation to New York University officials, claiming to be an NYU faculty member who wished to remain anonymous and demanding an investigation into Schiffman's conduct. Finally, defendant sought to use the plagiarism investigation that ensued to undermine Schiffman's invitation to the Jewish Museum lecture, under the apparent expectation that defendant's father would be an obvious replacement.

Finally, when the Scrolls exhibit moved on to Ontario, Canada, defendant impersonated Rabbi Jonathan Seidel, a former student of Schiffman's, in order to communicate with people involved in the Ontario exhibit. Defendant hoped to stir up enough debate about his father's theory that the Canadian exhibit might devote some attention to it.

On March 5, 2009, after an extensive forensic investigation and analysis, New York County District Attorney's Office Squad Investigators arrested defendant at his apartment at 206 Thompson Street. Armed with a search warrant, they seized

defendant's computer, which at that very moment was still displaying one of the accounts he had used during his online campaign.

By New York County indictment number 2721/2009, a grand jury charged defendant with 51 counts of identity theft, criminal impersonation, forgery, aggravated harassment, and unauthorized use of a computer. On September 13, 2010, defendant proceeded to a jury trial before Justice Berkman, and on September 30, 2010, 31 counts were submitted for the jury's consideration. That same day, the jury convicted defendant of the 30 counts noted above and acquitted him of one count of criminal impersonation. On November 18, 2010, the court sentenced defendant as noted above, and also on that date Justice Richter granted defendant's application for a stay of execution of the judgment.

On appeal, defendant contends that the jury's verdict on one of the two identity theft counts was against the weight of the evidence. He also contends that the trial court's jury instructions violated his state and federal constitutional rights. Defendant further argues that the application of forgery, criminal impersonation, and identity theft statutes to all his conduct renders those statutes "vague and overbroad." Defendant also claims that the application of the aggravated harassment statute to his conduct against Cargill, Goranson, and Schiffman renders that statute "vague and overbroad." Finally, defendant contends that the application of the unauthorized use of a computer statute to his use of the Bobst Library computers renders that statute "void for vagueness."

THE EVIDENCE AT TRIAL

The People's Case

In the mid-2000's, Professor LAWRENCE SCHIFFMAN was the Chairman of the Department of Hebrew and Judaic Studies at New York University. He was an expert on the Dead Sea Scrolls, a collection of ancient documents found in caves near Qumran on the West Bank of what is now Israel, and he had been teaching courses on the Scrolls for almost 40 years. Like most scholars, Schiffman believed that the Scrolls were stored in the caves by members of a Jewish sect living in or near Qumran; this is known as the "Qumran-Sectarian" theory. Museums frequently invited Schiffman to speak at exhibits about the Scrolls, and for such engagements he would usually receive an honorarium of from several hundred to over a thousand dollars (Schiffman: 43-56).

Defendant's father, University of Chicago Professor Norman Golb, also had studied the Dead Sea Scrolls; he disagreed with the prevailing view of their origin, believing that they were rescued from libraries in Jerusalem and brought to the caves for safekeeping. Professor Schiffman had known Norman Golb for decades. Although Schiffman frequently argued with Professor Golb about their differing theories, to his recollection he had "never had any negative experience" with Golb as a result. Schiffman did not know defendant at all (Schiffman: 56-65, 225). Schiffman had no idea that, in fact, defendant's family despised him, apparently in part for Schiffman's minor role in mildly censuring a protégé of Golb's some 20 years before

(Schiffman: 151-157, 160; People's Exh. 15 [p. 38, Ruth Golb: "Schiffman is a real snake"; p. 59, Ruth Golb: "Schiffman is such a sleaze"]).

Also in the mid-2000s, ROBERT CARGILL was a graduate student at UCLA, working toward his Ph. D. in near eastern languages and cultures. Cargill had taught a class about the Dead Sea Scrolls and had published on the topic. His views aligned more closely with the Qumran-Sectarian theory of the Dead Sea Scrolls than with Norman Golb's theory. Cargill made broad use of the internet in his professional and personal life, maintaining a website at www.bobcargill.com and authoring a blog at www.robertcargill.com; he frequently participated in online discussions about the Scrolls (Cargill: 704-717).

1. THE SAN DIEGO EXHIBIT: Defendant begins an online campaign to encourage inclusion of his father's theory at Dead Sea Scrolls Museum exhibits. After doctoral student Robert Cargill produces a video for the San Diego exhibit that did not pay homage to defendant's father, defendant begins to harass Cargill.

Starting in September 2006 and continuing into 2007, defendant began using the internet to criticize museum exhibits showcasing the Dead Sea Scrolls. Defendant's primary complaint was that the exhibits were not paying enough attention to defendant's father's theory about the origins of the Scrolls. To that end, defendant posted anonymous "blogs" in the style of news articles reporting that Seattle's Pacific Science Center was presenting a misleading Scrolls exhibit, and later defendant wrote blogs and sent emails under assumed names to scholars and museums in an attempt to highlight his father's theory and to influence upcoming

Scrolls exhibits. For example, on September 15, 2006, writing under the name "We Demand a Neutral Scientific Exhibit," defendant authored a blog entitled "The Dead Sea Scrolls in Seattle and San Diego: Pacific Science Center exhibit misleads Seattle public" (People's Exh. 40-A1).[1]

Cargill quickly noticed defendant's burgeoning "internet blog campaign" attacking the Seattle Scrolls exhibit. Although Cargill did not immediately know who was behind the scheme, he concluded that "[s]omeone was cutting and pasting the same thing over and over in the attempt to elevate its search standings within Google." Essentially, the comments were always most critical of one thing: that Norman Golb had not been invited to present his theory at the exhibit (Cargill: 716-717, 719-721, 737, 741; People's Exhs. 40A1-40A5).

In 2007, the Dead Sea Scrolls were slated to be put on exhibit at the San Diego Natural History Museum. For use at that exhibit, Cargill created a digital movie called "Ancient Qumran," which was essentially a silent virtual reality tour of the site where the Scrolls were discovered. Cargill's movie was designed to be watched while a live narrator read from a script Cargill had prepared (Cargill: 711, 745). The script –

[1] The People introduced forensic evidence, expert testimony, and other records to prove defendant's authorship under assumed names of this and dozens of other blog entries, as well as hundreds of emails involving over 70 email addresses (*see*, *e.g.*, Earthlink Contracts and Compliance Manager CANDIDA GIBSON: 475-493; American Express Security Manager ROBERT CURRAN: 494-498; District Attorney's Office Senior Forensic Analyst SELENA LEY: 499-561; Google Legal Assistant COLIN BOGART: 564-584; Yahoo Legal Services Supervisor YUKIN KANG: 587-604; District Attorney's Office Senior Cybercrime Analyst SARA BRIGLIA: 818-946).

which did not describe Golb's view of the Scrolls' origins – was unpublished, and it bore a copyright warning that it must not be reproduced without permission (Cargill: 781-782). Cargill's movie began showing when the San Diego exhibit opened on June 29, 2007 (Cargill: 745-746, 778).[2]

In a blog entry dated that very day, and periodically updated thereafter, defendant anonymously chronicled his grievances about the San Diego exhibit, including Cargill's movie (Cargill: 739; People's Exh. 40-A6). At some point thereafter, Norman Golb requested, and as a courtesy was given, a copy of Cargill's unpublished script that accompanied his movie. Notwithstanding Cargill's script's express warning requiring permission before publication, Norman Golb proceeded to post a scathing criticism of the script on the University of Chicago's website, liberally reproducing portions of the script in the process (Cargill: 746-749). Cargill complained to the University of Chicago and Golb's article was removed, although Golb then re-posted it to a site not subject to the University's review (Cargill: 782-784). Norman Golb also sent letters to UCLA complaining that Cargill should not have excluded Golb from mention in the script (Cargill: 711-714, 719-720).

As Cargill's conflict with defendant's father developed, defendant, using pseudonyms, started sending emails to scholars in Cargill's field – and even to a

[2] Before the exhibit opened, a UCLA publicist described Cargill's film in an article, and on June 19, 2007, defendant – writing as Charles Gadda – emailed the publicist to complain that Cargill's film was misleading for failing to give Golb's theory proper weight (People's Exh. 17-1).

company with which Cargill had signed a contract – harshly criticizing Cargill's film for not giving Golb's theory enough credit, and suggesting that Cargill was intentionally dishonest and unworthy of receiving the doctoral degree for which he was a candidate (*see*, *e.g.*, People's Exhs. 17-6 [Oct. 6, 2007 email from Don Matthews to UCLA media], 17-9 [Oct. 22, 2007 email from Don Matthews to UCLA media], 17-10 [Nov. 17, 2007 email from Robert Dworkin to UCLA media], 17-13 [Nov. 23, 2007 email from Dworkin to Morningstar Entertainment]). Defendant even had a friend send an email to Cargill, posing as a fan and looking for links to reviews of Cargill's film (People's Exh. 15 [p. 7: emails to defendant and Cargill sent by "Dale Summers"]).[3]

Defendant stepped up his efforts in early 2008, and email exchanges between defendant and his brother, Joel Golb, reflect efforts to use a deceptive email campaign to undermine Cargill's doctoral aspirations. For example, in mid-January 2008, defendant discussed with his brother a proposed email from "Robert Dworkin" to Professor Carter, Chair of the UCLA department in which Cargill and his Ph.D. advisor worked. Defendant's brother, commenting on defendant's mention that his "intent in writing" was not "to harm Mr. Cargill's academic career prospects," suggested that to the contrary, "[c]learly, for all who read this, one of the purposes of

[3] Specifically, on November 21, 2007, "Dale Summers" sent an email to defendant's email address, but the salutation was to "Bob" and the email purported to ask for links to reviews of Cargill's film. Six minutes later a slightly modified email was sent to Cargill from the Summers account and blind copied to defendant (People's Exh. 15 [p. 7]).

Dworkin's devastating letter will be, precisely, to destroy the career prospects of a really nice guy." Defendant suggested that his claim not to wish harm to Cargill's career was "intentionally disingenuous" (People's Exhs. 17 [pp. 44-47], 31 [p. 69]). Defendant also explained that his purpose in claiming to be an alumnus was to make his allegations more credible, since he needed to have some apparent motivation for his claims to care about the reputation of the university (People's Exh. 17 [p. 51]). Defendant's brother warned him to make sure that the emails were "untraceable" (*id.*).[4]

Right up until the month of his arrest, defendant continued to use aliases to send dozens of emails to hundreds of "ucla.edu" recipients, as well as other individuals, attacking Cargill (*see*, *e.g.*, People's Exhs. 17-44, 17-48, 17-49, 17-50, 17-53, 17-54, 17-55, 17-59, 17-60, 17-82). Once, when a UCLA administrator asked one of defendant's aliases to stop sending emails, defendant replied that he would "continue to contact [the] department" until the complaints about Cargill were addressed (People's Exh. 17-77). Over time, virtually all Cargill's colleagues and supervisors approached Cargill because they had received these emails. The university's provost, Cargill's dean, Cargill's doctoral advisor, and members of the university's press room had all received complaints, prompting many a person with influence over Cargill's

[4] About two months later, defendant's brother observed to defendant that Cargill's and his advisor's "careers may well be ruined" by defendant's campaign (People's Exh. 17 [p. 57A]).

career to ask Cargill "what the hell is going on?" The barrage of emails to Cargill's colleagues and supervisors thus caused him frequent difficulties at work and led him to fear that his career would be affected (Cargill: 715-717, 731-735, 742-744, 768).

As defendant's onslaught continued, Cargill realized that a single person or group had to be behind the emails and blogs promoting Golb's unpopular theory and harassing him. As Cargill observed, the "language," "grammar," "content" and "combative style" of all the writing "was the same" (Cargill: 718-721). Cargill quickly realized that most of defendant's emails and blog comments originated from the same "IP address" (69.86.34.90), which was being used by a computer located in Manhattan near New York University. Indeed, another commentator had the same realization and remarked in response to a comment posted by one of defendant's many aliases that it was obvious that many of the Golb-promoting comments were coming from a single IP address. Thereafter, the same aliases began posting comments from several different IP addresses; but those IP addresses resolved to multiple computers all located within New York University's Bobst Library – suggesting to Cargill that the author had simply migrated there, where he travelled from machine to machine (Cargill: 721-728).

Defendant anticipated that Cargill would eventually discover his identity. Indeed, in an email to his mother discussing the possibility that Cargill and others knew that defendant was behind the campaign, defendant gloated that such knowledge would be "truly maddening" to them. Defendant, after all, fancied himself

feared by his father's opponents as "a dedicated, in-the-know adversary who is out to get them, and there's simply nothing they can do about it" (People's Exh. 15 [p. 16: July 26, 2008 email]).[5]

2. THE RALEIGH EXHIBIT: When the Dead Sea Scrolls exhibit moves to Raleigh, North Carolina, defendant harasses Doctor Stephen Goranson at Duke University, and he impersonates Doctor Frank Cross in emails to Duke scholars.

In mid-2008, the Dead Sea Scrolls exhibit moved to Raleigh, North Carolina. Doctor STEPHEN GORANSON, a library clerk at Duke University who had earned his doctorate in the History of Judaism, Christianity and Archaeology, had published some articles on the Dead Sea Scrolls. Goranson disagreed "vehemently" with Golb's theories, and on many occasions criticized Golb's theories in public internet forums (Goranson: 633-636).[6] Goranson had on four or five occasions been suspended or banned from some internet discussion groups when the moderators felt that he had posted an attack that was more personal than academic, but in most instances the members of the groups from which Goranson was suspended petitioned to have him readmitted (Goranson: 632-633).

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[5] On March 3, 2009, defendant – posing as a concerned alumnus of the UC system – emailed Cargill's dean to complain about Cargill. Among other things, defendant called "unsubstantiated and untrue" Cargill's accurate observation that defendant's 60 or more aliases plastering the internet in an effort to advance the theories of Norman Golb appeared to come from a single author (People's Exh. 17-88).

[6] In 1989, when Goranson published some commentary on an article that Norman Golb had written, Golb sent Goranson a letter politely taking issue with Goranson's comments, and thereafter they discussed their scholarly differences by telephone. Goranson felt that the exchange had been courteous (Goranson: 619-622).

Given these views, Goranson had a longstanding online disagreement with defendant's aliases regarding the Scrolls' origin (Goranson: 627-628), and defendant despised him. In undated draft emails in defendant's personal email account (People's Exh. 48-C), to which defendant and his brother presumably both had access, the Golb brothers discussed the timing of when they should "finish Goranson off"; it was agreed that Goranson was a "small fry" and that their goal was to "set him up" for an accusation.

Defendant acted on his animosity on July 1, 2008, when, writing as "Peter Kaufman, Ph. D.," defendant separately emailed the Provost and the President of Duke University, as well as Goranson's supervisor at the Duke University library. He complained about Goranson's purported attacks on Norman Golb on the internet (A292-A293; Goranson: 625, 628-630; People's Exh. 18 [Goranson emails]). On July 8, 2008, Duke's provost responded by email, opining that Goranson had not "crossed th[e] line" and that "no action can be taken at this time" (A296 [People's Exh. 18-15]). Defendant immediately replied that Goranson should "be prevailed upon to moderate his tone and avoid unseemly personal attacks on a respected historian," and he complained that Duke allowed "a stacks maintenance employee" such use of its internet resources (*id.*). The provost answered that Goranson "is being spoken to by his supervisor and advised of his obligations and of the matters of which he should be aware"; defendant promptly forwarded that email to his brother (*id.*).

