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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RAPHAEL GOLB,

Defendant-Appellant.

BRIEF FOR RESPONDENT

INTRODUCTION

By permission of the Honorable Eugene F. Pigott, Judge of the Court of Appeals, defendant Raphael Golb appeals from an order of the Appellate Division, First Department, dated January 29, 2012. That order modified a November 18, 2010 judgment of the Supreme Court, New York County (Carol Berkman, J.), convicting defendant, 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), and sentencing 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, by

vacating and dismissing the first identity theft count, and otherwise affirmed the judgment. Judge Pigott continued the Appellate Division's bail conditions and stay of execution of the judgment, and defendant remains at liberty on bail.

Defendant's conviction arose 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 the theory espoused by defendant's father, Norman Golb. Defendant countered by sending harassing emails under pseudonyms to museum administrators, academics, and reporters, and by publishing internet blogs criticizing the exhibits. Eventually, defendant turned to impersonation and identity theft, sending emails purportedly authored by 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's scholarship. 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 sought to get defendant's father invited to speak at the exhibit as well, but all their legitimate efforts failed. Defendant thereafter hatched an elaborate scheme to help his father, which included stealing Professor Schiffman's identity. First, 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 library in hopes that his activity would not be traced back to his own computer, 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. When the recipients' replies revealed they had indeed been duped, defendant responded 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 demanded an investigation into Schiffman's conduct. 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, Justice Berkman sentenced defendant as noted above, and the Honorable Roslyn H. Richter granted defendant's application for a stay of execution of the judgment.

Defendant appealed to the Appellate Division, First Department, where he contended that the jury's verdict on the first of the two identity theft counts, which

required proof that defendant intended to benefit himself or harm a victim in excess of $1000, was against the weight of the evidence. He also contended that the trial court's jury instructions violated his state and federal constitutional rights; that the application of forgery, criminal impersonation, identity theft and aggravated harassment statutes to his conduct rendered those statutes "vague and overbroad"; and that the application of the unauthorized use of a computer statute to his use of the New York University computers rendered that statute "void for vagueness."

On January 29, 2012, the Appellate Division dismissed the challenged count of identity theft, agreeing with defendant's contention that the evidence did not support the jury's finding that defendant intended over $1000 in benefit or harm, and affirmed the other 29 convictions. As to the jury instructions, the Appellate Division noted that the trial court "incorporated many of defendant's requests, fully protected his constitutional rights," and "carefully informed the jury that academic discussion, parody, satire and the use of pseudonyms were protected by the First Amendment." The Appellate Division explained that the trial court properly "advised the jury 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,'" and that the court "was under no obligation to limit the definitions" of "injure," "defraud" or "benefit." 102 A.D.3d at 602. None of the statutes was vague or overbroad. Instead, "[t]he People were required to prove that defendant had the specific fraudulent intent to deceive email recipients about his identity, and to obtain benefits or cause injuries as a result of the

recipients' reliance on that deception"; thus, the statutes properly "criminalized the act of impersonation and its unlawful intent, not the content of speech falsely imputed to the victims." 102 A.D.3d at 603.

On appeal to this Court, defendant raises the three arguments that did not avail him in the Appellate Division. Primarily, he contends that the trial court's jury instructions pertaining to identity theft, criminal impersonation and forgery "compelled the jury to criminalize" conduct protected by the First Amendment, thereby rendering those statutes void for vagueness. Defendant also contends that the aggravated harassment statute is "unconstitutionally vague and overbroad," and that the unlawful use of a computer statute is "unconstitutionally vague."

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 (SA: 1-14 [Schiffman: 43-56]).[1]

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 (SA: 14-23, 180 [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 (SA: 109-115, 118 [Schiffman: 151-157, 160]; 915 [People's Exh. 15, p. 38] [Ruth Golb: "Schiffman is a real snake"]; 935 [People's Exh. 15, p. 59] [Ruth Golb: "Schiffman is such a sleaze"]).

Also in the mid-2000s, ROBERT CARGILL was a graduate student at the University of California in Los Angeles ("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-

[1] Parenthetical page references preceded by "A" are to defendant's Appendix, those preceded by "SA" are to the People's Supplemental Appendix, and those preceded by "DB" are to defendant's brief.

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 (SA: 372-385 [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 harnessed 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 (such as "Charles Gadda") 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" (SA: 1016-1020 [People's Exh. 40-A1]).[2]

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 (SA 384-385, 387-389, 405, 409 [Cargill: 716-717, 719-721, 737, 741]; 1016-1053 [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 (SA: 379, 413 [Cargill: 711, 745]). The

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[2] The People introduced hundreds of pages of expert testimony, computer forensic evidence 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. Contrary to defendant's intimation that these efforts were excessive because defendant's identity as the author of the relevant materials was not in dispute (DB: 50), defendant did *not* concede authorship until he testified, after he saw much of this proof at trial. However, because defendant did ultimately admit authorship and raises no appellate issue in that regard, in the interest of economy those hundreds of pages have not been included in the People's Supplemental Appendix and are not summarized here.

script – 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 (SA: 449-450 [Cargill: 781-782]). Cargill's movie began showing when the San Diego exhibit opened on June 29, 2007 (SA: 413-414, 446 [Cargill: 745-746, 778]).[3]

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 (SA: 407 [Cargill: 739]; 1054-1059 [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 (SA: 414-417 [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 (SA: 450-452 [Cargill: 782-784]). Norman Golb also sent letters to UCLA complaining that Cargill should not have excluded Golb from mention in the script (SA: 379-382, 387-388 [Cargill: 711-714, 719-720]).

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[3] 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 (SA: 974 [People's Exh. 17-6]).

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 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.*, SA: 973 [People's Exh. 17-1, Oct. 6, 2007 email from Don Matthews to UCLA media], 975 [People's Exh. 17-9, Oct. 22, 2007 email from Matthews to UCLA media], 976 [People's Exh. 17-10, Nov. 17, 2007 email from Robert Dworkin to UCLA media], 977 [People's Exh. 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 (SA: 885 [People's Exh. 15, p. 7] [emails to defendant and Cargill sent by "Dale Summers"]).[4]

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.

[4] 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 (SA: 885).

advisor worked. Defendant's brother, commenting on defendant's suggestion within one of those proposed emails that his "intent in writing" was not "to harm Mr. Cargill's academic career prospects," pointed out that to the contrary, "[c]learly, for all who read this, one of the purposes of 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" (SA: 978-980 [People's Exh. 17-44 – 17-47], 1014 [People's Exh. 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 (SA: 987-988 [People's Exh. 17-51]). Defendant's brother warned him to make sure that the emails were "untraceable" (*id.*).[5]

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.*, SA: 978, 981-986, 989-991, 993-995, 997 [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

[5] About two months later, defendant's brother remarked to defendant that Cargill's and his advisor's "careers may well be ruined" by defendant's campaign (SA: 992 [People's Exh. 17-57A]).

the complaints about Cargill were addressed (SA: 996 [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 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 (SA: 383-385, 399-403, 410-412, 436 [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" (SA: 386-389 [Cargill: 718-721]). Cargill quickly realized that most of defendant's emails and blog comments originated from the same "IP address" – one that 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 (SA: 389-396 [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 competition as "a dedicated, in-the-know adversary who is out to get them, and there's simply nothing they can do about it" (SA: 893 [People's Exh. 15, p. 16: July 26, 2008 email]).[6]

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

[6] On March 3, 2009, defendant – posing as a concerned alumnus of UCLA – 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 (SA: 997-998 [People's Exh. 17-82]).

