

Docket No.

In the Supreme Court of the United States

RAPHAEL GOLB, PETITIONER

v.

ATTORNEY GENERAL OF
THE STATE OF NEW YORK

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

Ronald L. Kuby
Counsel of Record
Law Office of Ronald L. Kuby
119 West 23rd Street, Suite 900
New York, New York 10011
ronkuby@aol.com
212-529-0223

Joel B. Rudin
LAW OFFICES OF JOEL B. RUDIN, P.C.
Carnegie Hall Tower
152 West 57th Street, 8th Floor
New York, New York 10019
jbrudin@rudinlaw.com
212-752-7600

QUESTIONS PRESENTED

Petitioner, Raphael Golb, waged a campaign of criticism bearing on the heavily publicized dispute over the Dead Sea Scrolls. In that context, Golb impersonated a public figure in a series of five short email “confessions” calling attention to alleged academic misconduct. Such acts of impersonation, shading into deadpan satire and parody, are frequently deployed in controversies on the Internet. Despite the long history of this form of discourse, Golb was prosecuted and convicted of criminal impersonation and forgery. The appellate courts upheld Golb’s convictions, finding that while it would not be a crime if Golb merely intended to “embarrass,” he actually intended to “damage a reputation.” These decisions raise two basic issues:

1. May the State of New York, consistent with the First Amendment, criminalize emails allegedly intended to damage the reputation of a public figure, despite the principle of overbreadth and this Court’s longstanding position that reputational damage is beyond the scope of the criminal law?
2. May the State of New York, consistent with the Fourteenth Amendment and the principle of vagueness, separate permissible from criminal speech on grounds of an intent to “damage reputation” rather than “embarrass”?

PARTIES TO THE PROCEEDING

Petitioner, Raphael Golb, was appellant and cross-appellee in the United States Court of Appeals for the Second Circuit. Respondent, the Attorney General of the State of New York, was appellee and cross-appellant in the United States Court of Appeals for the Second Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Raphael Golb respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 870 F.3d 89. The opinion of the New York State Court of Appeals is reported at 23 N.Y.3d 455.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Cons. Amend. 1.

2. The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The criminal impersonation statute, N.Y. Penal Law § 190.25(1), provides, in pertinent part:

A person is guilty of criminal impersonation in the second degree when he ... [i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another[.]

4. The forgery statute, N.Y. Penal Law § 170.05, provides, in pertinent part:

A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument.

INTRODUCTION

For the first time since the abolition of criminal libel, *see Ashton v. Kentucky*, 384 U.S. 195 (1966), New York's Court of Appeals and the United States Court of Appeals for the Second Circuit in this case have held that false writings made with the "intent to damage a reputation" may be criminalized. These courts have upheld, on direct appellate and federal

habeas review, respectively, petitioner's conviction for criminal impersonation and forgery for transmitting emails in another person's name that allegedly were intended to damage that person's reputation. Notwithstanding the First Amendment's protection of the free exchange of ideas and the Fourteenth Amendment's vagueness prohibitions, petitioner faces two months in prison for using impersonation—a rhetorical device with a long history—to call attention to his ideas and to criticize a well-known academic embroiled in an international, and highly public, dispute regarding the Dead Sea Scrolls.

Until petitioner's prosecution, New York State's criminal impersonation and forgery statutes had long been confined to their traditional scope: false writings or impersonations aimed at obtaining financial benefit, inflicting financial loss, or interfering with legitimate State functions; and other limited bases for prosecution that were considered to be non-offending of the First Amendment and were well-defined in the common law. Now, however, as a result of this case, anyone in the Second Circuit's jurisdiction may be prosecuted for criticizing another, including a public figure, in a writing in that person's name. So long as damage to reputation is a goal of the communication, it is irrelevant that the substance of the communication is true and that it was made in good faith, that is, with a desire to stimulate a public debate about a matter of public interest. Raphael Golb faces two months of imprisonment for this newly-minted crime.

Under the Second Circuit’s decision, many of those who engage in parody, satire, and such common internet practices as “click-bait” impersonation, with the intent to undermine others (even by exposing the truth about them) can today be prosecuted at the whim of law enforcement. The precise boundaries of legitimate ridicule, deadpan mimicry and personal criticism are difficult if not impossible to define. The criminal impersonation and forgery statutes, as now interpreted by the New York Court of Appeals and the Second Circuit, allow prosecutors to criminalize protected parody and other forms of “false” speech engaged in with the intent to expose misconduct and to stimulate public debate. The wild overbreadth of this newly-created crime of impersonating another to damage a reputation, and its chilling effect on the vast number of people who use impersonations (or avatars) to communicate in cyberspace, poses a clear danger to undisputed and clearly-established First Amendment rights and vagueness principles long established under Due Process.

The Second Circuit’s error, if uncorrected, threatens other legitimate communications. In view of this danger, *certiorari* should be granted, as this Court has done in other cases involving the risk of deterring legitimate free speech. *See, e.g., Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 4-5 (2004) (“In light of the obvious importance of the decision, we granted certiorari to review the First Amendment issue....”), *abrogated on other grounds by Lexmark Int’l. Inc. v. Static Control Components, Inc.*, ___ U.S.

_____, 134 S.Ct. 1377 (2014); *United States v. Providence Journal Co.*, 485 U.S. 693, 698 (1988) (“because of the importance of the [First Amendment] issues we granted certiorari.”); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698 (1986) (“We granted certiorari to decide whether the First Amendment bars enforcement of a statute”); *see also*, *Delaware Strong Families v. Denn*, __ U.S. ___, 136 S.Ct. 2376 (2016) (Justice Thomas dissenting from denial of certiorari on ground of the importance of the First Amendment issue).

STATEMENT

A. Factual Background

This case arose out of a decades-old controversy regarding the Dead Sea Scrolls. The controversy has two primary dimensions: (1) scholarly disagreement over who wrote the Scrolls and hid them in caves to the northwest of the Judaean Wilderness site known as Khirbet Qumran, and (2) widely-publicized allegations of misconduct against members and allies of an academic “monopoly” that for nearly half a century, through the early 1990s, controlled physical access to the Scrolls.