Defendant also associated Goranson's name with some of his illicit doings online, thereby setting Goranson up as a possible suspect in those activities. For example, with respect to his online campaign to have his father selected to replace Professor Schiffman as speaker at the Jewish Museum, as will be discussed below, defendant created an email account named steve.goranson@gmail.com and associated the account with one of several blogs accusing Schiffman of plagiarism (People's Exh. 16-EE [email confirmation from www.blogger.com]). He also chose the password "goranson33" when he opened a gmail account in Schiffman's name (People's Exh. 16-F), and he used that password for six other aliases as well (People's Exh. 65-C [forensic analysis of Goranson email account]). Defendant continued his campaign against Goranson at least until December 2, 2008, when defendant – this time writing as Simon Adler – once again complained to a Duke professor that Goranson was misusing the Duke computers (A300).

Shortly after he began complaining about Goranson in emails to Duke University administrators, defendant turned his attention to scholars at the University of North Carolina, undertaking an elaborate scheme involving defendant's impersonation of Dead Sea Scrolls scholar Frank Cross.[7] First, perturbed that University of North Carolina Professor Bart Ehrman was slated to lecture at the

[7] Doctor Cross, a retired Harvard professor who had played a major role in the study of the Scrolls for over half a century, was 87 years old, living in a nursing home, showing signs of dementia, and unable to use email (Cross's daughter ELLEN GINDELE: 696-699).

Raleigh exhibit while his father was not, defendant assumed the pseudonym "Jerome Cooper" to engage Ehrman in an email exchange about the origins of the Scrolls. Then, on July 17, 2008, defendant anonymously published a blog (A203 [People's Exh. 40-C13]) complaining that Ehrman should not have been invited to speak and that experts who disagreed with Ehrman should not have been excluded. Defendant reported that "[i]n the hope of clarifying these matters, Mr. Jerome Cooper emailed Dr. Ehrman, and received a lengthy response, which he has been good enough to forward to me." Defendant then reprinted his prior email exchange with Ehrman, criticizing Ehrman's arguments therein and promoting his father's theory.

On July 20, 2008, defendant used the email address frank.cross2@gmail.com to send four separate but identical messages to four University of North Carolina scholars (A307-A310 [People's Exhs. 19-4 – 19-7]). The sender's name appeared to be "Frank Cross." Writing with a familiar tone as if to a person he knew, defendant suggested that "Bart" had "put his foot in his mouth again." Defendant reported that this issue was "crop[ping] up everywhere on the web," and he attached links to his blog entries criticizing Ehrman for his recipients to click. Defendant signed the email, "Frank Cross."

3. THE NEW YORK EXHIBIT: Using NYU Library computers to the exclusion of his own, defendant assumes Professor Schiffman's identity online in an effort to trick NYU into investigating Schiffman for plagiarism and to convince the Jewish Museum to invite Golb to lecture in place of Schiffman.

The Dead Sea Scrolls were slated to be put on exhibit at the Jewish Museum in New York City in September 2008. Dr. SUSAN BRAUNSTEIN, the Museum's Curator of Archaeology and Judaica, was charged with organizing the exhibit and securing any lecturers (Braunstein: 267-268). Braunstein wanted the exhibit to recognize both the Qumran-Sectarian theory espoused by Schiffman and also the Jerusalem-Libraries theory that Golb embraced. In late March or early April 2008, Braunstein invited Professor Schiffman to give one of two lectures at the exhibit on October 30, 2008 (Schiffman: 97-99). In preparation for the exhibit, Schiffman reviewed some exhibit tags, which explained both theories and included quotes from Golb; he received a $500 honorarium for his troubles, and he was promised a $650 honorarium for speaking (Schiffman: 97-99; Braunstein: 267-272).

In late July 2008, after the Jewish Museum's exhibit was publicized, a flurry of emails erupted among defendant, his brother, his mother, and his father (People's Exh. 15). In those emails, the whole Golb family schemed about how to get Norman Golb invited to speak at the upcoming exhibit. They discussed defendant's internet campaign, they strategized over which aliases to use and when (People's Exh. 15 [pp.

9-14]), and they plotted how they might persuade Braunstein to extend an invitation (People's Exh. 15 [pp. 15-42]).[8]

In a July 30, 2008 email to his mother, defendant mulled emailing Braunstein using his true name to request a meeting to provide her with "some information on recent developments that could be of interest" to her. In reply, defendant's mother wondered whether being approached by Golb's son might lead Braunstein to "recognize something is afoot." Defendant ultimately agreed that influencing Braunstein directly would be futile, noting that his friend Dan Friedenberg – a benefactor of the Jewish Museum – said that "there was no way" that Braunstein would meet defendant because she was a "big shot." Thus, the Golbs hoped to enlist the aid of third parties who might persuade Braunstein. But Friedenberg failed to persuade Braunstein to invite Golb,[9] and defendant feared that they were "quickly running out of time." On July 31, 2008, emails reveal, Norman Golb discovered that he could not influence Braunstein through his connections in Israel (People's Exh. 15 [pp. 29-35]).

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[8] In one July 24, 2008 email to his mother, defendant suggested that his father refrain from mentioning the scheme in his own email, so that there would be "no trace of it in his account" (People's Exh. 15 [p. 26]).

[9] Defendant wrote in his email that Friedenberg had not even asked Braunstein about inviting Golb (People's Exh. 15 [p. 35]), but defendant was mistaken. Braunstein felt that the exhibit was already sufficiently balanced, so she declined Friedenberg's request (Braunstein: 274-276, 283-285).

Defendant, brainstorming with his mother again by email, suggested that a footnote in one of Schiffman's books was "incriminatory" and that they "should use it." His mother replied that if they were to "use the Schiffman thing," then defendant should find the relevant quotes. On July 31, 2008, defendant sent his father an outline of how he should argue that Schiffman had published "misrepresentations" of Golb's ideas, and he also noted that a reporter in Israel had suggested in 1993 that Schiffman had not given Golb sufficient credit for his ideas. Defendant urged his father to send these complaints to Braunstein by overnight mail (People's Exh. 15 [pp. 36-42]), but Golb did not send her anything (Braunstein: 274).

A few days later, on August 3, 2008, defendant crated an email account named larry.schiffman@gmail.com. In opening that account, defendant reported his name to Google as "Larry Schiffman," setting his password as "goranson33" (People's Exhs. 6 [gmail records], 16-F [gmail confirmation of account creation], 60 [email account summary]).

The next day, August 4, 2008, defendant used the pseudonym "Peter Kaufman" to publish an article at www.NowPublic.com entitled "Plagiarism and the Dead Sea Scrolls: Did NYU department chairman pilfer from Chicago historian's work?" (People's Exh. 40-B3; Schiffman: 77-78). Defendant called Professor Schiffman's work "quackery" and blamed his theory's acceptance on "corruption" in the field of Dead Sea Scrolls scholarship. In odd juxtaposition, defendant-as-Kaufman accused Schiffman at the same time of plagiarizing Norman Golb's work

but also of misrepresenting what Golb had said. Defendant published blog entries similar to the Now Public article at www.larryschiffman.blogspot.com and www.larryschiffman.wordpress.com (People's Exhs. 40A7, 40C16).

That same afternoon, also as Peter Kaufman and claiming to be an NYU faculty member acting anonymously in the best interests of the university, defendant emailed NYU administrators in an effort to instigate an investigation into whether Schiffman committed plagiarism (People's Exhs. 16H, 16I):

> I am writing to ask why it is that the outrageous misconduct of Dr. Lawrence Schiffman, chairman of the Skirball Department of Hebrew and Judaic Studies at NYU, has never been investigated.
>
> This man has in large measure based his career on the plagiarism and misrepresentation of another scholar's work. For the basic facts, see: http://larryschiffman.wordpress.com/2008/08/03/charges-of-impropriety-surface-against-new-yorkuniversity-professor-lawrence-schiffman/
>
> I would appreciate it if you could write back to me with any information on steps you may or may not wish to take concerning this egregious, widely known, and discreetly ignored violation of NYU's code of academic conduct.
>
> With best wishes,
>
> Peter Kaufman
>
> (I am frankly using an alias to write to you, as my own career at NYU could be ruined if it became known that I finally had the nerve to rat on Dr. Schiffman concerning facts that have been generally known to researchers for the past fifteen years, but which everyone has always calmly passed over in silence because of the man's popularity.).

A few hours later, defendant used email account larry.schiffman@gmail.com to send the following message – purportedly from Professor Schiffman – to Schiffman's four graduate students (People's Exhs. 10E, 16G):

> Miryam, Sara, Cory, Ariel,
>
> Apparently, someone is intent on exposing a minor failing of mine that dates back almost fifteen years ago.
>
> You are not to mention the name of the scholar in question to any of our students, and every effort must be made to prevent this article from coming to their attention. This is my career at stake. I hope you will all understand.
>
> http://www.nowpublic.com/culture/plagiarism-and-dead-sea-scrolls-did-nyu-professor-snitch-chicagohistorians-work
>
> Lawrence Schiffman

About 25 minutes later, Cory replied to defendant-as-Schiffman, as well as to the other three students, in apparent belief that he was responding to Schiffman himself (People's Exh. 10-F). Confirming that he had read the blog to which defendant-as-Schiffman's email had directed him, Cory expressed condolences to Schiffman for having to deal with such unjustified "character assassination," and he attached a copy of the article to the email so that the other students could avoid clicking the link to it and thereby raising its search-engine popularity. Defendant promptly replied, "Cory, thanks for your kind words. This is definitely ruining my week. I don't know if you can understand how I feel, but it is as if someone had set

fire to my beard. The last thing I need now is to be investigated by the dean" – again signing his name as "Lawrence Schiffman" (People's Exhs. 10O, 16S).[10]

The next day, defendant – again as Schiffman – emailed every member of Schiffman's department at NYU (Schiffman: 80-81; People's Exhs. 10I, 16R):

> Dear colleagues,
>
> Apparently, someone is intent on exposing a minor failing of mine that dates back almost fifteen years ago.
>
> Every effort must be made to prevent this article from coming to students' attention. This is my career at stake. I hope you will all understand.
>
> http://www.nowpublic.coin/culture/plagiarism-and-dead-sea-scrolls-did-nyu-department-chairman-pilferchicago-historian-s-work
>
> Lawrence Schiffman

A few minutes later, from the same address, defendant-as-Schiffman sent an email to the Provost of NYU and another to NYU Graduate School of Arts and Science Dean CATHERINE STIMPSON (Schiffman: 83-84; Stimpson: 232-235). In those identical emails, defendant-as-Schiffman wrote (People's Exhs. 10L, 10M, 16P, 16Q):

> I would like to know what action I can take to counter charges of plagiarism that have been raised against me.
>
> Apparently, someone is intent on exposing a failing of mine that dates back almost fifteen years ago. It is true that I should have cited Dr. Golb's articles

[10] Defendant-as-Schiffman later added in a follow-up email to Cory that the fourth section of the blog was especially outrageous – and once again, defendant signed his name as "Lawrence Schiffman" (People's Exh. 16-S).

> when using his arguments, and it is true that I misrepresented his ideas. But this is simply the politics of Dead Sea Scrolls studies. If I had given credit to this man I would have been banned from conferences around the world.
>
> I am especially concerned that this affair may come to students' attention. My career is at stake. I hope you will understand.
>
> http://www.nowpublic.com/culture/plagiarism-and-dead-sea-scrolls-did-nyu-department-chairman-pilferchicago-historian-s-work
>
> Lawrence Schiffman, professor[11]

Plagiarism is profoundly serious academic misconduct, and NYU's Code of Ethical Conduct requires an initial "inquiry" into any allegations of plagiarism; if necessary, a formal investigation will ensue. The matter was thus referred to NYU Faculty of Arts and Science Dean RICHARD FOLEY for the required initial inquiry (Schiffman: 87-90, 117, 147-148; Stimpson: 245-249; Foley: 293-300; People's Exh. 1-A [NYU Faculty Handbook]). The next day, on August 6, 2008, NYU's Vice Provost replied to defendant's "larry.schiffman" email address – addressing the email to "Professor Schiffman" – that he had assigned Dean Foley to investigate (People's Exh. 10P). Defendant-as-Schiffman promptly forwarded the Vice Provost's email to the NYU school newspaper with instructions not to "mention this matter" because his "career [wa]s at stake" (People's Exhs. 10-N, 10-R).

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[11] Also on August 5, 2008, defendant emailed the director of the museum hosting the Raleigh exhibit, complaining about Schiffman's scheduled speaking engagement there and calling attention to the plagiarism accusations. In that email, defendant purported to be "Al White" (People's Exh. 16-J).

Throughout all this, Professor Schiffman himself remained unaware of what was happening until Ariel Simon, one of Schiffman's students, remarked to Schiffman, "I got your email" (Schiffman: 62). Simon then showed Schiffman the email (Schiffman: 63-64, 69-72; People's Exh. 10-E [printout of email]). Thereafter, "a number of people" asked Schiffman about the emails, and others forwarded the emails to him (Schiffman: 63-64, 71, 75). Robert Cargill – who had by this time figured out that defendant and his brother were behind the escalating online campaign – saw the plagiarism allegations online, and he contacted Schiffman to explain what was happening (Cargill: 727-728, 739).

Defendant, too, emailed Schiffman about the plagiarism allegations. On August 6, 2008, using the alias "Steven Fishbane," defendant hypothesized to Schiffman that anti-Golb scholar Jeffrey Gibson might have authored the "outrageous" plagiarism accusation in order to "stir further resentment" against Golb. Defendant suggested that Schiffman offer "to issue a statement of some sort if he is willing to take down the article and discontinue his efforts." Defendant warned that Schiffman should not ignore this suggestion, because the author had "skill at using aliases," "contacts … around the country," and "in-depth knowledge of the internet," and if Schiffman did not take action the accusations might "boomerang all over the internet" and reach "mainstream news sources" (Schiffman: 115-116; People's Exh. 16-U [printout of email]).

Schiffman felt "attacked," and, for a time, "paralyzed" by the sheer onslaught of emails and the need to respond to the people who were receiving them. For over a month he could "do nothing but respond to people's inquiries" (Schiffman: 65-66, 157-160). Deans Stimpson and Foley interviewed Schiffman, who informed them that he was not the author of the emails that defendant had sent bearing his name, and Schiffman had to prepare an 11-page letter response to the allegations. The deans believed Schiffman, and they found the plagiarism allegation not very "credible" (Schiffman: 87-90, 117, 148; Stimpson: 238-265; Foley: 302-325; Defense Exh. C [Aug. 29, 2008 letter]). The allegation was especially incredible given the false confession by defendant-as-Schiffman that was so obviously synchronized with the pseudonymous accusation by defendant-as-Kaufman (Stimpson: 250; Foley: 322).[12] Ultimately, on September 17, 2008, Foley concluded that there was "no basis for further inquiry" and the matter was closed (Stimpson: 249; Foley: 318; People's Exh. 2 [Sept. 17, 2008 letter to file]).

That same day, defendant's brother emailed defendant that there was a new comment posted on defendant's "Now Public" article. Defendant wrote in reply, "which article, the plagiarism thing? let them fight it out, whether someone plagiarized

[12] Professor Golb revealed in an August 21, 2008 email to defendant that, when another professor called and asked him point blank about "possible plagiarizing by Lawrence Schiffman," he had answered that he would have to "look into the matter." Defendant replied that "the truth" was that Schiffman had plagiarized him and that he should be upset about it (People's Exh. 15 [pp. 61-63]).

dad isn't my concern. I am focused on the institutional problem" (People's Exh. 15 [p. 69]).

4. THE TORONTO EXHIBIT: Defendant impersonates former Schiffman protégé Doctor Jonathan Seidel in an effort to influence the curator of the Toronto Dead Sea Scrolls exhibit to devote more attention to defendant's father's theory.