(SA: 357-360 [Goranson: 633-636]).[7] 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 (SA: 356-357 [Goranson: 632-633]).

Given these views, Goranson had a longstanding online disagreement with defendant's aliases regarding the Scrolls' origin (SA: 351-352 [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 (SA: 349, 352-354 [Goranson: 625, 628-630]; 999-1004 [People's Exh. 18] [Goranson-related emails]). On July 8, 2008, Duke's provost responded by email, opining that

[7] 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 (SA: 343-346 [Goranson: 619-622]).

Goranson had not "crossed th[e] line" and that "no action can be taken at this time." 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. 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 (SA: 1005-1007).

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 (SA: 965 [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, and he used that password for six other aliases as well (SA: 1109 [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. First, perturbed that University of North Carolina Professor Bart Ehrman was slated to lecture at the 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 (SA: 1088-1093 [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 (SA: 1010-1013 [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, hoping thereby 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 (SA: 221-222 [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 paid lectures at the exhibit on October 30, 2008 (SA: 55-57 [Schiffman: 97-99]).

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 (SA: 886 *et seq.* [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

(SA: 886-891), and they plotted how they might persuade Braunstein to extend an invitation (SA: 892-919).[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 on July 31, 2008, emails reveal, Norman Golb discovered that he could not influence Braunstein through his connections in Israel. And after Friedenberg, too, failed to persuade Braunstein to invite Golb,[9] defendant feared that they were "quickly running out of time" (SA: 906-912).

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[8] In a 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" (SA: 903).

[9] Defendant wrote in his email that Friedenberg had not even asked Braunstein about inviting Golb (SA: 912), but defendant was mistaken. Braunstein felt that the exhibit was already sufficiently balanced, so she declined Friedenberg's request (SA: 228-230, 237-239 [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 (SA: 913-919), but Golb did not send her anything (SA: 228 [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" (SA: 1109).

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?" (SA: 35-36 [Schiffman: 77-78], 1069 [People's Exh. 40B3]). 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 simultaneously 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 (SA: 1061, 1094 [People's Exhs. 40A7, 40C16]).

That same afternoon, defendant-as-Kaufman emailed NYU administrators, claiming to be an NYU faculty member acting under an assumed name in the best interests of the university, and urged the university to open an investigation into whether Schiffman had committed plagiarism (SA: 947-948 [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 (SA: 946 [People's Exh. 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. 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" (SA: 956 [People's Exh. 16S]).[10]

The next day, defendant – again as Schiffman – emailed every member of Schiffman's department at NYU (SA: 38-39 [Schiffman: 80-81], 955 [People's Exh. 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 (SA: 41-42 [Schiffman: 83-84], 187-190 [Stimpson: 232-235]). In those identical emails, defendant-as-Schiffman wrote (SA: 952-953 [People's Exhs. 16P, 16Q]):

> I would like to know what action I can take to counter charges of plagiarism that have been raised against me.

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[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" (SA: 956 [People's Exh. 16-S]).

> 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 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 (SA: 45-48, 75, 105-106 [Schiffman: 87-90, 117, 147-148], 200-204 [Stimpson: 245-249], 243-250 [Foley: 293-300]). 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. Defendant-as-Schiffman promptly forwarded the Vice Provost's email to the NYU school newspaper and others with instructions not to "mention this matter" because his "career [wa]s at stake" (SA: 958-959 [People's Exhs. 16O, 16V, 16W).

[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" (SA: 948 [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" (SA: 20 [Schiffman: 62]). Simon then showed Schiffman the email (SA: 21-22, 27-30 [Schiffman: 63-64, 69-72]). Thereafter, "a number of people" asked Schiffman about the emails, and others forwarded the emails to him (SA: 21-22, 29, 33 [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 (SA: 395-396, 407 [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 "issue a statement of some sort if he is willing to take down the article and discontinue his efforts." Defendant warned Schiffman not to ignore this suggestion, because the author had "skill at using aliases," "contacts … around the country," and "in-depth knowledge of the internet"; if Schiffman did not act, the accusations might "boomerang all over the internet" and reach "mainstream news sources" (SA: 73-74 [Schiffman: 115-116], 957 [People's Exh. 16U]).

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" (SA: 23-24, 115-118 [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" (SA: 45-48, 75, 106 [Schiffman: 87-90, 117, 148], 193-219 [Stimpson: 238-265], 252-275 [Foley: 302-325]). 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 (SA: 205 [Stimpson: 250], 272 [Foley: 322]).[12] Ultimately, on September 17, 2008, Foley concluded that there was "no basis for further inquiry" and the matter was closed (SA: 204 [Stimpson: 249], 268 [Foley: 318], 855 [People's Exh. 2] [Foley email]).

That same day, defendant's brother emailed defendant that there was a new comment posted in connection with defendant's "Now Public" article. Defendant wrote in reply, "which article, the plagiarism thing? let them fight it out, whether someone plagiarized dad isn't my concern. I am focused on the institutional problem" (SA: 942 [People's Exh. 15, p. 69]).

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[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 to his father that "the truth" was that Schiffman had plagiarized him and he should be upset about it; defendant drafted a proposed response for his father to adopt that might better support a plagiarism accusation (SA: 937-938 [People's Exh. 15, pp. 61, 63]).

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 (SA: 331-342 [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 (SA: 856 [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 following day, 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 Toronto exhibit (SA: 1101 [People's Exh. 40C19]). The next 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" (SA: 861 [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" about Golb's theories (SA: 862-863 [People's Exh. 12-P]). These emails received replies that do not reflect any suspicion that the sender had not been Seidel (*e.g.*, SA: 864-880). Defendant continued to send similar emails as Seidel at least until December 6, 2008 (SA: 881 [People's Exh. 12]).[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 New York University "Friends of Bobst Library" card granting defendant access to

[13] As Cargill had explained in discussing his own online interactions with defendant (SA: 384 [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 (SA: 956 [People's Exh. 16S]), the frequency of clicking on and commenting on web links would elevate their standing in search results.

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. At the District Attorney's Office, defendant waived his *Miranda* rights and agreed to answer questions. 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" (SA: 276-330 [McKenna]).

Defendant then spoke to an Assistant District Attorney; the interview was videotaped (People's Exh. 46 [video]). 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

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[14] As an alumnus with library privileges, defendant's agreed to abide by all rules of NYU Libraries. The copy of 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." The Bobst code further warned that "[w]here appropriate," violations of the code would be referred to law enforcement (SA: 839-840 [People's Exh. 1B, "Policy on Responsible Use of NYU Computers and Data"], 1105-1106 [People's Exhs. 42A [identification cards], 42B [code of conduct]).

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 any emails 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" (SA: 482-485, 505 [Golb: 955-958, 978]). He had written everything the People accused him of writing, and he had opened all the accounts he was accused of opening (SA: 572-610 [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 (SA: 504-521, 525-528, 611 [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 (SA: 536-537 [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" whether Cargill should receive the degree without first answering

[15] According to defendant, his 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 had for years refused to grant defendant's father access to the Scrolls because he was Jewish (SA: 493-494 [Golb: 966-967]). The monopoly did, however, grant access to Professor Schiffman, whom one "could call" a Dead Sea Scrolls scholar (SA: 506, 519 [Golb: 979, 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 (SA: 514-515, 519, 528 [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" (SA: 550, 629, 640 [Golb: 1023, 1103, 1114]). Doctor Cargill, too, was "incredibly prolific on the internet" and waged "vicious attacks against [defendant's] family all the time" (SA: 570 [Golb: 1044]).

defendant's complaints about his work (SA: 537-545, 638-639 [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" (SA: 521, 670-671 [Golb: 994, 1143-1144]). For example, when defendant emailed his brother to inquire whether they should "finish Goranson off," it was just a colorful way to ask whether he should refute Goranson's arguments with better ones (SA: 521-522 [Golb: 994-995]).