Raphael Golb’s father, Norman Golb, professor emeritus at the University of Chicago’s Oriental Institute, is a proponent of the theory that the Scrolls are an eclectic mix of texts written by various Jewish groups, which likely were removed from libraries in

Jerusalem and deposited in caves for safekeeping when Roman legions besieged and sacked the Jewish metropolis in 70 CE. This view, increasingly supported by major archaeologists over the past two decades, was strongly opposed by members of the Scrolls monopoly group, who had long promoted the theory that a radical sect lived at Khirbet Qumran and wrote the Scrolls there (the “sectarian theory”). At least one defender of the sectarian theory, Lawrence Schiffman of New York University (“NYU”), then sought to reconcile it with various ideas originally developed by the theory’s critics—admitting, for example that many of the Scrolls came from “elsewhere.” As evidence at Petitioner’s trial showed, Schiffman was accused of plagiarism on account of his failure to openly acknowledge the original source of these ideas, Norman Golb. Tr. 66, 78, 207-17; Trial Exhibits. 40A7, 40A8, 40B3.

Raphael Golb’s internet campaign—the subject of this case—focused on the ethics of public Scroll exhibitions which, he argued, involved an effort to suppress debate similar to what occurred during the 1948-1993 “monopoly” period. His writings focused on widely publicized allegations that the defenders of the sectarian theory—in particular those involved in public exhibitions of the Scrolls—had engaged in a pattern of professional misconduct. During a three-year period from 2006 to his arrest in March 2009, he wrote and distributed pseudonymous online articles that severely criticized the conduct of several defenders of the sectarian theory.

Golb also sent pseudonymous email complaints calling attention to his articles. Golb's emails included links to the articles,¹ and used a variety of techniques (today often called "click-bait" by Internet experts) to encourage readers to click on the links and read the articles. These techniques included sending out messages in the "names" of several academics. At present, only one of the alleged "victims" of this campaign, the aforementioned Lawrence Schiffman of NYU, is still directly pertinent to the case, as all the other counts of conviction have been reversed, vacated, or dismissed.

Schiffman, at the time of Golb's writings, was a department chairman at NYU. He had played a role in setting the agenda of the Scroll exhibits that were the key focus of Golb's campaign. Tr. 98-99. By his own admission, he was a public figure. Tr. 202-203. Golb opened an email account entitled larry.schiffman@gmail.com, and sent five emails from this address. The emails were sent to members of Schiffman's department (about 15 people), two deans, the provost, the NYU student newspaper, and Schiffman's four graduate student teaching assistants. Appendix C, at 54a-58a; JA 1130, 1136-1139.²

¹ A hyperlink, or "link" for short, is a reference to an Internet page; when readers click on the link they are taken directly to the page.

² The emails are reproduced at Appendix C and in the Joint Appendix ("JA") filed with the Second Circuit, at JA 1130, 1136-1139.

The emails to NYU officials referred to “someone . . . intent on exposing a minor failing,” and then followed up with a “confession” that devolved into sharp academic mockery:

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 that 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.

Appendix C at 56a; JA 1136, 1137.

Challenging credulity, the emails declared: “My career is at stake.” Then, in blue typeface, came a link to an Internet article discussing allegations, originally made by Israeli academic and journalist Dr. Avi Katzman, that Schiffman had plagiarized Raphael Golb’s father. Recipients who clicked on the link and read the article saw that it began with a salvo mocking Dr. Schiffman’s television persona and a prominent quote, in bold typeface, from the satirical writings of Jonathan Swift. Trial Exh. 40B3. The article then discussed (1) the well-known accusation by Katzman that Schiffman had “adopted portions of Golb’s theory without acknowledging as much, and without appropriate credit,” and (2) NYU’s failure to investigate the matter in accordance with the institution’s faculty code of conduct. *Id.* Finally, after

the blue link to this article, came the name “Lawrence Schiffman,” followed by the word “professor” typed with a lower-case “p.” *Id.*

A similar email was sent to the NYU provost and forwarded to the campus newspaper, with the absurd admonition: “I must ask you not to publish a word about this in the Washington Square News, should it be brought to your attention.” Appendix C at 55a.

The emails to Schiffman’s teaching assistants and colleagues portrayed the author as ordering recipients to suppress discussion of the same “minor failing”—and of the same linked article. They stated:

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.

Appendix C at 54a; JA 1130, 1139. These emails, too, despite the preposterous—and, in an academic context, hardly credible—command “not to mention the name” of the allegedly plagiarized scholar and “to prevent” university students from seeing criticism, prominently linked the article discussing Avi Katzman’s allegations.

Schiffman testified at Golb’s trial that “no one believed” the self-confession to the plagiarism accusations. Tr. 223-24. He conceded, however, that

he had been confronted with the accusations several times in the past, including notably in Katzman's January 29, 1993, interview in Israel's daily paper *Haaretz*. See A. Katzman, "Anshe Hame'arot," *Haaretz*, Musaf, p. 50. Jan. 29, 1993. He also conceded that the allegations had at least some truth. *Id.* at 90. And he allowed that the list of publicly accessible blogs mentioning the subject is "very, very long." *Id.* at 136.

The witnesses who testified at trial, and who had read the emails, immediately recognized that the messages were unlikely to have originated from their ostensible author. One of Schiffman's superiors at NYU testified that the "impersonation" and "false confession" format of the emails made them hard to take seriously. *Id.* at 322. Another said that her reaction on receiving them was immediate skepticism: "This doesn't make sense." *Id.* at 238, 250. She recognized straightaway that the messages weren't genuine, and that the signatures and addresses used (including the lower-case "p" in the word "professor") weren't Schiffman's. "[T]hat's just not how he signs his name." *Id.* at 262-63. At no point did anyone testify that the emails caused even the slightest damage to Schiffman's reputation.