In the fall of 2008, the Scrolls exhibit was scheduled to move to the Royal Ontario Museum in Toronto. Doctor JONATHAN SEIDEL, a rabbi in Oregon and a professor of Judaic studies at the University of Oregon, had studied with Professor Schiffman at NYU in the 1980s and had maintained a friendship with Schiffman since then (Seidel: 607-618). On November 22, 2008, using the email address seidel.jonathan2@gmail.com, defendant sent an email to the Board of Trustees at the Royal Ontario Museum (People's Exh. 12-B). Defendant-as-Seidel suggested that the public had a "right to know" if Professor Golb, "who is widely considered to have debunked the traditional theory of the Dead Sea Scrolls in his book, will be excluded from participating in the museum's lecture series, as is reported to have been the case in San Diego." Defendant signed the email, "Jonathan Seidel."

The next day, November 23, 2008, in an anonymous blog, defendant maligned the exclusion of Golb's theory from the San Diego exhibit, criticized San Diego curator Risa Levitt Kohn for her role in that exhibit, and expressed concern that she was to be curator of the upcoming Scrolls exhibit in Toronto (People's Exh. 40-C19). The following day, defendant-as-Seidel emailed Kohn at the San Diego Museum –

blind copying 25 others – to ask whether she would respond to critiques of the San Diego exhibit. Defendant referred Kohn to the blog he had posted anonymously the day before, as if it had been written by someone else. He signed the email, "Jonathan Seidel" (People's Exh. 12-N).

Also that day, defendant-as-Seidel emailed 79 Dead Sea Scrolls scholars asking whether they would help develop a response to "lies" that were "being spread around the internet" wrongly supporting Golb's theories (People's Exh. 12-P). On December 6, 2008, defendant-as-Seidel emailed 89 Dead Sea Scrolls scholars with a link to an article questioning the prevailing theory, urging them to "condemn the continuing filth from Chicago," just as Dr. Goranson "has had the courage to do" (People's Exh. 12-ZZ).[13]

5. In March 2009, defendant is arrested and his computer, bearing evidence of much of his internet activity, is seized.

At 7:30 a.m. on March 5, 2009, District Attorney's Office Squad Investigators PATRICK McKENNA and ARIELA FISCH arrived at defendant's apartment at 206 Thompson Street armed with a search warrant. Defendant was present in a half-bedroom, where there was a laptop computer that was closed but on; when opened, it revealed a window displaying the Charles Gadda email account. Defendant also had a

[13] As Cargill had explained in discussing his own online interactions with defendant (Cargill: 716), and as Schiffman's student Cory had warned when he pasted defendant's blog in an email to prevent further clicking on it (People's Exhs. 10O, 16S), the frequency of clicking on and commenting on web links would elevate their standing in search results.

New York University "Friends of Bobst Library" card granting defendant access to NYU's Bobst Library, and a copy of the "Bobst Library Code of Conduct."[14] Investigator McKenna took defendant to the District Attorney's Office Squad while Fisch and other officers seized defendant's computer for forensic analysis (Fisch: 375-393; McKenna: 395-396).

At the District Attorney's Office, defendant waived his *Miranda* rights and agreed to answer questions (McKenna: 397-400; People's Exh. 44 [preprinted *Miranda* warnings form]). McKenna asked defendant whether he had any aliases and whether he was familiar with the list of email addresses that McKenna had already determined defendant had used in his Dead Sea Scrolls campaign. Defendant replied that he "would talk about them with the DA" but that "99 per cent of them I have no idea what they are" (McKenna: 401-405).

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[14] Defendant's signature on the back of his Bobst Library card acknowledged an agreement "to abide by all rules of NYU Libraries" and that "[a]buses will result in loss of privileges." The Bobst Library code of conduct found in defendant's apartment expressly requires that users must "refrain from engaging in behavior that leads to the denial of, or unreasonable interference with, the rights of others," and the code further specifies that it is violated by "refusing to abide by regulations … guiding access to and use of computing and networking resources" at NYU. NYU's computer use policy required authorized users not only generally to "behave with civil regard," but specifically to comply with "NYU policies and procedures and all applicable laws and regulations" (NYU Law School Assistant Dean PATRICIA McNICHOLAS: 328-336; NYU Division of Libraries Director of Development PAULA JENNINGS: 337-345; NYU Director of Technology Services JANE DELFAVERO: 346-371; A317 [Def. Exh. 1B, "Policy on Responsible Use of NYU Computers and Data"]). The Bobst code further warned that "[w]here appropriate," violations of the code would be referred to law enforcement (People's Exhs. 42A [identification cards], 42B [code of conduct]).

Defendant then spoke to an Assistant District Attorney; the interview was videotaped (McKenna: 406-407; People's Exhs. 46-A [video], 46-B [video with audio boost]). For a little over an hour and a half, defendant readily explained his difference of opinion with Schiffman about the origin of the Scrolls, acknowledged that his longstanding hostility toward Schiffman was rooted in a belief that Schiffman had mistreated one of Norman Golb's protégés, and admitted that he had used pseudonyms online in discussing the Dead Sea Scrolls and criticizing the museum exhibits. However, while maintaining his objections to Cargill's position on the Scrolls and disputing the accuracy of Cargill's film, defendant denied spearheading the email campaign to Cargill's supervisors and administrators. And, defendant steadfastly denied having sent emails to anyone that were purportedly from Schiffman.

Defendant's Case

When he testified at his trial, defendant RAPHAEL GOLB was 50 years old; he was a graduate of New York University Law School, but he practiced law only sporadically to make ends meet. Defendant's primary interests were his intellectual pursuits. He had been a Fulbright Scholar and held master's and doctoral degrees from Harvard University. Defendant also spent a lot of time "blogging about the Dead Sea Scrolls" (Golb: 955-958, 978). He wrote everything the People accused him of writing, and he opened all the accounts he was accused of opening (Golb: 1046-1084). In defendant's view, all these online activities concerning the Scrolls generally

involved his combating "many different forms of misconduct by members of the academic community and science museums across the United States." In particular, he campaigned against "efforts to silence scholars" like defendant's father, University of Chicago Professor Norman Golb, who disagreed with the mainstream theory of the origin of the Scrolls (Golb: 977-994, 998-1001, 1085).[15]

In late 2006, the San Diego Museum announced that it would present a Dead Sea Scrolls exhibit in June 2007 (Golb: 1009-1010). Defendant ascertained that the exhibit would not be paying more than "lip service" to his father's theory, and he learned that a group of predominantly Christian scholars, many of whom worked or had worked for Christian-affiliated universities, had produced a film to be shown at the exhibit. Graduate student Robert Cargill was one of them. Defendant and his father obtained the script associated with the film and "demolished it," thus instituting his feud with Cargill, who then began "stalking" defendant. Still, defendant never tried to prevent Cargill from receiving his doctorate; he merely "questioned"

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[15] Defendant's father had been a leading Dead Sea Scrolls scholar since the 1950's; but a Christian monopoly had until recent decades controlled access to the Scrolls, and the monopoly refused to grant defendant's father access to the Scrolls for a long time because he was Jewish (Golb: 966-967) – although Professor Schiffman, whom one "could call" a Dead Sea Scrolls scholar (Golb: 979), was granted access (Golb: 992). Defendant did not see his mission as to promote his father's theory, but rather to defend his father against "vicious attacks" by the mainstream scholars who had "smeared," "black-balled," and "silenced" defendant's father for decades (Golb: 987-988, 992, 1001). Professor Schiffman and Doctor Goranson, in particular, had "behaved in the most despicable manner towards [defendant's] father over the years" (Golb: 1023, 1103, 1114). Doctor Cargill, too, was "incredibly prolific on the internet" and waged "vicious attacks against [defendant's] family all the time" (Golb: 1044).

whether Cargill should receive the degree without first answering defendant's complaints about his work (Golb: 1010-1018, 1112-1113).

Defendant complained that his emails were "yanked from their context" in order to give them a "sinister implication that they did not have" (Golb: 994, 1143-1144). For example, when defendant emailed his brother to inquire whether they should "finish Goranson off" (People's Exh. 48-C), it was just a colorful way to ask whether he should refute Goranson's arguments with better ones (Golb: 994-995).

In July 2008, defendant became "very interested" in New York's Jewish Museum exhibit (Golb: 1113). He "resented" that Schiffman would be speaking and that his father would not, and defendant and his whole family wanted Norman Golb invited to speak as well (Golb: 1114-1115). On July 30, 2008, in the midst of family discussions about getting Golb invited to speak, defendant emailed his mother that they were "quickly running out of time" (Golb: 1120-1121).

In early August 2008, defendant posted the blogs accusing Professor Schiffman of plagiarizing Norman Golb (Golb: 963-966, 968-969, 1129-1130). In connection with publishing his blog, defendant gave the email address steve.goranson@gmail.com. He did not remember whether he thought that doing so might result in Goranson being blamed for authoring it. It was "possible that in [defendant's] fear of civil suits that it occurred to" him that someone investigating the blog might conclude that Goranson was behind it, but his purpose was "certainly not" to "deflect blame" onto Goranson (Golb: 1130-1131). And when defendant emailed

Schiffman under a pseudonym to suggest to Schiffman that Jeffrey Gibson might be behind the "outrageous" accusation, he was likewise not trying to "deflect the blame" from himself (Golb: 1131).[16]

Defendant did not tell his father or his brother that he was using the larry.schiffman@gmail.com account (Golb: 1116-1117). Defendant had created and used that account exclusively on NYU's computers rather than at home, where he had freely used pseudonyms that were not the names of actual Scrolls scholars, but that was not because he was trying to hide his identity – to the contrary, he thought he would be easily traced by anyone who cared (Golb: 1138-1139). Defendant "assumed" that NYU prohibited use of their computers to commit crimes, although he "never read that policy that they sent in the mail" (Golb: 1139). When he sent the emails from the larry.schiffman@gmail.com account, he "never intended anybody to believe that these e-mails were sent by Larry Schiffman" (Golb: 1002).

Instead, comparing himself to Voltaire combating dogmatic thought during the Enlightenment, defendant claimed that his emails were nothing more than "satire, irony, parody, and any other form of verbal rhetoric" (Golb: 1002). He deliberately included "telltale elements" in the emails to alert readers that it was not actually Schiffman authoring them, such as using lower case for the word "professor" instead

[16] Defendant also opened an email account using Gibson's name, but he did not send emails from that account, and he was acquitted of impersonating Gibson.

of capital (Golb: 1002-1008). He did not "seek to injure Schiffman," or "to benefit in any way" from his conduct (Golb: 1006-1007).[17] In fact, he wished only to benefit "the academic community," "the public," and "Schiffman himself" because it is "not good to conceal things" (*id.*). While defendant later wrote to his brother that "whether someone plagiarized dad isn't my concern" (People's Exh. 15 [p. 69]), that was because he was "focusing" on his belief that NYU was conspiring to cover up the plagiarism, which he believed "went beyond the plagiarism" (Golb: 1124-1125, 1143-1144).

Defendant also opened and used the frank.cross2@gmail.com account, again exclusively from NYU computers, but that was also merely parody (Golb: 1136, 1138, 1145). Regarding the emails about Bart Ehrman putting his foot in his mouth, which criticized Ehrman's discussion and purported to be from "Frank Cross," defendant did not intend for anyone to think they were actually from the Dead Sea Scrolls scholar named Frank Cross (1038, 1134, 1136).[18] He meant only to engage in parody

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[17] Shortly before defendant opened the Schiffman email account and published the plagiarism allegations, he discussed with his family whether and how to approach Susan Braunstein at the Jewish Museum to inform her about "recent developments." Defendant was not referring to informing her of the plagiarism allegations he was about to publish and that he had discussed with his family – the "developments" of which he wished to inform Braunstein were that his father had met some people in Israel who "supported" her handling of the exhibit (Golb: 1139-1142, 1149-1150).

[18] Defendant considered Frank Cross to be a dishonest Christian monopolist who, according to defendant, had once lied about the translation of a faint word inscribed on a piece of pottery in order to further the Qumran-Sectarian theory to the detriment of

(Continued…)

(Golb: 1134). Defendant felt that Ehrman should not have been invited to speak at a Dead Sea Scrolls exhibit, and defendant intended the Frank Cross email about Ehrman to have a "humoristic element" because "Ehrman just like Frank Cross participated in fraudulent assertions" about the Scrolls (Golb: 1038-1039, 1145).

As for the alleged impersonation of Jonathan Seidel, defendant "made the name up"; it was just a coincidence that Seidel was a Schiffman protégé who had attended the same undergraduate school as defendant and had once met Norman Golb (Golb: 1018-1019, 1131-1134, 1146-1147). Defendant did not use Seidel's name or other pseudonyms in order to benefit himself in any way or to injure Seidel or anyone else (Golb: 1020). To the contrary, defendant wished to use pseudonyms for three reasons. First, defendant wished to avoid having Cargill discover his identity. Second, defendant wished to call attention to his father's theory about the Dead Sea Scrolls; and if readers knew that the Golb-favoring comments were coming from Norman Golb's son, then they would probably discount what he was saying. Third, defendant wished to combat the tendency of Dead Sea Scrolls museum exhibits to present the generally accepted Scrolls scholarship as if there were consensus about it; he felt that by using multiple aliases, he could "fabricate a controversy" in order to suggest that there was not a consensus (Golb: 1021-1022).

(…Continued)
defendant's father's theory, and who had deliberately excluded defendant's father and others from studying the Scrolls before they were made public (Golb: 989, 1028-1029).

In September 2008, defendant received a notification from the Now Public website that they had been informed that he was under criminal investigation, but he was worried only about Cargill, Schiffman, or someone else suing him and not about being arrested (Golb: 1096-1097). Around that time, defendant obtained "Software CC Cleaner" and "cleaned out [his] computer" – but that had nothing to do with any fear of criminal or civil penalty (Golb: 1097-1099). Throughout all of defendant's activities, he did not "intend to gain a benefit or injure or defraud" anyone. He also did not "intend to annoy, harass, alarm or threaten anyone" (Golb: 1043).

In the morning on March 9, 2009, police officers arrived at defendant's apartment to arrest him. They had their guns drawn and were "threatening" him, and "lurched" toward him when he tried to put his underwear on (Golb: 958-960). Defendant at that time had a card in his wallet granting him access to New York University's Bobst Library; he had "no idea" whether the police had planted a copy of the Bobst Library Code in his apartment, but on the other hand, he admitted that the police "might have found it in an envelope on [his] table." Either way, defendant had not read the code (Golb: 1060-1061). The police took defendant to the District Attorney's Office and told him that if he spoke to a prosecutor he could return home; defendant agreed to do so because he wanted to go home (Golb: 961).

Although defendant verbally agreed with the prosecutor interviewing him that it would be wrong to send emails in other people's names, he did not actually think it was wrong to do so if one intended only to engage in "parody" (Golb: 1128-1129).

Nonetheless, defendant "consciously decided" to lie about having authored the Schiffman emails (Golb: 1101-1102), and he flatly denied responsibility for opening email accounts in other people's names (Golb: 1109-1110). Indeed, defendant suggested during the interview that Schiffman had falsely accused defendant of opening the larry.schiffman gmail account (Golb: 1104-1105), opining that Schiffman had many enemies and that "a lot of other suspects" could have created the email account (Golb: 1109). Defendant did not tell these lies because he thought what he did was criminal, but because he was worried that the prosecutor would tell Schiffman and that Schiffman might sue him (Golb: 969-970), because he was frightened of the "people who had arrested" him (Golb: 962-964), and because he was "acquiescing" to the prosecutor in general (Golb: 1129).

POINT I

THE EVIDENCE OVERWHELMINGLY PROVED DEFENDANT'S GUILT OF ALL THE CHARGED CRIMES (Answering Defendant's Brief, Point II).