In July 2008, defendant became "very interested" in New York's Jewish Museum exhibit (SA: 639 [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 (SA: 640-641 [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" (SA: 646-647 [Golb: 1120-1121]).

In early August 2008, defendant posted the blogs accusing Professor Schiffman of plagiarizing Norman Golb (SA: 490-493, 495-496, 655-656 [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 (SA: 656-657 [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 (SA: 657 [Golb: 1131]).[16]

Defendant did not tell his father or his brother that he was using the larry.schiffman@gmail.com account (SA: 642-643 [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 (SA: 665-666 [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" (SA: 666 [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" (SA: 529 [Golb: 1002]).

Instead, comparing himself to Voltaire combating dogmatic thought during the Enlightenment, defendant claimed that his emails were nothing more than "satire,

[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.

irony, parody, and any other form of verbal rhetoric" (SA: 529 [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 of capital (SA: 529-535 [Golb: 1002-1008]). He did not "seek to injure Schiffman," or "to benefit in any way" from his conduct (SA: 533-534 [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 tat "whether someone plagiarized dad isn't my concern" (SA: 945 [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" (SA: 650-651, 670-671 [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 (SA: 663, 665, 672 [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

[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 (SA: 666-669, 676-677 [Golb: 1139-1142, 1149-1150]).

Dead Sea Scrolls scholar named Frank Cross (SA: 564, 661, 663 [1038, 1134, 1136]).[18] He meant only to engage in parody (SA: 661 [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 (SA: 564-565, 672 [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 (SA: 545-546, 657-661, 673-674 [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 (SA: 547 [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

[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 defendant's father's theory, and who had deliberately excluded defendant's father and others from studying the Scrolls before they were made public (SA: 516, 555-556 [Golb: 989, 1028-1029]).

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 (SA: 548-549 [Golb: 1021-1022]).

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 (SA: 622-623 [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 (SA: 623-625 [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" (SA: 569 [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 (SA: 485-487 [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 (SA: 586-587 [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 (SA: 488 [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" (SA: 654-655 [Golb: 1128-1129]). Nonetheless, defendant "consciously decided" to lie about having authored the Schiffman emails (SA: 528-529 [Golb: 1101-1102]), and he flatly denied responsibility for opening email accounts in other people's names (SA: 536-537 [Golb: 1109-1110]). Indeed, defendant suggested during the interview that Schiffman had falsely accused defendant of opening the larry.schiffman gmail account (SA: 531-532 [Golb: 1104-1105]), opining that Schiffman had many enemies and that "a lot of other suspects" could have created the email account (SA: 536 [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 (SA: 496-497 [Golb: 969-970]), because he was frightened of the "people who had arrested" him (SA: 489-491 [Golb: 962-964]), and because he was "acquiescing" to the prosecutor in general (SA: 655 [Golb: 1129]).

POINT I

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 (count 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. Defendant asserts that the jury instructions defining those terms "compelled the jury to criminalize expressions of defendant's opinion, statements of fact, and causing hurt feelings" (Point I). In support of that assertion, defendant complains that federal law (DB: 37-45) and New York law (DB: 45-48) require a more tangible benefit or harm than the trial court's instructions required, and that the Appellate Division improperly relied on trademark law in rejecting defendant's appellate challenge to those instructions (DB: 49-52). On defendant's view, therefore, the statutes upon which he was convicted were void for vagueness as applied to him. In essence, however, he is really complaining not so much that the statutes were vague, but rather that they were overbroad for reaching protected speech (*see*, *e.g.*, DB: 37 n.15).

No matter the analysis undertaken, defendant's claims are meritless. The trial court gave appropriate instructions that correctly conveyed the elements of the crimes, and by adding specific instructions about the First Amendment, the court fully protected any relevant rights that defendant may have had. There is no support for defendant's view that the benefits and injuries he may have intended had to be more precisely delineated or that the trial court in any way wrongly defined those terms. To a significant extent, defendant ignores that the judge's instructions actually made many of the points he asked the court to make, and, in particular, made it crystal clear to the jury that defendant could not be convicted simply for the content of his speech or for any attempt to engage in mere parody or satire as opposed to fraud. Instead, defendant could be convicted only upon proof that he intended to deceive others about his identity, and that he intended, through reliance on that deception, to benefit himself or to injure his victims. Fraudulent conduct of that type is not constitutionally protected. Indeed, the content-neutral crimes for which he was convicted did not implicate the First Amendment at all because they did not even purport to criminalize his speech.

A.

A brief review of the convictions pertinent to this point is in order. Defendant's most serious conviction arose under count 2 of the indictment, alleging second-degree identity theft committed against Professor Schiffman. Penal Law § 190.79(3). As pertinent here, a person commits that crime when he "knowingly and

with intent to defraud assumes the identity of another person" by "presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person" and thereby "attempts to commit a felony." *Id.* The alleged attempted felony was first-degree falsifying of the business records of New York University. That crime is in turn committed when a person, "with intent to defraud," "[m]akes or causes a false entry in the business records of an enterprise," and when the person's intent to defraud additionally includes "an intent to commit another crime or to aid or conceal the commission thereof." Penal Law §§ 110.00, 175.05, 175.10.

Defendant also faced six counts of second-degree criminal impersonation of Schiffman (counts 5, 7, 10, 13, 16, 19) and five counts of third-degree forgery connected with those impersonation counts (counts 8, 11, 14, 17 and 20). Criminal impersonation is committed when a person "impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another." *See* Penal Law § 190.25(1). Forgery is committed when, "with intent to defraud, deceive or injure another," a person "falsely makes, completes or alters a written instrument." Penal Law § 170.05.[19]

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[19] Defendant was also convicted under counts 3, 40 and 48 of the indictment of aggravated harassment for harassing Schiffman, Goranson and Cargill, and under count 51 of the indictment of unauthorized use of a computer for using the New York University computers to commit some of his crimes. Because the aggravated harassment convictions are discussed in Point II, *infra*, in response to Point II of defendant's brief, and the (Continued…)

With respect to the crimes against Professor Schiffman, the People's evidence showed that defendant initially plastered the internet with allegations of plagiarism against Schiffman. Defendant then sought to falsify the records of NYU by manufacturing a subtle admission purportedly from Schiffman – but which Schiffman never made – that would support these allegations, in hopes that NYU would open a plagiarism investigation into Schiffman based on those efforts. Defendant did this by means of his carefully orchestrated online campaign of deception, whereby he criminally impersonated Schiffman once when he created an email account using Schiffman's name, and five more times when he sent the five forged emails purportedly from Schiffman using that account to Schiffman's students, Schiffman's colleagues, NYU's Dean, NYU's Provost, and the NYU press.