B. Procedural History

A New York County grand jury charged Raphael Golb in a 51-count indictment, including two felonies, that was filed on March 5, 2009. Of relevance

to this petition, the indictment contained five counts of criminal impersonation in the second degree, and five counts of criminal forgery in the third degree for each of the five Larry.Schiffman@gmail.com emails. The self-accusing “minor failing” email with the request to suppress the linked article was sent to Schiffman’s graduate students, Appendix C at 54a; JA 1130, and to several of his colleagues. Appendix C at 58a; JA 1139. The “simply the politics of the Dead Sea Scrolls” email justifying the misrepresentation of Golb’s ideas for fear of being “banned from conferences around the world” was sent to an NYU Provost, Appendix C at 57a; JA 1138, and an NYU Dean, Appendix C at 56a; JA 1137, again with a link to the article. The email that was sent to the Dean was then forwarded to the NYU student newspaper with the admonition not to publish “a word about this....” Appendix C at 55a; JA 1136.

The criminal impersonation statute, N.Y. Penal Law § 190.25(1), provides, in pertinent part:

A person is guilty of criminal impersonation in the second degree when he ... [i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another[.]

The forgery statute, N.Y. Penal Law § 170.05, provides, in pertinent part:

A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument.

At trial, Golb sought to dismiss these counts as overbroad and unduly vague. JA 1376-1411. He objected to jury instructions that allowed the terms “deceive,” “injure” and “benefit” to mean any harm or injury, no matter how ethereal or minimal. Counsel proposed instructions that would have allowed a finding of guilt only for types of harms, benefits, and deceptions that had traditionally been criminalized, that were not entitled to First Amendment protection, and that were sufficiently well-defined to avoid the peril of vagueness. JA 1412-1421.

Rejecting counsel’s requests and overruling counsel’s objections, the trial court instructed the jury that it could convict if it found intended benefit or harm, without defining those terms. The jury convicted Golb on 31 counts, including the five Schiffman criminal impersonation and five forgery counts. The Appellate Division affirmed. *People v. Golb*, 102 A.D.3d 601 (1st Dep’t 2013).

In a further appeal to the New York Court of Appeals, Golb argued that the absence of limiting jury instructions made the criminal impersonation and forgery statutes unconstitutionally overbroad. Recognizing that Golb had neither sought a benefit from nor defrauded anyone in any traditional sense,

the New York Court of Appeals found that the term “injure” “cannot be construed to apply to *any* injury,” but rather is limited to intent to cause 1) “a tangible pecuniary injury,” 2) “interference with governmental operations,” or 3) harm to “reputation.” *People v. Golb*, 23 N.Y.3d 455, 455-56 (Ct. App. 2014) (emphasis in original). The first two types of intended injuries encapsulated the traditional scope of the criminal impersonation statute; the third was created in this case by the New York Court of Appeals.

Based upon that ruling, the majority parsed the email messages and found “sufficient” evidence that the emails impersonating Schiffman and two other academics were sent “with intent to do real harm” to reputation. *Id.* at 466. Meanwhile, the court affirmed the forgery convictions in a single paragraph that did not purport to narrow the statute but held only that “[t]here was sufficient evidence to show that defendant deceived people by sending emails from accounts in the name[] of Schiffman.” *Id.* at 468. Then-Chief Judge Lippman partially dissented on the ground that the First Amendment required vacatur of all the criminal impersonation and forgery convictions. *Id.* at 469-71 (Lippman, C.J., dissenting). The Court of Appeals subsequently denied a motion for reargument, which challenged the conviction on a damage-to-reputation theory that had not been presented to the jury at trial, with no explanation. *People v. Golb*, 24 N.Y.3d 932 (Ct. App. 2014).

Golb then moved for habeas corpus relief pursuant to 28 U.S.C. §2254, challenging all

remaining counts of conviction. Carefully reviewing the emails in question, the district court vacated two of the criminal impersonation counts on the grounds that the emails involved were “perplexing” or could have been written with the intent to inform, rather than damage a reputation, but otherwise denied and dismissed the habeas application. *Golb v. Attorney General of the State of New York*, No. 15-cv-1709, 2016 WL 297726 (S.D.N.Y. Jan. 21, 2016). It did however, grant a certificate of appealability.

The Second Circuit Court of Appeals then affirmed in part and reversed in part. The court held that the adoption of “harm to reputation” as a basis for conviction under the criminal impersonation statute neither rendered the statute facially overbroad nor unconstitutionally vague, and that such harm also satisfied the definition of “deceive” under the forgery statute (“to cheat, defraud, [or] deprive of by deception”) to satisfy the statutory requirement of injury. *Golb v. Attorney General of the State of New York*, 870 F.3d 89 (2d. Cir. 2017) (citing “Deceive,” *The New Shorter Oxford English Dictionary* (1993)). The court vacated an additional two counts on the grounds that the emails involved may have been intended only to “embarrass” or “cause annoyance,” but otherwise left the district court’s judgment intact. *Id.* at 101. Thus, petitioner stands convicted, and is facing imprisonment, for intending to injure a well-known academic’s reputation through the rhetorical device of impersonation, using emails as his vehicle.

REASONS FOR GRANTING THE PETITION

I. Under Clearly Established Law, the Second Circuit’s Construction of the Criminal Impersonation and Forgery Statutes Renders the Statutes Unconstitutionally Overbroad

The creation of an offense that has the material element of intent to cause injury to a reputation is a content-based restriction on speech. This Court made clear in *Reed v. Town of Gilbert*, ___ U.S. ___, 135 S.Ct. 2218 (2015), that if a restriction is based on the function or purpose of the communication, it is by definition content-based:

Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Id. at 2227. *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2009) (even though a law “may be described as directed at conduct,” when “the conduct triggering coverage under the statute consists of communicating a message,” the law should be viewed as a speech restriction).

The intent to damage the reputation of another can be gleaned only from examining the words used in the communication, rendering the statute content based. For this reason, the reviewing courts in this case, in applying the damage-to-reputation requirement they have fashioned, have been forced to carefully parse the language petitioner used in order to conclude, as to various counts, that he did, or did not, have the requisite intent. See *People v. Golb*, 23 N.Y.3d 455, 466 (Ct. App. 2014) (vacating count of conviction for “email sent . . . to [a museum curator], asking . . . whether she was planning to answer Professor Golb’s critique,” because “this email sent in another person’s name does not prove the requisite intent to cause injury, either to reputation or otherwise.”); *Golb v. Attorney Gen. of the State of New York*, No. 15-cv- 1709, 2016 WL 297726 at *12 (S.D.N.Y. 2016) (vacating counts of conviction for “perplexing” emails whose language suggests a desire to “draw attention to [Norman Golb’s] work . . . or to obtain some ‘slight’ personal satisfaction,” rather than to cause reputational harm); *Golb v. Attorney Gen. of the State of New York*, 870 F.3d 89, 100-101 (2d Cir. 2017) (vacating counts of conviction for emails whose language manifests a “mere desire to antagonize,” rather than to cause reputational harm, or whose intent is “obscure,” and vacating counts of conviction for additional emails whose language, according to the court, manifests an intent “to embarrass . . . without actual injury to . . . reputation,” or “to cause consternation . . . or annoyance . . . rather

than any tangible, pecuniary, or reputational impact”).