Defendant stands convicted, for his online criminal conduct committed in furtherance of his desire to promote his father's career as a Dead Sea Scrolls scholar and harm opposing Scrolls scholars, of 30 counts of five different crimes against at least five scholars and institutions from all over the country. On appeal, defendant takes no issue with the strength of the evidence that he was the one responsible for all the online activity that formed the basis for the charges, and he poses no direct challenge to the proof of most of his 30 convictions. Defendant directly attacks the sufficiency and weight of the evidence only as to his identity theft conviction for attempting to commit a scheme to defraud. Otherwise, defendant invokes constitutional principles for the proposition that all of his convictions in some way violated defendant's freedom to express his opinion about the Dead Sea Scrolls, about scholarship, or about the scholars he attacked.

Contrary to defendant's insistence (*see* DB: 2), this was not a "libel" or "defamation" case. He was not convicted for rudely criticizing the many esteemed professionals who reject his father's unpopular theory. Most of defendant's thousands of hours of online activity regarding the Dead Sea Scrolls, in fact, served the purpose of promoting his father's theory and attacking opposing views to a tee and yet bespoke no criminality at all. Nor was he prosecuted simply for using

pseudonyms (*see* DB: 2). The criminal conduct took place when defendant resorted to impersonating actual Scrolls scholars and to using deception in furtherance of his agenda to benefit his father, intentionally harassing others in the process. It was only for that conduct that defendant was held criminally liable, and the evidence that he committed those crimes was truly overwhelming.

A.

In reviewing the sufficiency of the evidence, this Court must determine "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial." *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987). The evidence must be viewed in the light most favorable to the People, giving them the benefit of every reasonable inference that could be drawn. *People v. Tejeda*, 73 N.Y.2d 958, 960 (1989); *see*, *e.g.*, *People v. Norman*, 85 N.Y.2d 609, 620-621 (1995).

Upon a defendant's request, this Court also must determine whether a jury's verdict comported with the weight of the evidence. CPL 470.15(5); *People v. Danielson*, 9 N.Y.3d 342, 348 (2007); *People v. Romero*, 7 N.Y.3d 633, 636 (2006); *People v. Bleakley*, 69 N.Y.2d 490, 496 (1987). But this Court will overturn a verdict as against the weight of the evidence only if "the jury's findings of credibility and fact were 'manifestly erroneous and so plainly unjustified by the evidence that rejection is required in the interest of justice.'" *People v. Bartley*, 219 A.D.2d 566, 566 (1st Dep't 1995), quoting *People v. Corporan*, 169 A.D.2d 643, 643 (1st Dep't 1991). Under either

standard, the evidence must be reviewed in the light of the instructions that the trial court gave the jury. *See People v. Sala*, 95 N.Y.2d 254, 260 (2000) (sufficiency); *People v. Noble*, 86 N.Y.2d 814, 815 (1995) (weight). And under either standard, *mens rea* is normally a question best decided by the jury. *See*, *e.g.*, *People v. Cabey*, 85 N.Y.2d 417, 421-422 (1995) ("The issue of defendant's intent was one of fact for the jury").

B.

As noted, defendant conceded at trial (as he concedes on appeal) that he authored all the emails and articles that are the subject of the charges. Thus, the only question for the jury with respect to any of defendant's conduct was whether he committed it with the requisite criminal intent. Of course, there was never any doubt that one of defendant's overarching intents throughout the years during which he committed the charged conduct was to promote his father's theory about the Dead Sea Scrolls. But that non-criminal purpose merely reflects the motive for all of defendant's conduct pertaining to the Dead Sea Scrolls, including a great deal of non-criminal conduct, and it is not the intent upon which his criminal liability is based. As will be shown, with respect to each victim, defendant also harbored the specific criminal intent that, together with his actions, rendered him guilty of each charged crime.

1. *Crimes against NYU Professor Lawrence Schiffman (Counts 1, 2, 3, 5, 7, 8, 10, 11, 13, 14, 16, 17, 19, 20).*

Defendant's most serious conduct targeted Professor Schiffman, the victim of defendant's only felony crimes (two counts of identity theft in violation of Penal Law § 190.79[3]), as well as one count of aggravated harassment (Penal Law § 240.30[1][a]), six counts of criminal impersonation (Penal Law § 190.25[1]), and five counts of forgery (Penal Law § 170.05). Defendant directly challenges the sufficiency and the weight of the evidence underlying his conviction under count 1 of the indictment, for assuming Professor Schiffman's identity while committing or attempting to commit the felony of scheme to defraud against the Jewish Museum (DB: Point II). Defendant does not directly challenge the sufficiency or the weight of the evidence of his concurrent identity theft felony conviction under count 2 of the indictment, for assuming Schiffman's identity while committing or attempting to commit the felony of falsifying the business records of NYU. He also does not directly contest the evidence of his 11 concurrent criminal impersonation and forgery misdemeanor convictions for sending emails in Schiffman's name in furtherance of his plot.

Overwhelming evidence proved defendant's guilt of all these crimes. To begin, the trial court instructed the jury that to prove the identity theft counts, the People had to establish that defendant "knowingly, and with intent to defraud," assumed Schiffman's identity by using Schiffman's name, and that defendant thereby committed or attempted to commit the felonies of Scheme to Defraud in the First

Degree (as to count 1) and Falsifying Business Records in the First Degree (as to count 2) (1278-1279, 1285). *See* Penal Law § 190.79(3); *cf.* CJI2d[NY] Penal Law § 190.78(2). The court explained that a felony scheme to defraud is "a systematic ongoing course of conduct with the intent to defraud more than one person … by false or fraudulent representations" whereby one obtains property valued over $1,000 from one or more victims (1283), *see* Penal Law § 190.65(1)(b); that falsifying business records occurs "when [a person] makes or causes a false entry in the business records of an enterprise" with an intent to commit criminal impersonation or forgery (1284), *see* Penal Law § 175.10; and that an attempt is committed when a person "intends" to commit a crime and "comes dangerously close to succeeding" (1284), *see* Penal Law § 110.00.

To prove the six criminal impersonation counts, the People had to prove that defendant "knowingly impersonate[d] a specific other person and act[ed] in such assumed character with intent to obtain a benefit or to injure or defraud another" – once when he created the Schiffman email account, and five more times when he sent the emails from the Schiffman account to Schiffman's students, Schiffman's colleagues, Dean Stimpson, NYU's Provost, and the NYU press (1286). *See* Penal Law § 190.25(1); CJI2d[NY] Penal Law § 190.25(1). Similarly, with respect to the five forgery counts, the People had to prove that defendant "falsely made, completed, or altered" those five emails "with the intent to defraud, deceive, or injure another" (1288). *See* Penal Law § 170.25; CJI2d[NY] Penal Law § 170.25. Finally, to prove

aggravated harassment, the People had to establish that defendant "communicated anonymously or otherwise by any form of written communication, in a manner likely to cause annoyance or alarm to Dr. Schiffman" and that defendant "did so with the intent to harass, annoy, threaten, or alarm" Schiffman (1286, 1303). *See* Penal Law § 240.30; CJI2d(NY) Penal Law § 240.30.

Defendant's deceptive scheme left no room for doubt that he committed all these crimes, by coordinating the activities of his many aliases with his impersonation of Schiffman, with the intent that his deception would benefit Norman Golb and harm Schiffman. As an initial matter, the evidence that defendant intended to defraud the recipients of his emails from larry.schiffman@gmail.com into believing that Schiffman was the true author was so strong that no other conclusion could make sense. The facts that defendant created an email account in Schiffman's name, sent emails from that account to the correct email addresses of people that Schiffman knew, signed the emails from Schiffman, and purported to be defending himself-as-Schiffman from recently published allegations against Schiffman, are more than ample to support the jury's determination that defendant wished to dupe the email recipients into believing that the messages were in fact sent by Schiffman himself.

Defendant sought during his testimony to explain his impersonation of Schiffman as nothing more than parody, but the jury cannot be faulted for seeing through that lie. If there were any reason at all to doubt that someone who concocted such an elaborate scheme to send emails in Schiffman's persona actually wanted the

recipients to believe they were coming from Schiffman, that doubt would be obliterated by defendant's conduct upon learning that at least some recipients indeed believed that Schiffman had sent the emails. After all, a representative of the NYU Provost's office replied to defendant-as-Schiffman's email address, saluting him as "Professor Schiffman" and purporting to advise Schiffman that an investigation had been opened, that the Provost had referred the investigation to Dean Foley, and that Schiffman would be contacted about it. That was rather sensitive information not likely to be divulged to anyone other than Schiffman. Likewise, Schiffman's student, Cory, replied to the email he had received with a sincere response indicating his belief that the accusations were unjustified and offering his counsel to Schiffman. If defendant had meant only to parody Schiffman as he claimed, he would have realized upon receiving these sincere responses that his efforts had not been taken as he intended. Nonetheless, instead of correcting the mistaken belief that the emails were genuine – or even doing nothing – defendant confirmed his intent to pass as Schiffman by forwarding the provost's email to the NYU press and by replying to Cory twice, in each instance maintaining Schiffman's persona.

The content of those emails, in conjunction with defendant's other conduct during the same time period as well as his communications with his family, established that defendant's intent to defraud went way beyond an innocuous attempt to convince the email recipients that he was Schiffman simply for the fun of it. Instead, the only reasonable inference was that the impersonation was part of a plan to obtain through

deception what the family had failed through their best efforts to do with persuasion: an invitation for Norman Golb to speak at the Jewish Museum, to be obtained by ousting Schiffman from his speaking engagement on the ground that he was a plagiarist.

Indeed, defendant's personal emails reveal that in late July 2008, defendant and his family were frantically scrambling to get Norman Golb invited to speak at the Jewish Museum. The family entreated museum benefactor Dan Friedenberg to ply the curator of the Jewish Museum to extend an invitation, but that came to naught. Norman Golb tried to draw on his connections in Israel to exert pressure back in New York, but he came up empty as well. Having failed to persuade the curator to extend the desired invitation, defendant, in his late-July emails with his mother, lamented that they were "quickly running out of time." It was in that context that defendant hatched the idea of accusing Schiffman of plagiarism, advising his mother that they could "use" such an allegation. Against this backdrop, the jury had every reason to believe that the plagiarism accusation was born of defendant's desperate search for a way to undermine his father's competition and thereby get his father's theory the attention he thought it deserved – and not, as defendant suggested at trial, from some high-minded devotion to excellence in scholarship. Indeed, defendant began executing his scheme just days after discussing it with his mother. Specifically, from August 3-5, 2008, he opened the Schiffman email account, published the Now Public plagiarism piece as Peter Kaufman, and coordinated his sending of emails from

the Kaufman and Schiffman accounts addressing the allegations. Under these circumstances, it is apparent that the plagiarism accusation was nothing more than a tool to achieve defendant's devious end.

The theft of Schiffman's identity – in this case, the use of Schiffman's name to create an email account with which defendant proceeded to impersonate him – was an integral part of the scheme. This was because defendant crafted the emails he forged in Schiffman's persona so that they would serve as evidence against Schiffman in a plagiarism investigation, nesting within the emails to Schiffman's students, his colleagues, and his bosses some not-so-subtle admissions that the plagiarism allegations had merit. Naturally, defendant realized that if he were to coordinate this manufactured confession with the lodging of plagiarism accusations in the voice of Golb's son, he might signal to the recipient that something underhanded was "afoot," as his mother had warned him might be the case if he advocated for his father in his own name (People's Exh. 15 [p. 30]). Defendant thus ramped up his deception by using the Kaufman persona as well, seeking to cloak his allegations in Kaufman's voice with an extra layer of credibility by claiming to be an NYU faculty member who wished to remain anonymous.

As a result of defendant's impersonating Schiffman to confess to plagiarism, coupled with his deceptive use of the Kaufman identity to urge action on behalf of NYU's faculty, the jury did not have to pass upon whether the allegations actually had any merit. This was because defendant's criminal intent was not based on the making

of an accusation he knew to be false – it was based on his manufacturing false evidence to support the accusation. In other words, regardless of whether there was any validity to the allegations in the Kaufman article on Now Public, defendant sought to trick NYU into investigating Schiffman first by composing the allegations that would form the basis of his deceptive plot, then by using the Kaufman persona to dupe NYU into believing that one of their own faculty was behind those allegations, and then by using the Schiffman admission to make it seem as if Schiffman himself was conscious of his guilt of those allegations. Thus, contrary to defendant's supposition (*see*, *e.g.*, DB: 32), his campaign against Schiffman could not be justified by the possibility that he believed that Schiffman really had plagiarized his father.[19]

By fabricating both an apparently neutral accusation and Schiffman's apparent admission of guilt, defendant initially achieved exactly what he wanted: he defrauded NYU into opening an investigation into Schiffman's conduct. In so doing, defendant

[19] It bears noting, however, that a reasonable jury could quite easily have determined that the plagiarism allegations were false, and, further, that defendant was aware of their falsehood – and such an inference would have been reasonable even absent expertise on the Scrolls or on scholarship in general. After all, Norman Golb himself seemed to have no knowledge that Schiffman had plagiarized him, even when discussing the matter in private emails with defendant (People's Exh. 15, p. 61). Moreover, defendant had confided to his brother that whether someone had plagiarized their father was "not [his] concern" (People's Exh. 15, pp. 68-69]). Furthermore, when initially confronted by the District Attorney's investigators about his Dead Sea Scrolls online campaign, defendant staunchly denied any involvement in impersonating Schiffman or in accusing him of plagiarism – thereby suggesting that defendant realized that at least that much of his conduct was wrong. Finally, after an investigation, NYU dismissed the plagiarism allegations.

clearly intended to cause – and at the very least came dangerously close to causing – the entry of false records at NYU reflecting the bogus confession, and he did so in connection with his criminal impersonation of Schiffman. These facts supported the identity theft count based on falsifying business records.

Once the falsely induced investigation was under way, it was more than reasonable to infer that defendant planned to use the resulting smear on Schiffman's reputation in order to undermine Schiffman's speaking engagements – most notably at the Jewish Museum (as the family's email communications make clear was a paramount goal), and also at the Raleigh exhibit (A224 [People's Exh. 16-J: email to Director Bennett regarding Schiffman's speaking engagement in Raleigh]). Had defendant's efforts succeeded, his father could potentially have received the $650 honorarium that the Jewish Museum had earmarked for Schiffman, as well as such expenses as airfare from Chicago to New York, a hotel room, car service, and other fees comparable to the $500 Schiffman had received for consulting about the exhibit cards – thus bringing defendant's potential take from this scheme to defraud against multiple victims, including Schiffman, Braunstein, and the Jewish Museum, to well over $1000. More generally, defendant's efforts were directed at jeopardizing Schiffman's career, and at buttressing his father's career at the same time. Success would have to have had significant financial implications.

As to the identity theft count premised on an attempted scheme to defraud, defendant argues that proof of the $1000 threshold of his intended fraud was weak,

speculating, for example, that even if he had succeeded in obtaining an invitation for his father to speak, family friend and former curator Dan Friedenberg might have borne the expense instead of the Jewish Museum (DB: 54). Yet assuming that Friedenberg would have taken on that expense for the Museum, this argument would merely add Friedenberg to the list of victims of the fraud without affecting the value of it. Defendant further posits that the value of the fraud could have been less than $1000 because, even if the fraud had succeeded, his father might not have received over $350 worth of transportation, lodging, and other expenses beyond the $650 honorarium (DB: 54-55). But that argument is equally speculative and misconceived. Indeed, since defendant's scheme did not succeed, his father obtained nothing at all from anyone. A computation of the precise actual damages that would have accrued to each potential victim upon completion would thus be impossible.

Here, the relevant consideration on value was whether defendant *intended* to reap over $1000 from the victims of his fraud, and whether he came dangerously close to succeeding, without resort to speculation about how things might have played out had his fraud succeeded. After all, where a person satisfies the statutory definition of attempt by intending to commit a crime and coming dangerously close to success, it is no defense that the completion of the crime was impossible. Penal Law § 110.10; *see*, *e.g.*, *People v. Bel Air Equipment Corp.*, 46 A.D.2d 773, 774 (2nd Dep't 1974) (the defendants, contractors who believed that they would be paid the lesser of their bid or the actual cost of a project, "intentionally sought to obtain funds from the State in

excess of $ 1,500" by fraudulently padding invoices to make sure the reported cost of the project exceeded their bid; such conduct amounted to attempt even if the defendants were entitled to receive the bid amount regardless of whether the actual cost was less, since impossibility is not a defense to attempted larceny).