Defendant's lesser crimes against other scholars rested upon similar evidence. For example, counts 23, 25, 27, 29, 31, 33, 35, 37, 39 charged defendant with impersonating and forging emails purportedly from Jonathan Seidel, an acolyte of Schiffman's, in that defendant opened an email account using the address seidel.jonathan2@gmail.com, and used it to email the Royal Ontario Museum advocating Norman Golb's inclusion in "the museum's lecture series." Defendant signed the email, "Jonathan Seidel." Defendant then published an anonymous blog

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(…Continued)
unauthorized use conviction is discussed in Point III, *infra*, in response to Point III of defendant's brief, they will not be discussed here.

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. Under count 42, defendant was charged with criminal impersonation for opening an email account in Goranson's name; the most reasonable inference as to why defendant opened the account is that, within weeks of his first efforts to "finish Goranson off," defendant planned to use that deceptive email in connection with his continued campaign. Finally, counts 44, 46 and 47 charged defendant with impersonating and forging emails purportedly from Frank Cross, in that 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. Defendant did all this to promote his father's academic success; of course, that would create some degree of intangible personal satisfaction, but it was also liable to generate financial rewards, such as more frequent paid consulting or speaking engagements.

As the Appellate Division found, 102 A.D.3d at 602, the People's trial evidence "clearly established" that defendant sent the emails impersonating Schiffman (and the others), that he hoped to persuade recipients that "the purported authors were the actual authors," and that he intended that "the recipients' reliance on this deception would cause harm to the purported authors and benefits to defendant or his father." And by fabricating both an apparently neutral accusation and coupling it with

Schiffman's purported (but manufactured) admission of guilt, defendant initially achieved exactly what he wanted: he prodded NYU into opening an investigation into Schiffman's conduct in reliance on the false confession. This was plainly intended to cause – and at the very least came dangerously close to causing – the entry of false records at NYU reflecting the bogus confession, in furtherance of the identity theft count and defendant's efforts to help his father and hurt his father's rivals. Defendant's deceptive uses of Seidel's, Goranson's and Cross's names in connection with the other impersonation and forgery counts reflected similar intent.

B.

A jury instruction explaining a charged crime 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). In that regard, 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).[20]

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' 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.

To be sure, even on proper jury instructions, the Due Process Clause of the Fifth Amendment would prohibit a conviction for violating a statute that is unconstitutionally vague or overbroad. *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

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[20] 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 (accessed Nov. 13, 2013).

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, this Court has 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").

As an alternative to a vagueness challenge, a defendant may claim that a statute is "overbroad" because it proscribes speech to such 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]). For example, overbreadth challenges may be 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.

Thus, where a statute does not even purport to regulate speech directly, let alone any particular message, any overbreadth claim must fail because the First Amendment is not in play at all. *See*, *e.g.*, *Wisconsin v. Mitchell*, 508 U.S 476, 484-489 (1993) ; *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Cox v. Lousiana*, 379 U.S. 536, 556 (1965); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). This is because the First Amendment is implicated by laws "explicitly directed at expression,"

and not by laws directed at unprotected conduct. *Wisconsin v. Mitchell*, 508 U.S. at 487. Thus, a statute specifically prohibiting "fighting words" deemed to express racism or bigotry will implicate First Amendment concerns, *see R. A. V. v. St. Paul*, 505 U.S. 377, 391 (1992), but a statute permitting enhanced sentencing for assaultive conduct because it was motivated by racism or bigotry will not, *see Wisconsin v. Mitchell*, 508 U.S. at 487-488.

Indeed, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see United States v. O'Brien*, 391 U.S. 367, 376 (1968) (expressly rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"); *Cox v. Lousiana*, 379 U.S. 536, 556 (1965) (reaffirming and quoting *Giboney*, *supra*, and "emphatically reject[ing] the notion" that the First Amendment protects "those who would communicate ideas by conduct" to the same extent as "those who communicate ideas by pure speech"). In other words, the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. at 489.

Even if a statute could be said to be directed at speech, that does not necessarily mean that it contravenes the First Amendment. True, a content-based

statute prohibiting deceptive speech about a certain subject may run afoul of the First Amendment. *See*, *e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2545-2547 (2012) (plurality) (recognizing the diminished value of false speech, but "reject[ing] the notion that false speech should be in a general category that is presumptively unprotected"). But the First Amendment generally does not protect speech that is not merely false, but fraudulent. *See*, *e.g.*, *Alvarez*, 132 S. Ct. at 2547 (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) (striking down statute prohibiting advertising as to price of prescription drugs, but stressing that there was "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").

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 false speech about a particular topic 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.

C.

Applying all the above principles to defendant's case, the trial court's instructions properly conveyed the law while ensuring there would be no infringement of any First Amendment rights defendant may have had. 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). Those barebones instructions alone – defining crimes with elements that were not directed toward speech at all – might sufficiently have protected defendant's First Amendment rights.

Nonetheless, defendant wanted more than that, and he got it. In response to defendant's requests to expound upon the standard instructions, the trial court modified its instructions mostly for defendant's benefit. Defendant informed the court of his concerns in his six written requests to instruct the jury (A: 50-55), and the court's proposed final instructions (A: 60-82) – which the court ultimately delivered almost verbatim (SA: 790-815 [Jury Charge: 1266-1291]) – "incorporated many of defendant's requests." 102 A.D.3d at 602.

Importantly, in stark contrast to defendant's assertion that the trial court and Appellate Division "simply ignored" any First Amendment rights that might be at stake (DB: 36), the trial court's instructions emphasized defendant's 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 understandably sought an instruction conveying that "[s]atire, parody and/or pranks" are not criminal (A: 52). Far from ignoring that request, the trial court, as the Appellate Division noted, "carefully informed the jury that academic discussion, parody, satire and the use of pseudonyms were protected by the First Amendment." 102 A.D.3d at 602. Indeed, the trial 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" (SA: 804 [Jury Charge: 1280]). Thus, defendant's repeated comparison of his conduct to (presumably) permissible instances of satire (*see*, *e.g.*, DB: 43 ["satirical websites"], 44 ["e-mail satires have become a fashion among political activists"]) is inapposite, in that the jury necessarily found beyond a reasonable doubt that he was not engaging in that sort of protected conduct.

Just as with the parody instruction, the trial court accommodated another of defendant's requests, and in so doing independently assured he would not be convicted for protected conduct. Defendant urged the trial court to instruct the jury

that 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 (A: 52). Such an instruction would be consistent with *People v. Briggins*, 50 N.Y.2d 302, 307 (1980), cited by defendant, in which this Court held that the mere use of an assumed name did not support a forgery charge where there was no evidence that "defendant's consistent representation that the assumed name was his own manifested any 'intent to defraud, deceive or injure another.'" Once again, the court did exactly as defendant asked, using the example of criminal impersonation to instruct, as the Appellate Division noted, 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" (SA: 805 [Jury Charge: 1281]) (emphasis supplied). 102 A.D.3d at 602.[21] 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 acquitted him.

[21] 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" (A: 55). There was no doubt that the trial court conveyed that principle. As to the identity theft count, 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" (SA: 804, 811 [Jury Charge: 1280, 1287]).