Under this Court’s jurisprudence, only speech that enters into one of nine “traditional” unprotected categories can be regulated or criminalized. *See United States v. Alvarez*, 567 U.S. 709, 722 (2012); *see also United States v. Stevens*, 559 U.S. 460 (2010). Impersonating another with the intent to “damage a reputation” does not fall into any of those categories. Even under the deferential AEDPA standard that applies in this case under 28 U.S.C. § 2254(d), the New York courts’ creation of a new category of speech subject to criminal prosecution violates, or constitutes an unreasonable misapplication of, clearly established First Amendment law.

In a series of seminal First Amendment decisions more than half a century ago, this Court held that libel is protected speech unless it is *false and malicious*, that criminal libel statutes were subject to the same limitation, and that a criminal libel statute was unconstitutional. *See New York Times v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Ashton v. Kentucky*, 384 U.S. 195 (1966).

Furthermore, after deciding *Sullivan*, *Garrison*, and *Ashton*, the Court went on to hold that satire, no matter how damaging to a reputation, is a traditional form of speech protected by the “great principles of the free exchange of ideas.” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

The Second Circuit’s decision has the potential to criminalize vast swaths of hitherto protected speech. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (explaining that a “danger to freedom of discussion” is posed by “a penal statute” that “sweeps within its ambit other activities that, in ordinary circumstances, constitute an exercise of freedom of speech,” because the “existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials . . . results in a continuous and pervasive restraint on all freedom of discussion *that might reasonably be regarded as within its purview*”) (emphasis added). While the Second Circuit recognized that a statute that punishes, on grounds of reputational damage, a parody “that succeeds” would be unconstitutionally overbroad, 870 F.3d at 102, it erred in concluding that courts and juries can meaningfully distinguish parodies “that succeed” from impersonations intended solely to damage reputation such that a “substantial amount of protected speech” will not be criminalized. *Id.* at 101-02, citing *United States v. Williams*, 553 U.S. 285, 292-93 (2008). Under such a standard, the only parody that is safe from prosecution is satirical impersonation so obvious that it loses its bite as parody. “[I]t is the nature of satire that not everyone ‘gets it’ immediately.” *Farah v. Esquire Mag.*, 736 F.3d 528, 536 (D.C. Cir. 2013). It is a feeble and toothless parody that deceives and injures no one.

Satire and parody are notoriously imbued with anger, are often written in an intentionally confusing

and deadpan manner, and frequently seek to damage reputations by exposing misconduct. Indeed, the deceptive satires and hoaxes published (always pseudonymously) by authors like Jonathan Swift³, Daniel Defoe⁴, Benjamin Franklin⁵ and Mark Twain⁶,

³ Swift's pseudonymous "Bickerstaff" hoax first predicting the date of, and then falsely announcing, the death of the almanac-maker John Partridge (mocking, and harming, the latter's reputation as an author of horoscopes), as well as his "Tale of a Tub" and "Modest Proposal" (also published pseudonymously) were taken seriously by hundreds of readers, including Church authorities. Later editions of the "Tub" included a mock apology, explaining their satirical nature.

⁴ Defoe's "The Shortest-Way with the Dissenters," published pseudonymously in 1702, was a satire of the Tories so devastatingly deadpan and unrecognized by readers that its author had to be hunted down and imprisoned for seditious libel.

⁵ Franklin displayed his talent for unknown, unexpected, and "deceitful" satire in writings like the "Edict of the King of Prussia" (1773) and in a variety of epistolary hoaxes ("signed" by the likes of Captain Samuel Gerrish and naval fighter John Paul Jones) that notoriously continued to fool readers and, in some instances, to harm reputations even long after his death.

⁶ One of Twain's most popular hoaxes—an article entitled "A Bloody Massacre Near Carson"—described a murderous rampage by a citizen of his town who was actually a quiet, peace-abiding individual; it was distributed by the national press. See H. Silverstein and C.

the famous “Letters of Obscure Men” to which we owe the word “obscurantism,”⁷ and the fake, satirical, and embarrassing “memoirs” and “letters” attributed to French nobles during the eighteenth century,⁸ all manifestly relied for their impact on the specific expectation that many readers would *not* understand that they were reading fictions—and would then realize that the joke was on *them* when they became apprised of that reality.

Arnold, *Hoaxes That Made Headlines* (New York: Julian Messner, 1986) at 82.

⁷ Readers around Europe were notoriously fooled by these “letters,” today considered a “standard work of European humanism,” and three of which impersonated noted Catholic theologians of the time. *See, e.g.*, Tr. F.G. Stokes, *On the Eve of the Reformation: “Letters of Obscure Men”* (New York: Harper Torchbooks, 1964) [1515-17]. Only a concluding letter added to the second volume clarified their satirical nature, two years after publication of the first volume. See the introduction to Stokes’ original translation of 1909, at liii (remarking that “it has been, in every age, the fate of satire to be misunderstood”).

⁸ Many aristocrats, including Madame de Pompadour and Madame de Barry, were subtly mocked in pseudo-memoirs and collections of “letters” that appeared under their names. “Such writings were taken seriously, even by sophisticated readers”; only modern scholarship has firmly established that they were hoaxes. R. Darnton, *The Devil in the Holy Water, or the Art of Slander from Louis XIV to Napoleon* (University of Pennsylvania Press, 2011) at 25, 272-73.