Amid all this speculation about what might have been, defendant forgets that the evidence has to be viewed in the light most favorable to the People. Speculation as to how the evidence could have been interpreted more favorably to the defense thus has no place here. Since the jury had ample evidence from which to infer that defendant intended by his fraud to divert the benefits of Schiffman's speaking engagements to his father, and came dangerously close to doing so, its verdict was entirely justified.

Defendant further complains that his efforts did not come dangerously close to success because the Jewish Museum "never entertained, for a nanosecond" rescinding Schiffman's invitation to speak or inviting Golb (DB: 55). But the fact that defendant's best efforts to smear Schiffman out of a speaking engagement fell short means only that he did not complete his crime, not that he did not come dangerously close. Defendant did everything he had to do to complete his scheme, from drafting the plagiarism allegations to falsifying an anonymous NYU faculty member's accusation and Schiffman's confession. Thus, his conduct was punishable as an attempt because it went far beyond the "stage of mere intent or mere preparation to commit a crime." *People v. Naradzay*, 11 N.Y.3d 460, 466 (2008), quoting *People v.*

Mahboubian, 74 N.Y.2d 174, 189 (1989). Moreover, defendant's efforts did succeed in initiating a plagiarism investigation that placed a cloud of suspicion upon Schiffman for over a month, until the investigation was closed. Certainly, had defendant succeeded in having a plagiarism finding entered against Schiffman based on that false evidence, Schiffman's speaking engagements would have been cancelled. Viewing the evidence in the light most favorable to the People, the jury had more than ample basis from which to infer that defendant's efforts came "dangerously close" to success.

Defendant next protests that since the People had stated in opening remarks that defendant's scheme to defraud involved an effort to persuade the Jewish Museum "to change its cast of speakers," the trial court somehow created a "new, hybrid theory" of the case by instructing the jury more generally that the People had to prove for that count that defendant intended by his fraud to obtain property from "one or more persons" (DB: 50-53). But the statute itself specifies that the property obtained by the fraud can come from "one or more" people, Penal Law § 190.65, and the trial court cannot be faulted for instructing the jury on the elements of the crime. The prosecutor's specific reference to some of the evidence he expected to present did not render other evidence proving the same point irrelevant. The court's instruction appropriately tracked the language of the scheme to defraud statute and of attempt,

and it did not marshal the evidence in support of any "theory" at all on how to determine the value of the fraud defendant intended to commit.[20]

Defendant's lesser crimes against Schiffman are part and parcel of the scheme just discussed. After all, the criminal impersonation count for opening the Schiffman email account, and the five forgery and five criminal impersonation counts for sending five separate emails as Schiffman, were supported more than amply by the same criminal intent to deceive the recipients of the emails and to harm Schiffman and benefit Norman Golb as were the identity theft counts. As to these counts, the People were not required to prove that the intent to injure Schiffman or benefit his father was at all financial in nature, although as detailed above it clearly was at least in part.

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[20] Defendant also states in passing that the grand jury instructions on the topic might have confused the grand jurors, but this speculation is fueled only by his mistaken arguments regarding the purported change in theory at trial. Defendant further accuses Justice Berkman of flippantly rejecting a request to disclose those instructions by calling counsel "funny" and of "dismiss[ing] the grand jury function as 'blah, blah, blah'" (DB: 53 n.16, 55). Here, he takes both quotes completely out of context. At the end of a lengthy discussion about how to instruct the trial jury, counsel asked whether the grand jurors "understood any of this" when they indicted defendant, and the court remarked that there was no "standard" for determining "whether the grand jurors understood anything" and "nor does the charge have to be with the same precision, blah, blah, blah" (A492). Remarking that he was "not entirely being facetious," defense counsel suggested that the grand jury instructions be disclosed in order to serve as a starting point for crafting the instructions to the petit jury, and it was regarding this proposition that the court replied that counsel was "so funny" (A493). As is clear from a review even of this colloquy alone (*see* A490-492, A498 [court uttered the words "blah, blah, blah" on four separate occasions in different contexts]), the court used that rhetorical device solely to truncate needless exposition of points. Here, the judge was plainly alluding to the standard for the sufficiency of grand jury instructions set forth in *People v. Calbud, Inc.*, 49 N.Y.2d 389, 394-395 (1980) – a standard so well known that she understandably felt no need to finish her sentence regurgitating it.

The aggravated harassment was the natural result of defendant's concerted efforts to attack Schiffman. There was certainly no doubt that defendant "communicated anonymously or otherwise by any form of written communication, in a manner likely to cause annoyance or alarm" to Schiffman. Indeed, Schiffman was thoroughly harassed, annoyed and alarmed by having to deal with the plagiarism investigation. Aside from having to be interviewed, and having the various people who had received defendant's emails inquire about them, Schiffman had to prepare a lengthy response to the allegations in his own defense (Schiffman: 148; Stimpson: 250; Foley: 319-320; Defense Exh. C [Aug. 29, 2008 letter]).

Further, defendant does not directly contest the proof that he intended to "harass, annoy, threaten or alarm" Schiffman. Nor could he, given that he bragged to his mother while they were strategizing over how to unseat Schiffman from the Jewish Museum lecture – just 8 days before opening the Schiffman email account – that his online campaign was sure to be "maddening" to his father's rivals because defendant was an "adversary who is out to get them, and there's simply nothing they can do about it" (People's Exh. 15 [p. 16: July 26, 2008 email]). Moreover, the jury knew that the whole Golb family despised Schiffman and felt that he had wronged them. Given that longstanding animosity, the jury had every reason to believe that defendant's repeated impersonation of Schiffman and his multiple emails to Schiffman's bosses and colleagues were accompanied not only by the intent to defraud, but at the same time by a desire to harass, annoy and alarm Schiffman.

Defendant suggests that an aggravated harassment charge cannot be established where the communication underlying the charge is directed at someone other than the person the defendant intended to harass, annoy, threaten or alarm (DB: 78-79). Defendant's suggestion is irrelevant to his harassment of Schiffman, however, because he did communicate directly with Schiffman when he sent him an email under the pseudonym Steven Fishbane, warning Schiffman of disaster if he did not address the plagiarism allegations (People's Exh. 16-U).

In any event, the law does not support defendant's view. The law proscribes sending a written communication to a "person" while harboring the intent to harass a "person," without specifying that the recipient of the communication and the target of the nefarious intent must be the same person. Penal Law § 240.30(1)(a); *see*, *e.g.*, *People v. Johnson*, 208 A.D.2d 1051, 1052 (3rd Dep't 1994) (finding aggravated harassment where defendant wrote letter in victim's name responding to personal ad, causing victim to receive contact from stranger who received defendant's letter); *People v. Kochanowski*, 186 Misc. 2d 441, 444 (App. Term 2nd Dep't 2000) (finding aggravated harassment where defendant, "instead of placing the phone call to his victim himself, used others to do so"); *cf. People v. Dupont*, 107 A.D.2d 247 (1st Dep't 1985) (cited by defendant) (analyzing vagueness and free speech claims, and striking down aggravated harassment count where "there is no direct communication, there is no interference with privacy, *nor* is there a use or tying up of phone lines. There is merely the

distribution of literature") (emphasis added).[21] Naturally, criminals less sophisticated than defendant may be inclined to direct harassing communications directly to the targets of their harassment, but defendant harbored the requisite intent and he sent communications in furtherance of his intent. That was enough.

2. Crimes against UCLA graduate student Robert Cargill (Count 48).

UCLA graduate student Robert Cargill was the first victim of defendant's online criminal conduct, starting in June 2007, as well as the last, since defendant's victimization of Cargill did not end until early 2009, just days before defendant's arrest. The campaign began when Cargill produced the virtual reality video presentation to accompany the San Diego Dead Sea Scrolls exhibit; defendant became fixated on the fact that neither the presentation nor the exhibit gave any credence to defendant's father's theory. In tandem with his publication of blogs criticizing Cargill's film, defendant mounted a very personal email campaign designed not just to undermine the effectiveness of the video presentation but also, far more ominously, to threaten Cargill's hopes for a degree.

The People had to establish that defendant "communicated anonymously or otherwise by any form of written communication" (1286). Defendant takes no issue with the fact that he emailed virtually everyone connected to Cargill's career at UCLA, and elsewhere, to complain about Cargill and question his suitability for a doctoral

[21] *Dupont* is discussed in more detail *infra* at pp. 90-94.

degree. Dozens of Cargill's colleagues and supervisors were in the virtual line of fire, and Cargill had to endure their inquiries about what "the hell" was happening.

Moreover, there can be no doubt that, as required, defendant communicated "in a manner likely to cause annoyance or alarm" to Cargill, and that defendant fully intended that his actions would harass Cargill (1286). The tenacity with which defendant endeavored to disrupt Cargill's life for some two years itself indicated as much. Once again, defendant's admission to his mother, in July 2008, revealed his satisfaction that his conduct must be "maddening" to any adversaries he was "out to get" that might be able to figure out his identity – and defendant clearly counted Cargill among those adversaries. There can also be no doubt that defendant intended to pose a threat to Cargill's career, as his emails constantly questioned Cargill's fitness to receive the doctorate he was seeking, in one instance causing defendant's brother to warn him that his email's proclamation of good intentions was suspicious because the obvious intent was actually "to destroy the career prospects of a really nice guy." In response, defendant noted that his alias's claim not to want to ruin Cargill might be "intentionally disingenuous" (People's Exhs. 17 [pp. 44-47], 31 [p. 69]). Furthermore, while deception was not a required element of the aggravated harassment of Cargill, defendant's dishonest methods, such as pretending to be an alumnus to give his allegations more credibility (People's Exh. 17 [p. 51]), evinced defendant's overarching intent to do anything in his power to ruin the target of his wrath.

Finally, just as with Schiffman, while defendant harassed Cargill primarily by sending emails to everyone around Cargill, he also caused Cargill to receive one email personally. Specifically, "Dale Summers" sent Cargill an email inquiring about links to reviews of Cargill's film. Given that a draft copy of the email was first sent to defendant, and the final copy was then blind copied to defendant, it is clear enough that defendant had enlisted the help of "Dale Summers" to send that email. Moreover, the email was sent in the thick of defendant's harassment of Cargill, and cannot have been anything other than a piece of defendant's greater harassing puzzle. Thus, defendant's objection to a count of aggravated harassment based on communications sent to people other than the target of the harassment is, as discussed *supra* at pp. 53-54, without merit. *See Johnson*, 208 A.D.2d at 1052; *Kochanowski*, 186 Misc. 2d at 444.

3. Crimes against Duke University employee Stephen Goranson (Count 40, 42).

Starting in July 2008, defendant committed aggravated harassment of Goranson by sending emails to Goranson's supervisors in an effort to get them to revoke Goranson's privileges to use Duke's library or otherwise curtail Goranson's opposition to defendant's father. Weeks later, defendant committed criminal impersonation against Goranson by opening an email account in Goranson's name.

There was no question that defendant intended to harass, annoy, threaten, or alarm Goranson and sent communications designed to achieve that purpose. To that end, defendant, writing as Peter Kaufman, sent emails to Goranson's bosses at Duke

complaining about Goranson's internet use, and he did not let up until he received a reply that someone would address his complaints with Goranson.

Defendant correctly suggests that complaining about an employee's conduct in an effort to have it addressed would not be criminal (DB: 67, n.22), and it is probably true that defendant's emails to people with power over Goranson's livelihood would not establish harassment based solely on their content. That, of course, is because the harboring of criminal intent is a necessary component of aggravated harassment, and such intent in this case is not evident on the face of the communication alone. Here, the requisite intent is instead proved by the content of defendant's communications with his brother about Goranson and the circumstances surrounding his sending of the emails. Specifically, defendant and his brother discussed the timing of when they should "finish Goranson off," and they agreed that their goal was "to set him up" (People's Exh. 48-C). It was reasonable for the jury to infer from these comments that defendant's intent was to harass, annoy, threaten or alarm Goranson.

Defendant's subsequent impersonation of Goranson also sheds light on his intent to harass him. Indeed, within weeks of his first efforts to "finish Goranson off," defendant opened an email account in Goranson's name. Defendant's surrounding conduct suggests that he did this to set Goranson up as a suspect if the Schiffman accusation became a problem. For instance, just days after publishing the Schiffman allegations, defendant used the Goranson email account to save unsent emails that catalogued the email addresses of dozens of NYU scholars, Jewish

Museum connections, and other Dead Sea Scrolls luminaries who would be the recipients of future communications in defendant's campaign. He also wrote draft emails in the Goranson email account that he later sent from a "Sam Edelstein" email account; indeed, defendant used "Goranson33" as the password for the Edelstein email account and for six other aliases including the Schiffman email account and an account titled jewish.museum.schiffman@gmail.com (*see* People's Exh. 65-C [forensic analysis of Goranson email account]).

Goranson did not receive an email directly from defendant, and on defendant's view, this defeats the charge (DB: 78-79). But as already noted *supra* at pp. 53-54, the law does not support defendant's view. *See Johnson*, 208 A.D.2d at 1052; *Kochanowski*, 186 Misc. 2d at 444.

4. *Crimes against retired Professor Frank Cross (Counts 44, 46, 47) and Rabbi Jonathan Seidel (Counts 23, 25, 27, 29, 31, 33, 35, 37, 39).*

Defendant's criminal impersonation and forgery convictions for sending emails in the names of Professor Frank Cross and Rabbi Jonathan Seidel were distinct from each other in time but similar in concept: in each case, defendant impersonated a Dead Sea Scrolls scholar by opening an email account in his name and sending one or more emails from that account. In so doing, defendant hoped that the recipients' reliance on his deception would lead to speaking engagements for his father at the Dead Sea Scrolls exhibits. He sought to take advantage of those scholars' untarnished names in order to cloak himself with a degree of credibility he knew he did not have.

With respect to Frank Cross, in July 2008, defendant used this esteemed, retired scholar's name as part of an effort to bump University of North Carolina Professor Bart Ehrman from a speaking engagement at the Raleigh exhibit to make room for defendant's father. Thus, defendant embarked upon his elaborate ruse, assuming the pseudonym "Jerome Cooper" to engage Ehrman in an email exchange, anonymously publishing his blog critical of Ehrman and the exhibit, and eventually publishing his email exchange with Ehrman under yet another identity as if he were a reporter who had just unearthed it. Defendant then used the Frank Cross email account to send Raleigh Scrolls scholars a link to that handiwork, criticizing Ehrman within the email and signing it "Frank Cross." Naturally, defendant hoped that the recipients of the Frank Cross email would believe that he was Frank Cross, would thus credit his esteemed opinion, and perhaps would dislodge Ehrman from his speaking engagement – thereby paving the way for defendant's father to fill the gap.

With respect to Jonathan Seidel, an acolyte of Schiffman's, defendant opened an email account using the address seidel.jonathan2@gmail.com, and on November 22, 2008, defendant-as-Seidel sent his email to the Royal Ontario Museum advocating Norman Golb's inclusion in "the museum's lecture series" for having debunked the prevailing theory on the origin of the Scrolls. Defendant signed the email, "Jonathan Seidel." Defendant then published an anonymous blog about Golb's exclusion from the San Diego exhibit – whose curator would be handling the Toronto exhibit as well – and sent additional emails as Seidel, blind copied to dozens of Scrolls scholars,

highlighting this manufactured debate about the Scrolls. As had become his practice by this point, defendant banked on his deception luring the email recipients into trusting him and clicking on the links he supplied, all in furtherance of his efforts to get his father invited to Ontario.