Thus, the People were required to prove that defendant intended not only to deceive people about his identity as the source of the emails, but also to use those people's reliance on that particular deception to his benefit or his victims' detriment. As a result, defendant's various comparisons of his conduct to the non-fraudulent use of pseudonyms are inapt (*see*, *e.g.*, DB: 33, fn. 14 [noting that "famous intellectuals have used multiple pseudonyms to influence debates without becoming the object of an inquisition"], 35 [suggesting he could have been found guilty for mere "accusatory mimicry of Schiffman" if the jury believed it to be a "trick"], 35 [claiming his guilt was based on mere "impersonation plus any harm or benefit"], 36 [complaining that his conviction resulted from the theory that "pseudonym + intended harm or benefit = felony"]). In *Briggins*, this Court observed that although it is generally not illegal *per se* to use an alias, "freedom to do so reaches its limits when the practice is accompanied by a fraudulent design." 50 N.Y.2d at 307. Under the jury instructions here, defendant could be convicted only if he breached that limit not only by having a fraudulent design, but by making the alias (which in reality was a specific person's actual name) a critical part of that design.

Defendant deems it significant that, with respect to some of the satirical conduct to which he likens his own conduct, some people might have believed that the author of the satire was in fact the person in whose name it was written (*see*, *e.g.*, DB: 43-44). But he confuses the result with the intent. To convict defendant, the

jury had to find that defendant *intended* to deceive others into believing that his emails came from Schiffman or the others he impersonated.

Consequently, it does defendant's argument no good that in some other case, a piece the author intended as satire might have been mistaken by readers to have actually been authored by the satire's target, even though the author *did not intend* the readers to so conclude. For example, a Republican satirist authored an email nominally from Democrat Nancy Pelosi purporting to be a fundraising email for Republicans – in other words, an email that did *not* appear to be "designed to fool readers into thinking that it's really from Pelosi" The email nonetheless fooled a "gullible blogger" into believing Pelosi had authored it (DB: 44, citing http://talkingpointsmemo.com/muckraker/nancy-pelosi-sends-out-fundraising-email-for-gop) (accessed Nov. 13, 2013). Plainly, however, the email's author was not expecting to raise funds based on convincing recipients of the email that Pelosi was indeed the true author. Defendant's similar comparison of his case to an instance when pundit Tucker Carlson satirically impersonated pundit Keith Olbermann by emailing "crazy sounding rants" purportedly written by Olbermann, unintentionally causing some to believe Olbermann had authored the emails (DB: 35), is likewise inapposite to defendant's case. Carlson's deliberate lampooning of his rival with unlikely "rants," clearly designed to make fun of Olbermann and not actually to be attributed to him, markedly distinguishes his conduct from defendant's. By contrast here, as the Appellate Division recognized, 102 A.D.3d at 603, defendant's intent to

deceive recipients as to the authorship of the emails, not to parody them, had to be – and was – decisively proved.

D.

Defendant attacks on state law and federal constitutional grounds the court's definitions of the terms "intent to defraud," "benefit" and "injury." With respect to fraudulent intent in particular, it was defendant who asked 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" (A: 52). 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" (SA: 803 [Jury Charge: 1279]). The court's dictionary-inspired definition was remarkably similar to defendant's proposed instruction. Defendant broadly characterizes the instruction that the court delivered as improperly permitting "literally *anything*" to constitute a harm (DB: 34). But he has not explained why his similar proposed instruction was correct while the court's was so seriously flawed.

Defendant now seeks support in state law for his view that fraudulent intent must have a financial definition (DB: 45-48). However, as is evident from the charge request just detailed, defendant never asked the court to tell the jury that only financial benefits or harms could be considered. On the contrary, defendant conceded at trial that the benefits and injuries did *not* have to be financial (A: 50-51). His newfound objection to the instructions, on grounds other than that the precise instruction he requested should have been delivered, cannot be deemed a question of law preserved for this Court's review. *See People v. Whalen*, 59 N.Y.2d 273, 280 (1983).

In any event, as noted, this Court has rejected defendant's current restrictive interpretation of the term. *Kase*, 53 N.Y.2d at 991. Defendant nonetheless cites to legislative history for the proposition "that the type of 'fraud' the [New York] lawmakers intended to remedy was financial" (DB: 47). 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."

At trial, defendant did ask 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" (A: 53). 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 argues that the trial court mistakenly permitted the People to prove the falsity of defendant's accusations against Schiffman but precluded defendant from introducing evidence that his allegations were true (DB: 50). However, defendant misunderstands the nature of the crimes that he 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; no element of the crime turned on whether anything else he communicated in the process was true or false (SA: 805 [Jury Charge: 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" (SA: 805 [Jury Charge: 1281]), he had a right to speak freely "whether the speech [wa]s correct or incorrect, truthful or not, derogatory or positive" (SA: 804 [Jury Charge: 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, such as offering the manufactured confession as Schiffman's own. 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.

Somewhat in parallel to his arguments about defining fraud, defendant concomitantly claims to have been harmed by the trial court's failure to exclude certain benefits and injuries from the legal definitions of "benefit" and "injure" (DB: 34-35). To that end, defendant asked the trial 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," or "intending to abuse, deride, provoke, with the use of words, even vulgar words" (A: 50). 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" (A: 51).

However, there was 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).

As to the term "injure," it is not defined by statute at all, and thus 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 irrelevant whether what he said was true. In any event, as the Appellate Division found, "the evidence established that defendant intended harm that fell within the plain meaning of the term 'injure,' and that was not protected by the First Amendment, including damage to the careers and livelihoods of the scholars he impersonated." 102 A.D.3d at 602. Thus, there was no vagueness, because had the trial 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.

Still, defendant attacks the trial court for not issuing these instructions, and thereby defining the terms "benefit" and "injury" so broadly that his First Amendment rights were violated. But the instructions detailed *supra* at pp. 53-54 fully

addressed any First Amendment concerns that might have been applicable, obviating any need to distort the governing statutory provisions in the manner defendant 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 (SA: 802, 809 [Jury Charge: 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 (SA: 805 [Jury Charge: 1281]). The forgery counts required a finding that defendant intended to "defraud, deceive, or injure" (SA: 812 [Jury Charge: 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.

Thus, defendant's First Amendment claim was short-circuited by the instructions requiring proof of his overarching intent to defraud. As a result, defendant was surely not entitled to craft instructions that essentially immunized him

from criminal liability simply because he claims to have had noble motivation for his crimes.

Contrary to defendant's belief, neither *United States v. Alvarez* nor *Skilling v. United States* suggest that criminal statutes are vulnerable to either vagueness or First Amendment overbreadth challenges simply because they permit punishment for intending to cause benefits or harms that are not pecuniary or tangible. Specifically, defendant is wrong to say that *Alvarez* hinged crucially on the distinction between a mere attempt to gain respect and a "legally cognizable benefit" (DB: 40). In fact, what the Court targeted was the power of the government to outlaw a particular topic of falsehood. The crucial concern was stated thus: "Were the Court to hold that the interest in *truthful discourse alone* is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." 132 S. Ct. 2547-2548 (emphasis added). There was no attempt to define "material advantage" in a particular way, as this was not the crux of the reasoning; the concern was whether the government should have the power to impose an outright ban on lying about a particular topic. And as detailed *supra* at pp. 51-52, *Alvarez* plainly acknowledged that fraudulent speech would not enjoy the same protections as merely false speech. Here, of course, the statutes were applied to conduct during which defendant lied as part of a course of fraudulent behavior, rendering *Alvarez* wholly irrelevant to the discussion.