As one authority on satire puts it, the “understandable willingness to *identify the satirist with his or her persona and his or her characters* has plagued satire since, in all probability, the original curse itself . . . Because of the passionate and partisan nature of their attacks, satirists have long been forced to seek refuge behind anonymity.” G.A. Test, *Elliott’s Bind; or, What is Satire, Anyway? In Satire: Spirit and Art* (Tampa: University of South Florida Press, 1991), at 10 (emphasis added).

Moreover, the intention of most parody is to undermine reputations, to make the apparently respectable appear less respectable. As this Court explained in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action,” and even the most offensive parody, serving as a “*weapon of attack, of scorn and ridicule*,” is also entitled to constitutional protection, because it conveys an “individual expression of ideas.” *Id.* at 51, 54, 55 (internal quotes omitted; italics added). Such weapons seek precisely to harm reputations. However much we may dislike them, if they express ideas they are protected speech.

Noting the resurgence of similar forms of expression during the past few decades, one sociologist describes satirical hoaxes as “staged provocations designed to persuade.” He observes that such provocations, “at their most productive, inspire critical inquiry and thoughtful reflection.” He further comments that satirists “lie and tell the truth at the

same time,” and that they “often use falsehoods to reveal deeper truths.” See K. Mcleod, *Pranksters: Making Mischief in the Modern World* (New York University Press, 2014) at 53, 127, 175. “Identity correction”—a phenomenon by which an impersonator making false claims forces the subject of his impersonation to correct the falsehood, thereby calling further attention to the incident itself and to the often-brutal truth—is indeed becoming more and more widespread.⁹

In one of various examples used throughout this litigation, conservative pundit Tucker Carlson opened a website in the name of liberal pundit Keith Olbermann and, in response to queries that a reporter erroneously thought he was addressing to Olbermann, sent numerous diatribes under Olbermann’s name. The reporter to whom the widely

⁹ The Yes Men, an international group of pranksters, famously succeeded in appearing on the BBC as representatives of Dow Chemical. Dow ran the Bhopal chemical plant in India after taking over from Union Carbide. On December 2, 2004, the 20th anniversary of the Bhopal gas tragedy, the Yes Men falsely announced on the BBC that Dow would take full responsibility for the world’s worst industrial disaster, offering a \$12 billion settlement to the victims. The incident reminded the world of Dow Chemical’s failure to take responsibility for the more than 20,000 deaths attributed to the disaster. See, <https://www.theguardian.com/media/2004/dec/04/india.broadcasting>.

distributed messages were addressed thought they came from Olbermann. Carlson's parody depended on *initially deceiving, for as long as possible*, its recipients into believing that it originated with Olbermann. The prank would have lost its value if Carlson had announced that he was parodying Olbermann. Instead, by his deception, Carlson lured the reader into engaging with the message. Yet under the Second Circuit's holding, the only thing that prevents a prosecution of Carlson is prosecutorial discretion.

At present, the Internet is the dominant medium for a type of "deceitful" discourse that served, during past ages, the ends of political, social, and personal satire in works some of which are now famous. Allowing as it does usernames, avatars, and other proxies, it is a prime vehicle for impersonation and other "deceitfully" false writings. Fake academic tweets regularly go out in the names of various university presidents around the country. These communications are notoriously difficult to distinguish from the "real thing," leading an anthropologist to comment: "I actually like how 'authentic' they seem." See, Young, J. (2009, May 21). When a Twittering College President Is Not Who He Seems. *The Chronicle of Higher Education*. Available at <http://chronicle.com/article/When-a-Twittering-College-P/47269/>.

Examples of the countless websites opened in names of individuals who are being criticized include <http://sirpeterscott.com> (criticism of Sir Peter Scott,

the former chancellor of Kingston University). The false impression created by the use of a name in the URL address of any such website lasts at least long enough to send readers to the site. There, they encounter reputation-damaging information. This simple trick results in sites like SirPeterScott.com being viewed millions of times. None of the *Golb* courts has explained how long the trick or false impression must last to result in criminalization; any “deceit,” even one ultimately meant to be detected, can now land someone in jail, as long as a reputation is at stake.

Politicians have been repeatedly impersonated by individuals wishing to attract attention to their ideas. *See*, Mazella, D. Satire and the Fake First-Person Voice. Dec. 11, 2007. *Available at*: <http://long18th.wordpress.com/2007/12/11/satire-and-the-fake-first-person-voice/> (Professor David Mazella describes “an entire constellation of fake blogs” that impersonate John McCain and other figures, and comments that “the satire always works better . . . when there is genuine uncertainty regarding its origins and therefore its purposes”); Orr, “If You Can’t Beat ‘Em,” The New Republic Blog, Oct. 27, 2009. *Available at*: www.tnr.com/blog/the-plank/if-you-cant-beat-em-0 (33 accounts “created by Republicans using the names of Democratic state representatives to send out posts under the Democrats’ names mocking [them]”).

As of August 31, 2017, all of these communications, at least within the jurisdiction of the

Second Circuit, may be prosecuted as crimes. All that is required is a prosecutor sympathetic to the hurt feelings of the object of the parody or criticism, or to whom the “victim” of the impersonation has a political, financial, or social connection.

Even if the New York State Legislature passed a statute specifically criminalizing impersonations and forgeries intended to “damage reputations,” such a law would have *no* legitimate sweep, as reputational damage, without the appropriate limitations established by this Court half a century ago, is not a cognizable harm for criminal redress. The chilling effect of such a law would be obvious and its First Amendment infirmities clear. The statutes now being used, by judicial *ipse dixit*, to achieve the same result cannot be sheltered from overbreadth review merely because they formerly were narrowly-confined and non-controversial. The statutes no longer operate “only with [the] narrow specificity” to which measures burdening speech must be confined. *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also, Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). *Certiorari* should be granted so that the lower courts’ decisions may be reversed before even greater, irreversible damage to the free exercise of First Amendment rights occurs.