5. *Crime against New York University (Count 51).*

Finally, defendant was convicted of unauthorized use of NYU's computers. As the trial court instructed the jury, a person is guilty of unauthorized use of a computer when he "knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization" (1288-1289). The court explained in particular that "the People's theory of lack of authorization in this case is that the defendant used the NYU computer to commit a crime in violation of the terms of use," and that as a result, the People "must prove beyond a reasonable doubt that the defendant had no reasonable grounds to believe that he had authorization to use the computer for the purpose." Thus, the People had to prove that: (1) from July 2008 to March 2009, defendant used NYU's computers "without authorization"; (2) that defendant did so "knowing he had no permission for the use, in that he used the [computers] to commit a crime or crimes"; and (3) that defendant "did not have reasonable grounds to believe that he had authorization to use [the computers] for a criminal purpose" (1289-1290).

Defendant does not contend that, given the jury's instructions, the evidence was insufficient to support a guilty verdict. Nor could he, since it hardly needs saying

that NYU's Bobst Library required its computer users to comply with the law (NYU Law School Assistant Dean PATRICIA McNICHOLAS: 328-336; NYU Division of Libraries Director of Development PAULA JENNINGS: 337-345; NYU Director of Technology Services JANE DELFAVERO: 346-371; People's Exh. 1-B). And even defendant, who self-servingly claimed that he had "never read that policy that they sent in the mail," admitted that he "assumed" that NYU prohibited use of their computers to commit crimes (Golb: 1139). Clearly, then, he had no reason to believe that he was authorized to use NYU's computers to commit crimes. Yet, he used those computers to send emails impersonating Schiffman and others in furtherance of his elaborate campaign to harass his father's competitors and shift business to his father, thereby committing dozens of crimes including identity theft, criminal impersonation, forgery and aggravated harassment.

* * *

In sum, defendant's attack on the evidence underlying count one must fail. The People overwhelmingly proved that defendant committed all the charged crimes.

POINT II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENTS OF THE CHARGED CRIMES. THOSE INSTRUCTIONS ENSURED THAT THE CONVICTIONS DID NOT VIOLATE DEFENDANT'S FIRST AMENDMENT RIGHT TO FREE SPEECH (Answering Defendant's Brief, Point I).

Defendant argues that the trial court's instructions to the jury regarding the intent to benefit, harm, injure and defraud – mental states associated with identity theft (counts 1 and 2), criminal impersonation (counts 5, 7, 10, 13, 16, 19, 23, 25, 29, 33, 37, 42, 44 and 46), and forgery (counts 8, 11, 14, 17, 20, 27, 31, 35, 39, and 47) – require reversal of all those counts. He insists that those mental states were not "carefully defined to exclude" the particular sorts of benefits, harms, injuries and frauds that are "the emotional and intellectual results of expressive conduct that is protected by the First Amendment" (DB: 26-27).

Defendant's claims are meritless. To a significant extent, he ignores that the judge's instructions actually made many of the points he wished to stress, and, in particular, made it crystal clear to the jury that defendant could not be convicted simply for saying untrue or controversial things. His other requests to charge were incompatible with the law and betrayed a complete misunderstanding of the relevant theories of criminal liability. Indeed, all of these counts required proof that he attempted to dupe others into acting in reliance on his deception about who was writing to them – and fraudulent conduct like that is not constitutionally protected.

A.

An instruction explaining a charged count is proper if, viewed as a whole, it "define[s] the People's burden with respect to that count." *People v. Hills*, 95 N.Y.2d 947, 949 (2000). The test is "whether the jury, hearing the whole charge, would gather from its language the correct rules which should be applied" in arriving at a decision. *People v. Samuels*, 99 N.Y.2d 20, 25 (2002); *see People v. Ladd*, 89 N.Y.2d 893, 895 (1996); *People v. Coleman*, 70 N.Y.2d 817, 819 (1987).

Significantly, a defendant has no right to select the language of a jury charge, so long as the charge that the judge actually delivers conveys the appropriate principles. *See People v. Dory*, 59 N.Y.2d 121, 129 (1983); *People v. Dym*, 163 A.D.2d 150, 153 (1st Dep't 1990). Further, jurors are presumed to possess "'sufficient intelligence' to make elementary logical inferences presupposed by the language of a charge, and hence . . . defendants are not 'entitled to select the phraseology' that makes such inferences all the more explicit." *Samuels*, 99 N.Y.2d at 25-26 (quoting *People v. Radcliffe*, 232 N.Y. 249, 254 [1921]). Moreover, a trial court generally has no obligation to graft explanatory language onto standard instructions. In fact, such language "may entail exposition that . . . could mislead a jury or involve a court inappropriately in the evaluation of evidence." *Id.* at 26.

As pertinent here, the identity theft counts required proof that defendant acted "with intent to defraud," Penal Law §§ 190.78, 190.79; criminal impersonation required proof that defendant acted "with intent to obtain a benefit or to injure or

defraud another," Penal Law § 190.25(1); and forgery required proof that defendant acted with "intent to defraud, deceive or injure another," Penal Law § 170.05. The Penal Law succinctly defines "benefit" as "*any* gain or advantage" to the defendant or to another person pursuant to the defendant's "desire or consent." Penal Law § 10.00(17) (emphasis supplied). The terms "defraud," "deceive" and "injure" are not statutorily defined at all. Thus, the pattern instructions do not provide expositions of those terms, and there is no list of benefits, injuries and frauds that are either expressly included or excluded from the meaning of those terms. *See* CJI2d[NY] Penal Law §§ 170.05 (Forgery in the Third Degree), 190.25(1) (Criminal Impersonation in the Second Degree), 190.78(2) (Identity Theft in the Third Degree), 190.79(3) (Identity Theft in the Second Degree).[22]

Notably, case law construing the term "intent to defraud" is clear that the intended fraud need not be financial in nature. *People v. Kase*, 53 N.Y.2d 989, 991 (1981), *aff'g for reasons stated at* 76 A.D.2d 532, 537-538 (1st Dep't 1980). There need not even be proof that an intended victim was successfully "misled to its detriment," because it is the defendant's state of mind, and not the ultimate injury he caused, that must be proved. *See People v. Taylor*, 14 N.Y.3d 727, 729 (2010) ("'Intent to defraud'

[22] Identity Theft in the Second and Third Degrees differ only by the degree of crime committed in furtherance of the identity theft. Thus, there is no separate recommended instruction for the second degree crime, and the reader is directed to the recommended instruction for the third degree crime. *See* http://www.nycourts.gov/cji/2-PenalLaw/190/art190hp.htm.

refers only to a defendant's state of mind in acting with a conscious aim and objective to defraud"). Thus, it does not matter whether a defendant actually succeeds in obtaining or depriving another of anything at all (*cf.* DB: 37).

Of course, statutes prohibiting identity theft, criminal impersonation, and forgery may have the effect of banning conduct that includes speech, and the First Amendment prohibits the government from criminalizing speech based on "its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). However, the First Amendment generally does not protect fraudulent or deceptive speech, *see*, *e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2545-2547 (2012) (plurality) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976) (finding "no obstacle" to enforcement of statutes such as Va. Code Ann. § 18.2-216, which criminalizes the use of any "method, device or practice which is fraudulent, deceptive or misleading to induce the public to enter into any obligation"). Nonetheless, content-based statutes criminalizing speech solely for being false can still run afoul of the First Amendment. *See*, *e.g.*, *Alvarez*, 132 S. Ct. at 2547 (plurality) (recognizing diminished value of false speech, but "reject[ing] the notion that false speech should be in a general category that is presumptively unprotected").

Alvarez makes this distinction between fraud and mere falsehood clear. In *Alvarez*, the United States Supreme Court struck down a federal law making it a crime to claim, falsely, to have received a congressional "decoration or medal" for military service. A plurality of four opined that this content-based ban required "the most exacting scrutiny," 132 S. Ct. at 2548, while a concurrence of two would have applied only "intermediate scrutiny," 132 S. Ct. at 2552; all six agreed that the statute was unconstitutional because it failed to withstand the required scrutiny. 132 S. Ct. at 2551, 2556.

In explaining the Court's ruling, the plurality and the concurrence distinguished the offending statute's outright ban on falsehood from the sort of statutory limitation on speech that the Court unanimously agreed does not implicate the First Amendment. For example, the plurality noted that perjury may be banned without implicating the First Amendment "not simply because perjured statements are false," but because a perjured statement can cause a court to act on the statement's falsity, *Alvarez*, 132 S. Ct. at 2546. Likewise, statutes that outlaw "falsely representing that one is speaking on behalf of the Government," "apart from merely restricting false speech," also "protect the integrity of Government processes," *id.* Similarly, the concurrence suggested that such crimes as perjury, fraud, defamation, and impersonation are distinguishable from a simple ban on lying because they require proof of something more than the mere falsity of a statement. 132 S. Ct. at 2553-2554. For example, an impersonation statute might require proof that "someone was

deceived" into acting in reliance on the perpetrator's deception. *Id.* Given the dissenters' view that, absent justifications not at issue here, "false statements of fact merit no First Amendment protection" at all, *Alvarez*, 132 S. Ct. at 2562, the divided *Alvarez* Court was unanimous to this extent: there is no First Amendment right to engage in deceptive conduct aimed at duping victims into acting in reliance on the deception.

B.

Applying these principles here, the trial court's instructions properly conveyed the law and raised no First Amendment concerns. As defendant does not appear to dispute, the instructions that the trial court delivered for identity theft, criminal impersonation, and forgery were at their core consistent with those recommended by the CJI. By covering just the standard instructions for the charged crimes, the trial court would adequately have informed the jurors of the applicable law. *See Samuels*, 99 N.Y.2d at 25-26 (upholding convictions for sale of drugs where trial court gave standard charge and declined to give additional, explanatory charge on the defendants' intent and ability to consummate sale).

Nonetheless, at defendant's request, the trial court modified those standard instructions for defendant's benefit. After all, defendant informed the court of his concerns in his six written requests to instruct the jury (A50-A55), and the court's proposed final instructions (A60-A82) – which the court ultimately delivered almost verbatim (1267-1291) – plainly were crafted to address many of those requests.

To begin, contrary to defendant's assertion that the court "completely ignored" any First Amendment rights that might be at issue (DB: 27), the court emphasized his First Amendment rights in sweeping terms tuned directly into his defense and his requests to charge. Most importantly, given defendant's trial testimony that his conduct was intended only as parody rather than impersonation, defendant sought an instruction conveying that "[s]atire, parody and/or pranks" are not criminal (A52). In harmony with that request, the court specifically included "free academic discussion," "parody" and "satire" in its explanation of what the First Amendment protected. The court exhorted the jury to "zealously protect the right to speak freely, whether under one's own name or anonymously, or even under a fake name," and to "zealously protect that right whether the speech is correct or incorrect, truthful or not, derogatory or positive" (1280).

Defendant also asked the court to instruct the jury that to prove fraud, the People had to demonstrate that defendant actually intended for others to believe that the emails he sent in other people's names came from those other people (A52). The court did exactly that, using the example of criminal impersonation to instruct that "without the intent to deceive or defraud as to the *source* of the speech with the intent to reap a benefit *from that deceit*, there is no crime" (1281) (emphasis supplied). This instruction was key to the defense, because if the jury had any reason to believe that defendant was telling the truth when he testified about having meant only to parody Schiffman and the others, then the jury would have to acquit him. Given all this,

defendant's lengthy appellate discussion of the right to use pseudonyms (DB: 22-26) is curious, and his allegation that the court's instructions allowed for criminalization of a "scheme to influence debate" (DB: 40) is patently incorrect.

Similarly, defendant asked that with respect to identity theft and criminal impersonation, the jury be told that he could be guilty only if he "intended to assume, and did assume, the identity of a specific, identifiable person" (A55). There was no doubt that the court conveyed that principle. As to the identity theft counts, the court instructed the jury that the People had to prove that defendant impersonated Schiffman. As to the criminal impersonation counts, the court emphasized that all the impersonations had to be of an "actual" or "specific" person. Indeed, the court modified the CJI instruction – which speaks of impersonating "another person" – precisely as defendant wished, changing it alternatively to "a specific other person" and "another real person" (1280, 1287).[23]

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[23] Defendant, citing *Ben-Oliel v. Press Pub. Co.*, 251 N.Y. 250 (1929), seeks to categorize his conduct as a civil libel (DB: 46). In *Ben-Oliel*, the defendant published a deliberately inaccurate article about Palestinian marriage customs in the name of the plaintiff, who made her living as an expert on such customs, in an attempt to expose the plaintiff to ridicule. The plaintiff sued civilly for libel, and the Court of Appeals found the complaint sufficiently pleaded libel. *Ben-Oliel* did not discuss whether the defendant's impersonation could have been deemed criminal. Defendant follows his discussion of *Ben-Oliel* by quoting the Model Penal Code drafters' opinion that the "penal law need not address itself to . . . irritating or malicious gossip, or to the ordinary case of defamation compensable in a civil suit" (DB: 46-47). However, defendant makes no effort to show that New York's Penal Law was meant to track the model code on these points. In any event, there is no reason to believe that the drafters of the Model Penal Code would have deemed defendant's elaborate, deceptive scheme to undo Schiffman – or even the facts of *Ben-Oliel* – an "ordinary case of defamation."

Moreover, defendant persuaded the court to expand upon the barebones CJI definition of "intent to defraud." The CJI instruction is simply that "a person acts with intent to defraud when his or her conscious objective or purpose is to do so." *See*, *e.g.*, CJI2d(NY) Penal Law §190.78(1) (citing Penal Law § 15.05[1] [intent]). Defendant sought a more detailed instruction defining "intent to defraud" as "an intention to deceive another person, and induce such person, in reliance on the deception, to assume, create, transfer, alter or terminate a right, obligation, or power" (A52). The court did not adopt defendant's precise wording, but he got essentially what he requested. For starters, the instruction discussed above, namely that the People had to prove defendant's intent to deceive as to the *source* of the speech and to reap a benefit from *that* deceit, already addressed the reliance principle at the heart of this related request.

The court also responded specifically to this request by defining the word "defraud" as "to practice fraud, to cheat or trick to deprive a person of property or any interest or right by fraud, deceit, or artifice"; by defining the word "fraud" as "a deliberately planned purpose and intent to cheat, or deceive, or unlawfully deprive someone of some advantage, benefit, or property"; and by explaining that "[a] person acts with the intent to defraud when his conscious objective or purpose is to deceive or trick another with intent to deprive that person of his or her right or in some manner to do him or her an injury" (1279). The court's dictionary-inspired definition was remarkably similar to defendant's proposed instruction. While defendant broadly

characterizes the instruction that the court delivered as "a masterpiece of error and confusion" (DB: 31), he has not explained why his proposed instruction was correct while the court's was so seriously flawed.

C.

To be sure, the court did not provide every instruction that defendant requested. That was because some of defendant's suggested instructions were just plain wrong. For example, defendant asked for an instruction that in order to establish that he intended to defraud, to cause harm, or to obtain a benefit, the People had to prove that he "knew that the accusations he was making under assumed identities were false" (A53). Defendant further requested that the jury be permitted to "consider whether the accusations made by defendant were, in fact, true," and he noted that "in all prosecutions for criminal libel, truth is a defense." *Id.* He now attacks the denial of these instructions by arguing at length that truth necessarily had to be a defense to many of the charges against him (DB: Point I[C]). These requests and arguments are misguided, because they completely misunderstand the crimes that defendant was convicted of committing.