Skilling v. United States involved 18 U.S.C. § 1341, which outlaws using the mail "for the purpose of executing" any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Federal appellate courts before 1987 had interpreted the definition of "scheme or artifice to defraud" to include fraudulent schemes to deprive someone of "honest services" by way of "bribes or kickbacks." *See Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010). In 1987, however, in *McNally v. United States*, 483 U.S. 350, 352 (1987), the United States Supreme Court struck down the "honest services" construction because the federal statute simply did not say anything about "honest services." However, the Court did not say that such an intangible injury was impermissible – it merely invited Congress to amend the law. Thus, in 1988, Congress enacted a fix, explaining that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

In *Skilling*, the Supreme Court revisited the mail fraud statute. Contrary to defendant's apparent belief, the Court did not find that all frauds must implicate pecuniary benefits or harms. Instead, it found simply that that banning a "scheme or artifice to deprive another of the intangible right of honest services" would encounter "a vagueness shoal" unless the "right of honest services" were construed – consistently with the understanding of that term in the pre-*McNally* federal appellate decisions that Section 1346 sought to revive – to include only the loss of honest

services brought about by way of bribes or kickbacks. 130 S. Ct. at 2929. In other words, *Skilling* did not find some vagueness or overbreadth concern with "intangible" fraud statutes generally, but was concerned only with the potential for vagueness in the specific language of the particular statute construed in that case. This does not at all establish that the well-established and traditional terms in the New York statutes at issue here – "defraud," "benefit" and "injure" – are susceptible to any sort of vagueness challenge.[22]

In short, *Alvarez* and *Skilling* do not create a constitutional requirement that all fraud statutes must spell out tangible benefits or harms. Accordingly, and contrary to defendant's belief (DB: 45-48), this Court's holding in *People v. Kase* – that fraud need not involve "property or pecuniary loss," 53 N.Y.2d at 991 (affirming 76 A.D.2d at 537) – is unaffected by *Alvarez* and *Skilling*.

E.

As shown, any First Amendment right defendant may have had was fully protected by the instructions the court delivered. In reality, though, no First Amendment right of defendant's was at stake here. That is because the Penal Law

[22] In another case noting the limitation of the federal mail fraud statute to property-related frauds, the Supreme Court reiterated that this construction was required only because Congress had not been more precise in its enactment, and indeed the Court suggested that state fraud statutes should be *expected* to extend beyond mere pecuniary frauds. *Cleveland v. United States*, 531 U.S. 12, 27 (2000) ("[a]bsent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States").

provisions at issue do not regulate or restrict speech at all. They prohibit conduct, such as assuming the identity of another person (*see* Penal Law § 190.79[3]) or doing an act in such person's assumed character (*see* Penal Law § 190.25[1]), when accompanied by a prohibited mens rea. The Appellate Division appreciated and emphasized this point. That court stressed that the statutes in question "criminalized the act of impersonation and its unlawful intent, not the content of speech falsely imputed to the victims." 102 A.D.3d at 603. Likewise, the court ruled that defendant "was not prosecuted for the content of any of [his] emails, but only for giving the false impression that his victims were the actual authors of the emails." *Id.* Moreover, the Appellate Division saw through defendant's effort to cloak himself in the constitution, pointing out that the fact that the underlying dispute between defendant and his father's rivals "was a constitutionally-protected debate does not provide any First Amendment protection for acts that were otherwise unlawful." *Id.* at 602-603.

Rather than helping defendant's First Amendment argument, *United States v. Alvarez* actually provides an illustrative contrast. *Alvarez* involved a statute that was expressly directed at banning a certain type of speech – lying about having received a medal.[23] The First Amendment was controlling because the statute was not content-

[23] Defendant assumes that Alvarez would have been decided the same way if, instead of falsely claiming that he himself had won the Congressional Medal of Honor, he had falsely claimed that he was an identifiable other person who had won one, in a "pathetic attempt to gain respect" (DB: 42-43). Even if defendant's assumption were correct, *Alvarez* would be distinguishable from defendant's case precisely because the statute in *Alvarez* (Continued…)

neutral. On the other hand, the New York criminal statutes defendant was convicted of violating do not purport to target any particular topic of speech, and thus the First Amendment is not implicated at all. Obviously, too, neither *Alvarez* nor *Skilling* had anything to do with "internet discourse" (DB: 45); indeed, *Skilling* had nothing to do with the First Amendment at all.

In the end, contrary to defendant's intimation that he was prosecuted for his expression of his opinion, or as a result of governmental disapproval of his message about Professor Schiffman (DB: 49-51), the statutes under which he was convicted do not include elements that concern themselves with the content of his speech. Naturally, much of defendant's speech was introduced at trial, because his deceptive conduct that satisfied the elements of the crimes was committed primarily with words. But those words were admitted as evidence, not submitted for censorship. As noted, a defendant's First Amendment rights are not violated by the introduction at his trial of evidence of speech to prove the elements of crimes. *Wisconsin v. Mitchell*, 508 U.S. at 489 (First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent"); *see People v. Wagner*, 27 A.D.3d 671, 672 (2nd Dep't 2006). Thus, statutes prohibiting identity theft, criminal impersonation, and forgery, without targeting speech directly – even if they have the

(…Continued)
directly targeted speech, unlike the statutes of which defendant was convicted. Moreover, as discussed, the statute in *Alvarez* did not require proof of an intent to defraud.

incidental effect of criminalizing conduct committed by someone who wishes to express an idea, and even if proof of a defendant's motive includes evidence of the messages he wished to convey – cannot be deemed overbroad because they simply do not purport to criminalize conduct *based on* "its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

F.

Finally, a word is in order regarding defendant's complaint that the Appellate Division improperly relied on trademark law in rejecting his claims. In particular, he protests the court's reference to a definition of "parody" in a Second Circuit trademark case to conclude that his emails were not parodies (DB: 49-52). Plainly, the Appellate Division did not apply trademark law here. Rather, it simply cited for general principles cases that happened to involve trademark disputes. The Appellate Division committed no wrong by looking for guidance in another courts' understanding of a word that is undefined by statute. Courts rely on dictionaries for that sort of help, and defendant offers no reason why the Second Circuit is any less valid a source. Most importantly, there is no legal or logical reason why "parody" should have a different definition in the trademark and First Amendment contexts. And of course here, where the evidence so powerfully established that defendant wished to persuade the recipients that his emails were genuine, the precise definition of "parody" was academic.

* * *

In short, the court's instructions made it plain that what was "criminalized" here was the fraudulent conduct that defendant undertook *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, protected any First Amendment rights he may have had, and rejected his request for instructions that were wrong. As a result, defendant was convicted of specific crimes for plainly criminal conduct that fell squarely within the proscription of statutes which, as applied to defendant, were constitutionally sound.

POINT II

THE AGGRAVATED HARASSMENT COUNTS 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, Point II).

Defendant was convicted of three counts of Aggravated Harassment in the Second Degree (Penal Law § 240.30[1][a]), under counts 3 (Schiffman), 40 (Goranson) and 48 (Cargill) of the indictment, for having sent "written communications" that were "likely to cause annoyance or alarm" to Schiffman, Goranson and Cargill, while harboring "the intent to harass, annoy, threaten or alarm" those victims (SA: 810 [Jury Charge: 1286]). The written communications that were likely to (and which ultimately did) annoy and alarm defendant's victims consisted of defendant's deceptive emails to Schiffman's bosses and colleagues, and one to Schiffman himself, relating to the false plagiarism confession made to look as if it came from Schiffman; defendant's deceptive emails to Goranson's university boss purportedly from Peter Kaufman, attempting to obstruct Goranson's access to university computers; and defendant's deluge of deceptive emails to Cargill's university supervisors, colleagues and business associates, pretending to be various different credentialed critics genuinely concerned about Cargill's fitness for a degree. Defendant made his intention at least to annoy and alarm all three victims with these communications undeniable, as evinced by his proud boast to his mother that his campaign must be "maddening" to his targets and

that he was "out to get them" (SA: 893 [People's Exh. 15, p. 16] [July 26, 2008 email]; *see also* SA: 1107 [People's Exh. 48C] [emails wherein defendant and his brother discussed the timing of when they should "finish Goranson off," and agreed that their goal was "to set him up"]). Indeed, the fairest inference was that he wished to do far more than merely annoy and alarm them, in that he was actively attempting to affect their livelihoods by having Schiffman adjudicated a plagiarist and removed from the lecture circuit, by getting Goranson fired or banned from the library at his university, and by blocking Cargill from earning his doctorate.