II. Distinguishing Between Intent to Harm Reputation and Intent to Embarrass is Too Vague a Basis for Criminal Liability

The New York State Court of Appeals held, and the Second Circuit agreed, that the intent-to-injure requirements of the criminal impersonation and forgery statutes is satisfied when one acts with the intent to “damage a reputation.” *See People v. Golb*, 23 N.Y.3d at 465; *see also, Golb v. Attorney General of the State of New York*, 870 F.3d at 102. The State Court’s ruling that the Second Circuit upheld was that Golb’s impersonations were “more than a prank intended to cause temporary embarrassment or discomfiture, and that he acted with intent to do real harm.” 23 N.Y.3d at 466. Presumably, under this standard, intent to cause “temporary embarrassment” or “discomfiture” would not be criminal. The Second Circuit not only accepted the State’s imputation of “injury to reputation” to the criminal-impersonation statute, but imported that imputation to the forgery statute as well. This erroneous standard renders both statutes unconstitutionally vague.

“The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Second Circuit erred in

holding that “reputation is not so elusive a concept that the ordinary person would fail to understand it, particularly in a professional context ... where the potential injury is evident.” 870 F.3d at 103. The difficulty successive courts have had in the Golb case distinguishing between emails purportedly evidencing an intent to “damage a reputation” and ones evidencing only an intent to “embarrass,” or “antagonize,” or “cause annoyance” or “consternation,” or whose intent is “perplexing” or “obscure,” shows that the boundaries of legitimate prosecution are elusive not only to lay people but also to distinguished jurists.

Reputation is, in fact, a profoundly vague concept. Webster’s dictionary defines it as “overall quality or character as seen or judged by people in general.” What constitutes injury to it is even more elusive. *See, e.g., T.V. v. Smith-Green Community School Corporation*, 807 F.Supp.2d 767, 789 (N.D. Ind. 2011) (the notion of “good character” inherent in a high school disciplinary standard forbidding speech that results in “lack or loss of honor or reputation . . . introduces a *nebulous degree of value judgment* . . . [T]he meaning of the terms may be readily understood by persons of ordinary intelligence, but ready agreement about all the conduct and circumstances they apply to cannot reasonably be expected.”) (*italics added*). The trial court did not even use the word “reputation” in its jury instructions. The New York State Court of Appeals used the word, but did not define it. The Second Circuit has now permitted

prosecutors to take two previously straightforward criminal statutes and use them as an open-ended prohibition against using a “deceitful” writing to “injure a reputation”—a vague and chilling prohibition.

By loading the two statutes with a new category of “reputational” injuries, the Second Circuit and New York State Court of Appeals have redefined them in a manner that renders their scope more indefinite, and more susceptible of “arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This re-interpretation of New York’s criminal impersonation and forgery statutes has had the opposite effect to vindicating legitimate interests with narrowly tailored regulation. It leaves New York citizens and law-enforcement authorities alike uncertain about the boundaries of acceptable and prohibited expression.

Those who are confused include a Fordham University media law specialist, who writes in a recently published book that the New York State Court of Appeals’ justification for imposing the restriction—that “Many people, particularly with a career in academia . . . value their reputations at least as much as their property”—

is an unconvincing . . . sidestepping of First Amendment . . . precedents. In effect, the court carved out in cursory fashion an exemption from the First Amendment for speech with academic value—or scholarly

debates. But why stop with scholars? Don't, say, authors, priests and Buddhist monks, ethicists and artists, political and ideological purists value their reputations as much as their property, oftentimes more so? They do, of course, but the court did not consider them. It drew a constitutional line with little justification. Moreover, if . . . reputations . . . were injured, civil actions—libel lawsuits—were the constitutionally appropriate recourse.^{10 11}

The setting of an outer limit at “embarrassment” hardly clarifies the line being drawn; it makes it even vaguer. To “embarrass” means “to cause (someone) to feel ashamed”; a synonym is “to humiliate.” It is hard to see how anyone who intends only to cause momentary shame by exposing and deriding the misconduct of another, can rest secure that his intent

¹⁰ Hayes, Arthur, *Censorship Redux: “The 21st Century Attack on the First Amendment Right of Public Criticism by the Use of Cyberharassment, Cyberstalking and Online Impersonation Laws,”* in *Sympathy for the Cyberbully: How the Crusade to Censor Hostile and Offensive Online Speech Abuses Freedom of Expression* (Peter Lang, Inc., Communication Law series, 2017), 149-161 at 160.

¹¹ *See also* Hayes, Arthur, “Raphael Golb Is Facing Jail Time—For Parodying a Dead Sea Scrolls Scholar,” *The Forward*, October 12, 2017, *available at*: <http://forward.com/opinion/385050/raphael-golb-is-facing-jail-time-for-parodying-a-dead-sea-scrolls-scholar/>.

won't be misinterpreted for something else called "damage to reputation."

In a series of well-established cases, the principles that should have guided the lower courts' decisions regarding Golb's vagueness claims have led this Court to overturn convictions under various state and federal laws. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (when a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness "demands a greater degree of specificity than in other contexts"); *Ashton*, 384 U.S. at 199 (overturning a criminal libel conviction because the statute swept in "a great variety of conduct under a general and indefinite characterization, and [left] to the executive and judicial branches too wide a discretion in its application").

Notably, these principles have also led this Court to limit the scope of fraud laws that allowed prosecutions based upon intangibles that rendered the statutes impermissibly vague and threatened First Amendment values. *See, e.g. Skilling v. United States*, 561 U.S. 358, 408-09 (2010) (limiting scope of the "honest services" fraud statute because of "due process concerns underlying the vagueness doctrine"); *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (limiting scope of the federal mail fraud statute to "wronging one in his *property* rights by dishonest methods or schemes" and "the *deprivation* of something of *value* by trick, deceit, chicane or overreaching") (internal quotes omitted; emphasis

added); *McNally v. United States*, 482 U.S. 350 (1987) (vagueness problems in fraud statute require construction limiting injury to property rights). It was precisely the “vagueness shoal” spotlighted by *Skilling* that led this Court, just months ago, to reject the government’s expansive interpretation of the term “official act” as part of the “honest services” violation:

Under the “standardless sweep” of the Government’s reading, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), public officials could be subject to prosecution, without fair notice, for the most prosaic interactions. “Invoking so shapeless a provision to condemn someone to prison” for up to 15 years raises the serious concern that the provision “does not comport with the Constitution’s guarantee of due process.” *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). Our more constrained interpretation of §201(a)(3) avoids this “vagueness shoal.” *Skilling*, 561 U.S., at 368.