Defendant's intent to deceive was not based on his making a false *accusation* in hopes of passing it off as true. Rather, the elements of identity theft, criminal impersonation and forgery as charged required proof of defendant's deception as to his *identity*, coupled with the intent to benefit himself or injure someone else, regardless of whether anything else he communicated in the process was true or false

(1281). Thus, as the court instructed, unless defendant harbored "the intent to deceive or defraud as to the source of the speech with the intent to reap a benefit from that deceit" (1281), he had a right to speak freely "whether the speech [wa]s correct or incorrect, truthful or not, derogatory or positive" (1280). Truth was simply not an element. Thus, even if his accusations were completely true, defendant could still be guilty of the charged crimes if he intentionally lied about who he, the accuser, was, in the process of committing the other elements of the crimes. Defendant was not entitled to have an additional "truth" element invented for him just because, while he pretended to be someone else, he happened to make accusations.

Likewise, defendant's assertion that NYU's records could not have been falsified if his allegations about Schiffman were true (DB: 48-49) completely misses the point. The falsity defendant sought to create in the records was that Schiffman had confessed to plagiarism, and he sought to create it by sending a forged email in Schiffman's persona containing a purported confession to plagiarism. Whether or not that "confession" was substantively accurate, it is undeniably false that Schiffman made it.

In a similar vein, with respect to the intent to defraud NYU in particular under the second identity theft count, defendant wished for the court to instruct the jury that they could convict only if they found that defendant intended "to convince others to initiate an investigation of Professor Schiffman based upon an induced belief in the false self-confession rather than upon the content of the linked article."

He further sought an instruction that "[i]f the content of an e-mail would have triggered an investigation no matter who the sender (as in the case of NYU), then the sender is irrelevant unless there was an attempt to add weight or credibility to the underlying accusation by impersonating a specific person" (A52). These requests would have required the judge to encourage and the jury to engage in rampant speculation as to how thoroughly defendant hoped to fool NYU and what might have happened if the facts had been different, and on that basis alone would have been impermissible. *See Samuels*, 99 N.Y.2d at 25-26 (a court's excessive elaboration on legal principles in jury instructions "could mislead a jury or involve a court inappropriately in the evaluation of evidence").

Additionally, defendant's requested instruction could also have misled the jurors into believing that they had to reach unanimity about the precise details of defendant's expectations. In reality, the only element that the People had to prove was that defendant intended to defraud NYU. So long as all 12 jurors agreed that defendant committed that element, they had no obligation to agree on a particular theory of guilt as to that element. *See*, *e.g.*, *People v. Mateo*, 2 N.Y.3d 383, 408 (2004) (jurors were not required to agree on theory of guilt); *People v. Russell*, 91 N.Y.2d 280 (1998) (jurors not required to agree on which of the three codefendants fired the fatal shot); *People v. Jones*, 190 A.D.2d 632 (1st Dep't 1993) (jury not required to reach unanimous agreement on theory of how burglary was committed); *see also Schad v. Arizona*, 501 U.S. 624, 631-632 (1991) (permissible for individual jurors to be

"persuaded by different pieces of evidence" provided they agree upon "the bottom line") (internal quotations omitted). Hence, the denial of this request was not merely a permissible ruling, but the correct one.

Defendant further complains that the trial court's instruction on falsifying business records "made a subtle but important change in the People's theory" by requiring proof only generally that defendant "sought to falsify the business records of NYU." According to him, the court had to specify that, as the People argued in their opening (A635), defendant intended "to generate an inquiry and a reaction based upon false premises" (DB: 32-33). Defendant provides no support for his apparent assumption that the court had to model its jury instruction on the prosecutor's reference to that proof rather than on the elements of the crime. But this argument also reflects defendant's fundamental misunderstanding of the theory of the case. As noted, the court's instructions required the People to prove that defendant intended to deceive his targets about his identity and to induce them to act in reliance on that deception (1280-1281) – thereby requiring, just as defendant would have it, proof that defendant intended to provoke "a reaction based upon false premises."

Defendant also complains that there was no specification of which records he intended to falsify (DB: 33). This complaint is misconceived because defendant was not charged with the completed crime of falsifying business records. His crime was identity theft, and an element was that he *attempted* to falsify records. Because there was no completed crime alleged, there was no particular falsified record for the court

to name as a basis for the count. By correctly explaining the elements of falsifying business records and of attempt, including the intent required, the court gave the jury sufficient instruction to decide whether defendant was guilty of those elements. Nothing more was required.

D.

Defendant also sought instructions essentially excluding certain benefits and injuries from the legal definitions of "benefit" and "injure" in the court's jury instructions. To that end, defendant asked the court to inform the jury generally that "not all injuries are the subject of the criminal law," and specifically that there is no crime in "[i]ntending to [injure] another's reputation by disseminating falsehoods," "intending to have another spend time responding to accusations or criticisms," and "intending to abuse, deride, provoke, with the use of words, even vulgar words" (A50). Similarly, defendant sought an instruction that "not all benefits are the subject of the criminal law," and specifically that a "benefit" as contemplated by a criminal statute cannot be based on "[t]he fact that a defendant may gain emotional pleasure from harming another's reputation, from informing the public or the academic community of perceived wrongdoing, from provoking debate, from getting another to respond to criticisms, and/or from irritating another" (A51).

On appeal, defendant styles this attack on the definitions of benefit and injury as a complaint about the jury instructions, but the core of his complaint is actually a First Amendment claim. Indeed, defendant concedes that the "definitions may be

adequate" in a typical case, but he complains that "where, as here, the benefits or harms are ideological, spiritual, or emotional, these definitions mandated wholesale criminalization of constitutionally-protected forms of speech" (DB: 32). Defendant also suggests that offenses involving the assumption of identity or impersonation should be criminal only when "the use of the identity of another person" is intended "to make money, damage someone financially, frustrate the legitimate ends of the criminal justice system, or to commit another crime that is presumably independent of the assumption of the false identity" (DB: 35). As a preliminary matter, while defendant summarily declares that there was "not even a hint" that he intended by his conduct "to make money" or to "damage someone financially" (DB: 35-36), he is plainly wrong. *See* Point I, *supra* at 40-51 (discussing sufficiency and weight of evidence of crimes against Schiffman). In any event, defendant simply rewrites the statute and redefines "benefit" and "injury" to suit himself, but he is mistaken both factually and legally.

First of all, the instructions detailed in section B, *supra*, fully protected defendant's First Amendment rights, obviating any need to distort the governing statutory provisions in the manner he demands. Most concretely, as noted, speech undertaken with intent to defraud merits no First Amendment protection at all. *Alvarez*, 132 S. Ct. at 2545-2547; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-772. Here, thanks to the trial court's careful instructions, defendant could not have been convicted of anything had the jury not been persuaded beyond a reasonable doubt

that he intended to defraud. The instructions on identity theft specifically stated that (1278, 1285), and the instructions on the criminal impersonation counts expressly required that defendant intended to "defraud or deceive" others into believing that the forged emails really came from the victim he was impersonating, and to induce reliance on that deception (1281). The forgery counts required a finding that defendant intended to "defraud, deceive, or injure" (1288). But it would not have been possible for the jury to convict based only on a finding that defendant intended to injure but not to defraud, since for every forgery count there was also a count charging defendant with impersonating the ostensible maker of the forged email. Defendant's conviction of the impersonation counts based on those forgeries thus assured that the forgeries were likewise intended to defraud.

Had defendant's First Amendment claim not been short-circuited by the instructions requiring proof of his overarching intent to defraud, there was still nothing troubling about the court's delivery of the standard statutory definition of "benefit" as "*any* gain or advantage" to the defendant or to another person pursuant to the defendant's "desire or consent." Penal Law § 10.00(17) (emphasis supplied). While defendant would have this broad definition narrowed to his specifications, such a course would subvert rather than respect the plain language of the statute. *See People v. Robinson*, 95 N.Y.2d 179, 182-183 (2000) ("If the words chosen have a definite meaning, which involves no absurdity or contradiction, [then] there is no room for

construction and courts have no right to add to or take away from that meaning") (internal citations and quotations omitted).

Defendant contends that the court should have excluded from the injuries contemplated by the criminal impersonation and forgery statutes non-financial injuries such as harm to reputation, because the Legislature did not affirmatively enumerate such non-financial injuries (DB: 45-46). But by that logic, the court's instructions would have to have excluded everything, because no injuries are enumerated – the term "injure" is not defined by statute at all. Thus, "injure" should carry its common meaning. *See People v. Finley*, 10 N.Y.3d 647, 654 (2008) (presuming that "lawmakers 'have used words as they are commonly or ordinarily employed, unless there is something in the context or purpose of the act which shows a contrary intention'") (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 232). According to Merriam-Webster's online dictionary, the first meaning for "injure" is "to do an injustice to" or "wrong." http://www.merriam-webster.com/dictionary/injure. Moreover, in discussing synonyms for the term, that dictionary explains that "injure implies the inflicting of anything detrimental to one's looks, comfort, health or success." *Id.* Given that broad, common sense meaning, the court would have been wrong to endeavor to legislate by judicial fiat which harms would and would not qualify.

Defendant particularly faults the trial court for not providing a definition of "injury" that would exclude from the definition of that term any intent to harm his

victims' reputations. He argues that the court's failure to do so resulted in his conviction for what amounted to nothing more than the civil wrong of libel (DB: 42). But for the reasons already discussed, his attempt to equate his conduct to libelous behavior is doubly inept: first, under the court's instructions he was convicted because he pretended to be someone he was not, not because of what he said; and second, it was completely irrelevant whether what he said was true. In any event, had the court undertaken a definition of intended injuries that would permit a conviction, that definition would have to have included the intent to ruin someone's career and destroy his livelihood – an intended injury with fairly obvious financial implications, and one of defendant's plainest goals.

Defendant also insists the judge should have similarly limited the scope of the term "intent to defraud." However, he correctly acknowledges (DB: 38) that such an intent need not have financial implications. *See Kase*, 76 A.D.2d at 537-538. He observes that such an intent usually does, but that certainly does not call for limiting the term so that it can never be used in a non-pecuniary situation. Defendant cites to legislative history for the proposition "that the type of 'fraud' the lawmakers intended to remedy was financial" (DB: 39, n. 12). The legislative history that defendant offers in support of his point instead defeats it. After all, defendant's quote from the 2008 Memorandum in Support of Bill S8376A submitted to the New York State Senate recognizes the danger of damage not only to the "financial record" of an identity theft victim but also much more generally to his "well being." Defendant also refers to the

1996 Memorandum in Support of the enactment of Senate Bill S587A, which refers to the financial cost of certain frauds. But that same quote also speaks generally of the "significant problems" that can be caused by the "theft of personal identification numbers" (DB: 39-40, n. 12). Accordingly, while it is clear that financial ramifications concerned the Legislature, the harms it sought to prevent extended beyond financial ones.

* * *

In short, the court's instructions made it plain that what was "criminalized" here was the conduct that defendant engaged in *while* he was "speaking" by way of his forged emails, not the content of that speech itself. The court was careful to ensure that the jury would not convict defendant for parody, satire, or academic debate, but rather for engaging in fraudulent misrepresentations regarding his identity. The court properly charged the jury on the elements of the crimes, addressed defendant's legitimate concerns, and rejected his request for instructions that were wrong.

POINT III

ALL OF THE CHARGED CRIMES WERE CONSTITUTIONALLY APPLIED TO DEFENDANT, BECAUSE THE CONVICTIONS DID NOT CRIMINALIZE DEFENDANT'S BELIEFS OR HIS SPEECH; THEY CRIMINALIZED HIS CONDUCT (Answering Defendant's Brief, Points III, IV & V).

Defendant argues that if his conduct truly ran afoul of New York's identity theft, criminal impersonation and forgery laws, then all those statutes are unconstitutionally vague and overbroad (Point III). He finds similar fault with the aggravated harassment counts (Point IV) and the unauthorized use of a computer count (Point V). As defendant sees it, all the statutes upon which he was convicted are unconstitutionally vague because they did not give him notice that his conduct was criminal or assurance that he would not be the victim of arbitrary enforcement. He also contends that all the statutes but the one proscribing the unauthorized use of a computer are overbroad as well, because they criminalized his exercise of the right to free speech. All of defendant's arguments suffer the same common flaw: he misapprehends the elements of the crimes of which he was convicted. As already detailed, defendant was not convicted for having authored an intellectual campaign and for having derived enjoyment from it, nor was he convicted of crimes for each and every of the many hundreds of emails and blogs he authored. Instead, defendant was convicted of just 30 specific crimes for fraudulent and harassing conduct that fell squarely within the proscription of statutes that were not the least bit vague.

A.

The Due Process Clause of the Fifth Amendment prohibits a conviction for violating a statute that is unconstitutionally vague. *See United States v. Williams*, 553 U.S. 285 (2008). A statute is unconstitutionally vague when it either "fails to provide a person of ordinary intelligence fair notice of what is prohibited" or "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304; *see People v. Shack*, 86 N.Y.2d 529, 538 (1995); *People v. Nelson*, 69 N.Y.2d 302, 307 (1987).

Nonetheless, "perfect clarity and precise guidance have never been required." *Williams*, 553 U.S. at 304 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 [1989]); *see Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("we can never expect mathematical certainty from our language."); *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) ("few words possess the precision of mathematical symbols"). Thus, "inherently imprecise language … does not render a statute fatally vague if that language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Shack*, 86 N.Y.2d at 538 (quoting *United States v. Petrillo*, 332 U.S. 1, 8 [1947]).

In that light, a statute is unconstitutionally vague only when it "proscribe[s] no comprehensible course of conduct at all" and "forbids no specific or definite act." *United States v. Powell*, 423 U.S. 87, 92 (1975). A vague statute leaves open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no

one can . . . adequately guard against," *Powell*, 423 U.S. at 92, and it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982) (quoting *Grayned*, 408 U.S. at 108-109). Accordingly, a vagueness challenge "may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). Put another way, "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines*, 342 U.S. at 340. And even where the limits of what a statute proscribes may seem unclear, a defendant whose conduct "clearly fell within the ambit of the statute" may not be heard to complain that "the statute may be vague when applied to the potential conduct of others." *Shack*, 86 N.Y. at 538 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 608 [1973] and *Nelson*, 69 N.Y.2d at 308).

Statutes that contain an element of intent are especially unlikely to suffer from vagueness, because a scienter requirement "remove[s] the possibility that a defendant could be unaware of his criminal conduct." *Shack*, 86 N.Y. at 539. And, an intent element need not by itself reflect criminality to undermine a vagueness claim. For example, the Court of Appeals found that the requirement of an "intent to engage in a course of conduct targeted at a specific individual" – even absent any specific intent to cause "fear or harm" – supported the rejection of a vagueness challenge to a stalking statute. *People v. Stuart*, 100 N.Y.2d 412, 426-427 (2003); *see also Nelson*, 69

N.Y.2d at 307 (rejecting vagueness challenge to jostling statute, which proscribes placing one's hands "intentionally and unnecessarily" close to a person's "pocket or handbag," because it "should present no difficulty for a citizen to comprehend that he must refrain from acting with the intent to bring his hand into the proximity of a stranger's pocket or handbag unnecessarily").

Finally, even where a statute is not vague, a defendant may claim it is "overbroad" because it proscribes speech to an extent that it violates the First Amendment. *See*, *e.g.*, *Broadrick*, 413 U.S. at 611-616. Overbreadth challenges are best levied against "statutes which, *by their terms*, seek to regulate 'only spoken words.'" *Broadrick*, 413 U.S. at 611 (quoting *Gooding v. Wilson*, 405 U.S. 518, 520 [1972]) (emphasis added). Overbreadth challenges are also sometimes appropriate to protect against statutes which "by their terms" seek to regulate the time, place and manner of expressive conduct, to impose "prior restraints" on speech, or to interfere with the right to freedom of association. *Broadrick*, 413 U.S at 612-613. But "overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct," *Broadrick*, 413 U.S. at 613, especially when the law is applied "in a neutral, noncensorial manner," *id.* at 614. In short, "where conduct and not merely speech is involved," overbreadth must be "substantial," *Broadrick*, 413 U.S. at 615, and courts should strike down a statute on this ground only "sparingly, and only as a last resort," *Broadrick*, 413 U.S. at 613.