Defendant argues that if his conduct toward these victims truly ran afoul of New York's aggravated harassment law, then the statute is unconstitutionally vague and overbroad (Point II). As defendant sees it, the statute was vague because it criminalized conduct that is merely annoying but should not be criminal, and it was overbroad because it criminalized his exercise of the right to free speech. All of defendant's arguments suffer the same common flaw: he misapprehends the nature of the conduct for which he was convicted. As already detailed, defendant was not convicted for having authored an intellectual campaign or for conveying unpopular opinions, nor was he convicted of crimes for each and every of the many hundreds of annoying emails and blogs he authored. Instead, defendant was convicted of these three counts for his intentionally harassing conduct against three specific victims, and this conduct fell squarely within the proscription of the statute.

As discussed more fully in Point I, *supra*, a statute is 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 Shack*, 86 N.Y.2d at 538; *Nelson*, 69 N.Y.2d at 307. A statute will not be deemed vague when it "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Shack*, 86 N.Y.2d at 538 (quoting *Petrillo*, 332 U.S. at 8). 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. at 361; *see Boyce Motor Lines*, 342 U.S. at 340. 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 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. Lastly, a claim that a statute is "overbroad" is 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. at 520) (emphasis added). Overbreadth rarely plagues "ordinary criminal laws that are sought to be applied to protected conduct," and will be invoked to invalidate such neutral laws only "sparingly" and "as a last resort," *Broadrick*, 413 U.S. at 613.

Under those standards, Penal Law Section 240.30(1) is 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 (SA: 810, 827 [1286, 1303]). Plainly, the evidence established this crime, as "this language criminalizes anyone who intends to annoy someone and does so by distributing a written communication that is likely to annoy" (DB: 53). Indeed, as even defendant recognizes, his communications were not just "annoying," but so disturbing that the victims were likely to have found them "intolerable" (DB: 54, 57). Likewise, as already noted and as defendant appears to concede (DB: 54), there can be no doubt that defendant intended at least to "annoy" his victims, and probably worse.

Regardless of whether the statute could somehow be deemed vague as to someone else on some other facts, therefore, it was not the least bit 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). His conduct clearly violated the statute, and any complaint that the law should not criminalize such conduct is best addressed to the Legislature.

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: 58-60). 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 (SA: 957 [People's Exh. 16-U]). Defendant's argument that this email was neither intended to nor likely to harass Schiffman, but instead to be somehow helpful or sympathetic (DB: 59-60), is disingenuous. The email was plainly designed to hit Schiffman's eyes in the midst of defendant's choreographed electronic assault upon the unsuspecting man, and to convey the fear that if he did not take the recommended action, the brewing storm could become a maelstrom. Given defendant's declared intentions toward his perceived adversaries, and the actual troubles he ultimately caused them, the Iago-like friendliness of the email borders on comical.[24]

In any event, the law does not support defendant's view that only communications sent directly to the victim can be intended to harass that victim. After all, the law proscribes sending a written communication to a "person" while

[24] The effect on Professor Schiffman's life was particularly acute. 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 (SA: 106 [Schiffman: 148], 205 [Stimpson: 250], 269-270 [Foley: 319-320]). Defendant's repeated impersonation of Schiffman and his multiple emails to Schiffman's bosses and colleagues – and one to Schiffman himself – were all accompanied not only by the intent to defraud, but at the same time by defendant's almost pathological desire to harass, annoy and alarm Schiffman with communications that were virtually certain to do so.

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 and discussed *infra* at pp. 80-81). 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.

In that light, defendant's true complaint cannot really be that the statutory language is vague for failing to provide notice that his conduct would violate it, as it is perfectly plain that the elements of aggravated harassment are met by the conduct defendant was charged with committing. His real argument is that the statute is overbroad for criminalizing that conduct, which, according to him, amounted to speech that must be 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 communications. 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, and neither element discriminates based upon the substance of the communication used to achieve that annoyance.

To further 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 I, *supra*, 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" (SA: 804 [Jury Charge: 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" (SA: 804-805 [Jury Charge: 1280-1281]). Accordingly, there was no danger that the statute's reach would be stretched to cover situations where complainants merely feel annoyed by "criticism of their scholarship or actions relating to an academic controversy" (DB: 54). Defendant's jury was required to find that his intent had been much more nefarious than that before they

could convict him, and their verdict negated the possibility that his conduct was merely expressive in nature. Moreover, as demonstrated, and as the associated counts of other criminal conduct such as criminal impersonation confirm, defendant strayed miles outside the usual bounds of internet criticism and debate (DB: 57-58).

In *People v. Smith*, the Appellate Term 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 listed – without suggesting that the list was meant to be exhaustive – five sorts of harassing communications that would fall within the purview of the statute, including, as pertinent here, "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 designed to interfere intolerably with Cargill's, Goranson's and Schiffman's lives. Cargill and Schiffman in particular had to spend considerable time dealing with bosses and colleagues confronting them in response to defendant's barrage of emails; Cargill felt that his receipt of his doctorate could be in jeopardy as a

result, and Schiffman actually had to write a defense to plagiarism allegations that, had they been substantiated, could have ruined his career. The victims here were not oversensitive academics being "thin-skinned" about academic criticism (DB: 56-57); they were confronting a campaign to destroy their livelihoods.

Defendant relies heavily on the Appellate Division's decades-old decision in *People v. Dupont*, 107 A.D.2d 247 (1st Dep't 1985) (DB: 54-56). Dupont 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 Dupont's prolific distribution, over a period of several months, of a magazine mocking the attorney's sexual orientation and practices. Regarding that conduct, the indictment charged that Dupont, "with intent to harass, annoy, threaten and alarm another person, communicated and caused to be initiated a written communication with [the complainant], to wit: a magazine entitled 'Now East,' in a manner likely to cause annoyance and alarm." *Dupont*, 107 A.D.2d at 250.

The Appellate Division affirmed Dupont's convictions 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 Appellate Division 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. In fairly tentative language, the Appellate Division held alternatively that the statute did not proscribe Dupont's conduct in the first place, that the statute was vague and overbroad as applied to Dupont, and that the statute was unconstitutional on its face. 107 A.D.2d at 252-253.[25]

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. 76-77, 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. In *Dupont*, by contrast, the messages were simply posted publicly and not delivered to the victim or his colleagues with the expectation

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[25] The Second Circuit found *Dupont* inconclusive as well. As defendant notes (DB: 56), 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 Court held that a New York City police officer should not have arrested the plaintiff under the aggravated harassment statute because the statute had been found unconstitutional. Relying in part on *Dupont*, the District Judge had 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.'" 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* merely found the statute unconstitutional as applied to the "facts before it" and that its holding was otherwise "not entirely clear." *Vives v. City of New York*, 405 F.3d 115, 117 n.3 (2nd Cir. 2005).

that they would confront him with it. 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, reveals that his primary intent was not to communicate ideas, 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.