McDonnell v. United States, ___ U.S. ___, 136 S. Ct. 2355, 2373 (2016) (string cites omitted).

When notorious quarrels over allegations of academic misconduct and issues of public interest are involved, writers almost always intend to diminish—

and thus to do real harm to—the reputations of those they criticize. That is an essential element in the lifeblood of debate.

CONCLUSION

The Second Circuit’s adoption and construction don’t just threaten Raphael Golb alone with “the opprobrium and stigma of criminal conviction,” *Reno vs. American Civil Liberties Union*, 521 U.S. 844, 872 (1997), nor do they save these statutes from either unconstitutional overbreadth or vagueness. Indeed, now that the Second Circuit has unmoored criminal impersonation and forgery from their traditional tethers, it is unclear precisely which reputation-lowering “impersonations,” or satirical communications, if any, are still permissible, other than parody that explicitly announces itself as such. The reinterpreted law will potentially compel actors, impressionists, bloggers, yearbook editors, cartoonists, lampooners, and even amateur law-revue thespians, to “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal quotes omitted). This criminal prohibition against conduct injurious to “reputation” looms *in terrorem* over creative acts of satire, caricature, and impersonation. *Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-51 (1991).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronald L. Kuby
Counsel of Record
LAW OFFICE OF RONALD L. KUBY
119 West 23rd Street, Suite 900
New York, New York 10011
(212) 529-0223
RonKuby@aol.com

Joel B. Rudin
LAW OFFICES OF JOEL B. RUDIN, P.C.
Carnegie Hall Tower
152 West 57th Street, 8th Floor
New York, New York 10019
(212) 752-7600
jbrudin@rudinlaw.com

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Docket Nos. 16-0452—pr

Raphael GOLB, Petitioner-Appellant-Cross Appellee

v.

The ATTORNEY GENERAL OF THE STATE OF
NEW YORK, Respondent-Appellee-Cross Appellant,

Argued and Submitted:

June 23, 2017

Decided: August 31, 2017

OPINION

Appeal from the United States District Court
for the Southern District of New York

Before: DENNIS JACOBS, PIERRE LEVAL,
REENA RAGGI, Circuit Judges

JACOBS, Circuit Judge:

In the academic debate about who wrote the Dead Sea Scrolls, petitioner–appellant Raphael Golb (“Golb”) was deeply committed to the side championed by his father Norman Golb. To further his father’s position, Golb wrote several emails impersonating other scholars in an apparent effort to at least embarrass proponents of the rival view and, in some instances, harm their reputations. A Manhattan grand jury charged him with, *inter alia*, multiple counts of criminal impersonation in the second degree and forgery in the third degree. He was convicted of most of those charges and pursued appeals up through the New York Court of Appeals, which vacated several convictions and narrowed the scope of the criminal impersonation statute, but left most of the convictions intact.

In this federal habeas proceeding, the District Court for the Southern District of New York (Failla, J.) granted relief from two of Golb’s convictions, and denied it as to the other 17.

Golb makes three arguments as to why his surviving convictions must be vacated. In opposition, the state prosecutors argue on the merits and rely on the deference owed to state courts under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104–132, 110 Stat. 1214 (1996).

- First, Golb invokes *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), arguing that his impersonation convictions must be vacated if the jury might have relied on the impermissibly overbroad literal terms of the statute that the Court of Appeals subsequently narrowed. We owe no AEDPA deference on this question because the New York Court of Appeals did not answer it “on the merits.” 28 U.S.C. § 2254(d). We conclude that four of Golb’s criminal impersonation convictions must be vacated under *Shuttlesworth*, but that five of them are so reliably supported by the evidence that they survive.
- Second, Golb argues that the criminal impersonation statute is facially unconstitutional. We do owe AEDPA deference as to this challenge, and we conclude that the New York courts’ resolution of this issue was not so unreasonable as to require habeas relief.
- Third, Golb argues that the criminal forgery statute is unconstitutionally overbroad. We conclude that the statute, as interpreted by the trial court and the Court of Appeals, is so clearly overbroad as to be facially unconstitutional notwithstanding AEDPA deference. We narrow the statute to save it, and grant the habeas petition as to some (but not all) of the forgery convictions.

I

This case arises from a protracted academic debate about who wrote the Dead Sea Scrolls, ancient documents discovered in the 1940s and 1950s in a

group of caves near Jerusalem. Most academics think that they were written by a Jewish sect called the Essenes who reportedly lived nearby (the “Essene Theory”), while the defendant’s father Norman Golb, a professor at the University of Chicago, argues that they had many disparate authors and were hidden in caves when Roman armies attacked Jerusalem in 70 A.D. (the “Golb Theory”).

The defendant is not a Scrolls scholar, but he has devoted much time to advocating for his father’s theory online. His anonymous and pseudonymous advocacy raises no issue here. But one of Golb’s email tactics was to impersonate other Scrolls scholars. The surviving criminal counts in this case are based on ten such emails, in which Golb impersonated, variously, Frank Cross, Lawrence Schiffman, and Jonathan Seidel—all scholars of the Scrolls. We review the three impersonations in turn.

In mid-2008, Bart Ehrman, a proponent of the Essene Theory, was invited to lecture at a museum exhibit about the Scrolls. Golb wrote an anonymous blog post arguing that Ehrman should not have been invited and criticizing the Essene Theory. Golb also created an email address (frank.cross2@gmail.com) which he used to impersonate Frank Cross, a well-known Scrolls scholar who has taught at Harvard and Wellesley. Using that email address, Golb sent emails to four scholars at the University of North Carolina—the host of the exhibit—which contained a link to his

blog post and stated: “It looks like Bart [Ehrman] has gone and put his foot in his mouth again ... I’m seeing this crop up everywhere on the web.” Joint App’x at 1066. The email was signed “Frank Cross.”

In the fall of 2008, the Jewish Museum in New York City invited Professor Lawrence Schiffman of New York University, also a proponent of the Essene Theory, to lecture at its exhibit on the Scrolls. Golb published an article using the pseudonym “Peter Kaufman” which accused Schiffman of plagiarizing some of Norman Golb’s work. The same day, Golb created the email address “larry.schiffman@gmail.com” and sent the following message to four of Schiffman’s graduate students, including a link to the “Peter Kaufman” article accusing Schiffman of plagiarism:

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-chicago->

historians-work.¹
Lawrence Schiffman

Id. at 1130.