B.

The identity theft, criminal impersonation, and forgery statutes are neither vague nor overbroad. As an initial matter, these convictions did not implicate defendant's First Amendment rights at all, and as a result they cannot be deemed overbroad for chilling the exercise of such rights. After all, as discussed in Point II, *supra* at 63-67, the People had to prove that defendant had the fraudulent intent to deceive email recipients about his identity and to reap benefit or cause injury from their reliance on that deception – and fraudulent speech warrants no First Amendment protection at all.

The very specific intent required by these statutes also militates against defendant's vagueness claim, for each statute states not only the conduct that it proscribes but also a mental state, in terms sufficiently clear for potential defendants, law enforcement, and jurors to understand what the law forbids. To prove the identity theft counts, the People had to establish that defendant "knowingly, and with intent to defraud," assumed Schiffman's identity by using Schiffman's name, and that defendant thereby committed or attempted to commit the felonies of Scheme to Defraud in the First Degree and Falsifying Business Records in the First Degree (1278-1279, 1285). *See* Penal Law § 190.79(3). To prove each criminal impersonation count, the People had to prove that defendant "knowingly impersonate[d] a specific other person and act[ed] in such assumed character with intent to obtain a benefit or to injure or defraud another" (1286). *See* Penal Law § 190.25(1). And as to each

forgery count, the People had to prove that defendant "falsely made, completed, or altered" emails "with the intent to defraud, deceive, or injure another" (1288). *See* Penal Law § 170.25. Thus, each crime plainly proscribed not only specific conduct, but also specific intent, making its mandate doubly clear. *Shack*, 86 N.Y. at 539. And as set forth in detail in Point I, *supra*, the People proved overwhelmingly that defendant's fell squarely within "the ambit" of all those statutes. *Shack*, 86 N.Y. at 538; *see Stuart*, 100 N.Y.2d at 426-427 ("defendant could not reasonably have failed to realize that his intentional course of conduct directed at the complainant for over a month was unlawful"). These are garden variety criminal statutes prohibiting deceptive and harmful conduct that any reasonable defendant, police officer, or juror would know was wrong, and defendant's conduct fell squarely within their boundaries. There was no vagueness at all.

Defendant nonetheless insists that all three statutes are vague because a reasonable person would have no way of knowing that the definitions of "fraud," "benefit," and "injure" would render criminal "the act of influencing an academic debate or injuring someone's reputation" (DB: 59-60). Once again, defendant misunderstands his crimes. It was not the "act" of influencing a debate or injuring a reputation that subjected defendant to liability; it was his intentionally deceptive conduct regarding his identity, coupled with his additional intent to gain from that deception or harm someone else by it. As discussed at length in Points I & II, *supra*, the court properly informed the jury that it could convict defendant of these crimes

only if he undertook fraudulent actions with the intent to benefit himself or harm someone else by the fraud, and the evidence powerfully proved that he did exactly that.

Along the same lines, defendant suggests that the term "injure" cannot be read to "criminalize" acts damaging another's "reputation" because such an interpretation would "resurrect the wholly discredited doctrine of criminal libel" (DB: 61). Once again, defendant recasts the crime as something it is not, in order to find fault with it. Of course it is not criminal merely to damage someone else's reputation. But all these crimes required deception at their core, and in each case that deception had to be coupled with an intent that, in reliance on the deception, a benefit or injury would ensue. There is nothing vague about that, even if the contemplated injury were solely to someone's reputation – but of course here, at least some of the intended injury was much more tangible, as defendant quite clearly hoped to cost Schiffman his livelihood.

Defendant also raises the concern that the statutes "provide[] the People with the power to engage in standardless prosecutions of a vast array of online activities" (DB: 62). Without explanation, defendant posits that plagiarism would be able to be prosecuted as forgery, and that any use of "fake identities" or of "the names of real people" to "lampoon, criticize, or set forth positions" would amount to impersonation and identity theft (*id.*). Defendant offers examples of "satirical mimicry" and other creative uses of the internet related to parody, satire, and mockery

of all sorts, under the apparent assumption that his conduct fell into one or another of those categories (DB: 62-64). Indeed, defendant is correct that none of those actions should be criminalized by those statutes, as properly interpreted and as charged to the jury here. Indeed, as detailed in Point II, *supra* at p. 68, the court expressly instructed the jury that defendant had a First Amendment right to engage in parody, satire, and mockery. Defendant was not convicted for engaging in those activities.

C.

The aggravated harassment statute, Penal Law Section 240.30(1), is likewise neither vague nor overbroad. To prove aggravated harassment, the jury was instructed, the People had to establish that defendant "communicated anonymously or otherwise by any form of written communication, in a manner likely to cause annoyance or alarm" to Cargill, Goranson and Schiffman, and that defendant "did so with the intent to harass, annoy, threaten, or alarm" them (1286, 1303). On its face, defendant states, "this language criminalizes anyone who intends to annoy someone and does so by distributing a written communication that is likely to annoy" (DB: 71). And, as defendant recognizes, his "speech was clearly annoying and alarming" (DB: 76). Likewise, there can be no doubt that he intended to annoy his victims or worse. Indeed, for example, he boasted that his conduct must be "maddening" to the victims he was "out to get" (People's Exh. 15 [p. 27]). Regardless of whether the statute could be deemed vague on some set of circumstances, therefore, it was not vague as to defendant. *See Broadrick*, 413 U.S. at 611-612; *People v. Smith*, 89 Misc. 2d 789 (App.

Term 2nd Dep't 1977) (rejecting vagueness challenge to aggravated harassment statute).

Defendant's true complaint is not really that the statutory language is vague for failing to provide notice that his conduct would violate it, but rather that it is overbroad for criminalizing speech that he deems protected by the First Amendment. But the statute simply does not suffer such "substantial" overbreadth, *Broadrick*, 413 U.S. at 615, as would warrant the "last resort" of striking it down, *id.* at 613. After all, the statute does not target "spoken words," regulate expressive conduct, impose "prior restraints," or concern itself with public speech or freedom of association in any way. *See Broadrick*, 413 U.S. at 611-616. Instead, it narrows the proscribed conduct without regard to its content, specifically addressing only written communication. Moreover, the statute requires both a subjective intent at least to annoy someone, and an objective element that the communication is likely to do so.

To remove any danger that the jury would have construed these elements in derogation of defendant's right to freedom of speech, the court meticulously instructed the jury about the First Amendment. As discussed more fully in Point II, *supra* at p. 68, the trial court expressly acknowledged the defense position that the emails constituted "free academic discussion," "parody" and "satire" directed at conveying a "negative opinion of another" or intended to make someone appear "ridiculous or foolish" (1280). The court cautioned the jury to "zealously protect" defendant's right to do those things, explaining that "without the intent to deceive or

defraud as to the source of the speech with the intent to reap a benefit from that deceit, there is no crime" (1280-1281). Accordingly, there was nothing vague about what the jury had to find and no danger that the statute's reach would be "stretched to cover situations where a complainant merely feels annoyed by abusive, mocking, satirical, or critical speech, or by challenges to debate" (DB: 71).

In *People v. Smith*, the court rejected a vagueness and overbreadth challenge to the same subdivision of aggravated harassment at issue here. Smith had called a police department dozens of times in less than four hours after being told that his complaint was not a police matter and that he should stop calling. That court opined that the scope of the aggravated harassment statute properly encompassed, among other things, "communications which are directed to an unwilling recipient under circumstances wherein 'substantial privacy interests are being invaded in an essentially intolerable manner.'" 89 Misc. 2d at 791 (quoting *Cohen v. California*, 403 U.S. 15, 21 [1971]). Just as the caller in *Smith* inundated the police department with unwanted telephone calls and thereby interfered intolerably with their interests, defendant blanketed dozens of Cargill's, Goranson's and Schiffman's colleagues and superiors with unsolicited emails that interfered intolerably with Cargill's, Goranson's and Schiffman's lives.

Defendant relies heavily on this Court's decision in *People v. Dupont*, 107 A.D.2d 247 (1st Dep't 1985) (DB: 73-79). In *Dupont*, the defendant had been convicted of two counts of aggravated harassment and four related crimes for stalking a lawyer with

whom he had a disagreement. One of the aggravated harassment counts in particular involved the defendant's prolific distribution, over a period of several months, of a magazine mocking the attorney's sexual orientation and practices; the indictment charged that defendant.

This Court affirmed Dupont's conviction on everything but the count of aggravated harassment premised on the distribution of the magazine. Finding that the statute generally targets "annoying and harassing communications transmitted directly to the complainant," and not the "the publication of vexatious material about an individual," the Court distinguished Dupont's case from *Smith* on the ground that "there is no direct communication, there is no interference with privacy, nor is there a use or tying up of phone lines. There is merely the distribution of literature, offensive though it may be." 107 A.D.2d at 252. Thus, the Court held alternatively that the statute would be vague and overbroad if applied to Dupont, and also that it did not in any event apply to Dupont's conduct. 107 A.D.2d at 252-253.[24]

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[24] Defendant notes that in *Vives v. City of New York*, 305 F. Supp. 2d 289, 302 nn. 8, 9 (S.D.N.Y. 2003), a United States District Judge held that a New York City police officer should not have arrested the plaintiff under the aggravated harassment statute because the statute was plainly unconstitutional. Relying in part on *Dupont*, the District Court found the aggravated harassment statute to be unconstitutionally overbroad on its face "to the extent it prohibits and punishes speech that is intended to 'annoy' and/or 'alarm'" (DB: 76-77). The Second Circuit reversed. While declining to rule on the constitutionality of the statute, that court disagreed that such unconstitutionality was clear, observing that *Dupont* found the statute unconstitutional as applied to the "facts before it" but was "not entirely clear" whether its ruling extended beyond that. *Vives v. City of New York*, 405 F.3d 115, 117 n.3 (2nd Cir. 2005).

Here, the conduct sought to be described was much more like the conduct in *Smith* than the conduct in *Dupont*. Of course, not all of defendant's communications were directed to his ultimate victims as in *Smith*. But defendant's intent to harass – indeed to ruin – his ultimate victims was admitted. Moreover, the communications were specifically directed to targeted recipients, as in *Smith*; and, as discussed *supra* at pp. 53, 55 & 58, those communications caused the recipients to become the instruments of defendant's harassment. *See* Penal Law § 240.30(1)(a); *Johnson*, 208 A.D.2d at 1052; *Kochanowski*, 186 Misc. 2d at 444. Defendant also employed Smith's technique of flooding his unwilling recipients with a high volume of communication designed to harass. Furthermore, defendant's rampant use of deception, while not an element of aggravated harassment, sheds significant light on his intent not to communicate, but to manipulate. All this is distinguishable from the mere distribution of one's opinion in public, because defendant was alleged to have targeted the very individuals who would be able to create problems for his victims.

Indeed, defendant's careful selection of the recipients of his emails demonstrated that his mental state was not even arguably at the benign end of the spectrum of an "intent to harass, annoy, threaten or alarm" another person. Instead, by targeting Goranson's boss and university officials, defendant plainly sought not only to annoy Goranson, but to harass and alarm him with at least the threat of the loss of library privileges, or even his livelihood should the complaints have led to him losing his job. As to Cargill, the targeting of Cargill's supervisors and the entire

university department in Cargill's area of study successfully instilled in Cargill the fear that he would be denied his doctorate as a result – a possibility not likely lost on defendant, whose brother had warned him that careers could be "ruined" by defendant's campaign. And finally as to Schiffman, it could not have been clearer that defendant's elaborate scheme to have Schiffman found to be a plagiarist and expunged from the lecture circuit was likewise of a far greater magnitude than merely annoying. Far beyond the mere criticism, embarrassment or opprobrium at issue in *Dupont*, and far from "imitatively poking fun" at someone (DB: 77), defendant was aggressively attempting to ruin his victim's lives.[25]

Defendant also seeks support from *People v. Dietze*, 75 N.Y.2d 47 (1989) (DB: 76-78). In *Dietze*, the defendant called a mentally retarded mother and son "bitch" and "dog" and threatened to "beat" the mother "some day." 75 N.Y.2d at 50. Dietze was charged under a former provision of harassment alleging that, "with intent to harass, annoy or alarm another person," and "[i]n a public place, he use[d] abusive or obscene language, or ma[de] an obscene gesture." Former Penal Law § 240.25. Finding that the statute was a "proscription of pure speech," the Court of Appeals

[25] Defendant suggests that aggravated harassment is best understood as criminalizing conduct only when accompanied by some degree of threat of violence (DB: 71-72). But the conduct in *Smith* had no violent overtones at all, and indeed that court noted that one purpose of the harassment statute was to remedy conduct that had the effect of "driving a person to distraction." 89 Misc. 2d at 970. There are other crimes, such as menacing, that deal with the threat of violence. *See*, *e.g.*, Penal Law § 120.14 (attempt to "place another person in reasonable fear of physical injury").

struck it down on the ground that such direct limitations on speech "must be sharply limited to words which, by their utterance alone, inflict injury" or otherwise "breach the peace." 75 N.Y.2d at 52. Here, by contrast, the statute does not purport to regulate what type of language a defendant may or may not use, and makes no attempt to regulate "pure speech." Instead, it proscribes only writing undertaken with both the specific intent to affect a particular victim and the reasonable expectation of such a probable effect. And of course, defendant's specifically targeting of everyone who knew his victims in an effort to thwart their livelihoods took his harassment into the private domain, further likening his case to *Smith* as opposed to *Dupont* and *Dietze*.

D.

Finally, defendant contends that the count charging him with unauthorized use of a computer was vague (Point V). Defendant's claims are all based on the notion that, as in *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009), lack of authorization could have been premised merely on a violation of any aspect of NYU's terms of service (DB: 81-85). He asserts that those terms are so broad, vague and standardless that a defendant might not be able to tell whether he is in violation of them and is left at the mercy of NYU and prosecutors as to whether his computer use constituted a crime. But defendant ignores the narrow basis for criminal liability upon which the jury was instructed.

To be sure, the trial court instructed the jury that a person is guilty of unauthorized use of a computer when he "knowingly uses, causes to be used, or

accesses a computer, computer service, or computer network without authorization" (1288-1289). *See* Penal Law Section 156.05. But the court went on to explain that "the People's theory of lack of authorization in this case is that the defendant used the NYU computer to commit a crime in violation of the terms of use." Thus, the People had to prove that defendant acted "knowing he had no permission for the use, in that he used the [computers] to commit a crime or crimes" (1289-1290). Specifically, defendant was charged with secretly using NYU computers to forge emails in furtherance of a plot to defraud NYU and to falsify records pertaining to Professor Schiffman.

There was no way that a reasonable defendant would be confused as to whether this conduct was permissible. After all, the Bobst library code found in defendant's apartment expressly requires computer users there to abide by NYU's computer use policy, which unsurprisingly requires computer users to respect "all applicable laws" (A317 [Def. Exh. 1-B: "Policy on Responsible Use of NYU Computers and Data"]). Indeed, defendant "assumed" he was not permitted to use NYU's computers to commit crimes (Golb: 1139). That assumption is telling, as it bespeaks the utter reasonableness of the proposition that a university making its computers available to alumni expects them not to commit crimes on them. And because defendant could thus be punished for unauthorized use of the computers only if that use was itself a crime, it was the Legislature, and not NYU, who defined

what the crime was (*cf.* DB: 84). Thus, whether or not the statute could have been vague in another prosecution, it was not vague in defendant's case.

* * *

In sum, defendant was convicted of specific crimes for plainly criminal conduct that he committed during a lengthy campaign. That conduct fell squarely within the proscription of statutes which, as applied to defendant, are constitutionally sound.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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