Moreover, far beyond the mere criticism, embarrassment or opprobrium at issue in *Dupont*, and far from merely being "really mean" to someone (DB: 56), defendant was aggressively attempting to ruin his victim's lives. 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. That possibility was not 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.

Defendant suggests that aggravated harassment is best understood as criminalizing conduct only when accompanied by some degree of threat of violence, over and above mere annoyance (DB: 57). However, defendant's construction would render the statute largely pointless, because 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"). Notably, too, the conduct in *Smith* had no violent overtones at all, and indeed that court noted that one purpose of enacting the harassment statute was to provide a remedy for conduct that had the effect of "driving a person to distraction." 89 Misc. 2d at 790.

Defendant also seeks support from *People v. Dietze*, 75 N.Y.2d 47 (1989) (DB: 56-57). 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 the harassment statute 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," this Court 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 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*.

In sum, the Legislature has made it a crime to commit the elements of aggravated harassment, and they have done so without reference to the content of any speech that may be expressed in the process. The conduct with which defendant was charged plainly satisfied the elements of that crime, defeating his vagueness argument, and the statute cannot be viewed as overbroad.

POINT III

DEFENDANT WAS PROPERLY CONVICTED OF UNAUTHORIZED USE OF A COMPUTER FOR USING NEW YORK UNIVERSITY'S COMPUTERS TO COMMIT CRIMES; PENAL LAW SECTION 156.05 WAS NOT VAGUE AS APPLIED TO DEFENDANT (Answering Defendant's Brief, Point III)

Finally, defendant contends that the last count of the indictment, charging him with unauthorized use of a computer under Penal Law Section 156.05, was vague (Defendant's Brief, Point III). Here he is wrong because he ignores the jury instructions. Regardless of whether the statute could conceivably be vague as applied to another defendant, as applied to this defendant it was perfectly clear: defendant's jury was instructed that he could be convicted of unauthorized use of NYU's computers only if they found that he knowingly used those computers to commit crimes in violation of the NYU's computer use policy. As the statute was applied to defendant, therefore, he could only have been convicted of this crime if he knew he was unauthorized to use the computers for the purpose of committing crimes with them, and committed crimes with them anyway.

As discussed more fully in Points I & II, *supra*, a statute is 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 Shack*, 86 N.Y.2d at 538; *Nelson*, 69 N.Y.2d at 307. If a statute is invoked to prosecute conduct under which "reasonable persons

would know that their conduct is at risk" of violating it, it is simply not vague. *Maynard v. Cartwright*, 486 U.S. at 361; *see Boyce Motor Lines*, 342 U.S. at 340; *Shack*, 86 N.Y.2d at 538. And as noted, even where the limits of a statute's potential reach 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.

Here, 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" (SA: 812-813 [Jury Charge: 1288-1289]). *See* Penal Law Section 156.05. 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" (SA: 813-814 [Jury Charge: 1289-1290]). Specifically, defendant was charged with secretly using NYU computers to forge emails in furtherance of his 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 authorized. After all, the Bobst Library code found in defendant's apartment when he was arrested expressly requires computer users there to abide by NYU's computer use policy, which unsurprisingly requires computer users

to respect "all applicable laws" (SA: 839 [People's Exh. 1-B] ["Policy on Responsible Use of NYU Computers and Data"], 1106 [People's Exh. 42-B] [Bobst Library Code]). Indeed, defendant concedes on appeal that he "[o]bviously" knew he was not authorized to use the NYU computers to commit crimes (DB: 66). That concession bespeaks the utter reasonableness of the proposition that a university making its computers available to alumni expects them not to commit crimes with 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 the nuances of NYU's computer use policy, that defined defendant's crime here (*cf.* DB: 65 [lamenting that there are no "legislated guidelines" clarifying the conduct that would violate this statute]). Thus, whether or not the statute could have been vague in another prosecution, it was not vague in defendant's case.

Defendant nonetheless seeks reversal on the mistaken premise that his lack of authorization to use NYU's computers might have been predicated merely on a violation of any aspect of NYU's computer use policy. He asserts that the policy's requirements are so broad, vague and standardless that a defendant might not be able to tell whether he is in violation of them, and is thus left at the mercy of NYU and prosecutors as to whether his computer use constituted a crime. In support of his position he offers *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009), a federal trial court's decision finding vagueness in a federal statute. But the facts of *Drew* are not at all similar to defendant's case, given that the terms of service of a website are not

comparable to a permissible use policy for physical computers, and that defendant's jury was instructed to consider a very narrow basis for his criminal liability.

Drew had created a fake MySpace profile in order to use it to help her teenaged daughter harass another teenaged girl who, as a result of that harassment, later committed suicide. As pertinent to this discussion, a federal crime is committed when one engages in interstate conduct and "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains … information." 18 U.S.C. 1030(a)(2)(C). There was no suggestion that Drew lacked authorization to use the computer with which she physically engaged in the charged conduct. Instead, the crime charged her with accessing the MySpace computers without authorization, and that lack of authorization was based on her violating MySpace's stated Terms of Service by creating a fake profile. The District Court found this construction vague, in part because it was unclear which violations of a website's terms of service would establish lack of authorization or whether all such violations would do so. *Drew*, 259 F.R.D. at 451-452, 462-467.

Putting aside that the federal statute at issue in *Drew* is not identical to the state statute under which defendant was convicted, the facts of *Drew* are so different from defendant's case that application of that holding here would make no sense. First, the lack of authorization to access the computer at issue in *Drew* was established by Drew's violation of the MySpace "terms of service," which took place when she used her own computer to remotely access the MySpace computers in another state. In

other words, she was being held accountable for unlawfully accessing a computer she could not even see, for using her own computer in a way that caused it to interact with that remote computer via the internet. Here, by contrast, the computer defendant unlawfully used was the one at which he sat, in the library of his alma mater, while he physically committed the elements of crimes at its keyboard. More fundamentally, while the defendant in *Drew* might have been convicted for any manner of violation of a website's terms of service, it was clear from the judge's instructions to defendant's jury that this was not so for him: defendant could only be convicted if he violated the computer use policy by committing crimes on the computers.

Defendant suggests that even if he knew he should not commit crimes on NYU's computers, the statute was vague because he "did not know, and could not know, that using an NYU computer to commit a crime was itself a crime separate and distinct from the crime he was allegedly committing" (DB: 67). However, such knowledge of the law is not an element of unauthorized use. Indeed, he would still be criminally liable for using the computers without authorization even if he affirmatively believed that doing so was not a crime, so long as he knew that he was using the computers without authorization. After all, this claim boils down to the incorrect one that ignorance regarding this particular statute is a defense. *See* Penal Law § 15.20(2) ("A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an

offense"); *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) ("ignorance of the law generally is no defense to a criminal charge").

All that defendant had to know was that his use of the NYU computers violated NYU's computer use policy. Because that policy expressly required compliance with all "applicable laws," no rational person could have failed to understand that use of the computers to violate the Penal Law was not authorized by the policy. Indeed, given defendant's concession that he knew he should not use the NYU computers to commit crimes, there can be no serious argument that he might have thought he was authorized to do so.

In short, a federal trial court's decision invalidating the application of a federal statute to conduct unlike defendant's casts no shadow over the plain language of New York's unauthorized use statute. There was no vagueness here.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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