The next day, Golb sent another message from the larry.schiffman@gmail.com email address, this time to every member of Schiffman's department at NYU, again attaching a link to the "Peter Kaufman" accusatory article:

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.com/culture/plagiarism-and-dead-sea-scrolls-did-nyu-department-chairman-pilfer-chicago-historian-s-work>
Lawrence Schiffman

Id. at 1139.

More emails from the Schiffman address went to the Dean and Provost of NYU, asking what the putative

¹ This link leads to the article Golb wrote under the pseudonym "Peter Kaufman."

writer could do to “counter charges of plagiarism that have been raised against me,” and conceding “[i]t is true that I should have cited Dr. Golb’s articles when using his arguments, and it is true that I misrepresented his ideas.” Id. at 1137. Golb’s email to the Dean was then forwarded by Golb to NYU’s student newspaper, with the added exhortation: “I must ask you not to publish a word about this.” Id. at 1136.

A few months later, a Scrolls exhibit opened at the Royal Ontario Museum. Golb created the email address “seidel.jonathan@gmail.com” and used it to ask the Museum’s Board of Trustees whether Norman Golb would be invited to lecture, while also calling a previous public statement by the Museum’s curator “shockingly obscurantist.” Id. at 1039–41. The prosecutors contend that Golb’s use of “seidel.jonathan” was an attempt to impersonate a Professor of Judaic Studies at the University of Oregon. Golb—as–Seidel then emailed the exhibit’s curator to ask whether she would respond to Golb’s father’s critique of the exhibit. Similar emails from the same address were dispatched to dozens of Scrolls scholars; those, however, added an unfavorable critique of Norman Golb’s work.

A Manhattan grand jury charged Golb in a 51-count indictment. The only convictions now before us, and the only counts we discuss, are nine for criminal impersonation in the second degree and ten for

forgery in the third degree. (An explanation of which emails correspond to each count is in the margin.)² The criminal impersonation statute provides:

² Count 7 (criminal impersonation) and count 8 (forgery) are based on an August 4, 2008 email impersonating Schiffman which can be found at Joint App'x 1130. Count 10 (impersonation) and count 11 (forgery) are based on an August 5, 2008 email impersonating Schiffman which can be found at Joint App'x 1139. Count 13 (impersonation) and count 14 (forgery) are based on a different August 5, 2008 email impersonating Schiffman which can be found at Joint App'x 1137. Count 16 (impersonation) and count 17 (forgery) are based on yet another August 5, 2008 email impersonating Schiffman which can be found at Joint App'x 1138. Count 19 (impersonation) and count 20 (forgery) are based on an August 6, 2008 email impersonating Schiffman which can be found at Joint App'x 1142. Count 25 (impersonation) and count 27 (forgery) are based on a November 22, 2008 email impersonating Seidel which can be found at Joint App'x 1039–41. Count 31 (forgery) is based on a November 24, 2008 email impersonating Seidel which can be found at Joint App'x 1044. Count 33 (impersonation) and count 35 (forgery) are based on another November 24, 2008 email impersonating Seidel which can be found at Joint App'x 1045. Count 37 (impersonation) and count 39 (forgery) are based on a December 6, 2008 email impersonating Seidel which can be found at Joint App'x 1064. Count 46 (impersonation) and count 47 (forgery) are based on a July 20, 2008 email impersonating Cross which can be found at Joint App'x 1066.

A person is guilty of criminal impersonation in the second degree when he ... [i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another[.]

N.Y. Penal Law § 190.25(1). The forgery statute provides:

A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument.

N.Y. Penal Law § 170.05.

At trial, Golb sought jury instructions defining several statutory terms, including “injure,” but the jury charge offered no definitions of “injure” or of “deceive.” The jury convicted Golb on 14 counts of criminal impersonation and ten counts of forgery, and the First Department affirmed all of those convictions. 102 A.D.3d 601 (1st Dep’t 2013) (“Golb I”).

The New York Court of Appeals entered an order accepting the appeal. 20 N.Y.3d 1099 (2013) (“Golb”).

II”). Golb argued to that court that the absence of limiting jury instructions made the criminal impersonation and forgery statutes unconstitutionally overbroad. The majority agreed with Golb “that the statutory terms ‘injure’ and ‘benefit’ cannot be construed to apply to *any* injury or benefit, no matter how slight,” but they “conclude[d] that injury to reputation is within the ‘injury’ contemplated by Penal Law § 190.25.” 23 N.Y.3d 455, 465 (2014) (“Golb III”) (emphasis in original). Given that ruling, the majority found sufficient evidence that the emails impersonating Schiffman, Seidel, and Cross were sent “with intent to do real harm.” *Id.* at 466. Nine of the 14 surviving criminal impersonation convictions were therefore affirmed; the other five, based on the creation of the fake email accounts, or on other insubstantial email conduct, were vacated. *Id.* The ten forgery convictions were affirmed in a single paragraph that did not purport to narrow the statute. *Id.* at 468. Then—Chief Judge Lippman partially dissented on the ground that the First Amendment required vacatur of all the criminal impersonation and forgery convictions. *Id.* at 469–71 (Lippman, C.J., dissenting).

Golb’s subsequent motion for reargument in the Court of Appeals contended that, under *Shuttlesworth*, 382 U.S. 87, he was entitled to a new trial on the criminal impersonation counts because he was tried using an overbroad version of the statute that the Court of Appeals had subsequently narrowed. The Court of

Appeals denied the motion for reargument saying nothing more than “Motion for reargument denied.” 24 N.Y.3d 932 (2014) (“Golb IV”). On remand, the trial court rejected the *Shuttlesworth* argument on procedural grounds and resentenced Golb to two months in prison on the surviving convictions. The First Department also rejected the *Shuttlesworth* argument on procedural grounds, 126 A.D.3d 401 (1st Dep’t 2015) (“Golb V”), and the Court of Appeals denied leave to appeal, 26 N.Y.3d 929 (2015) (“Golb VI”).

Golb then filed this federal habeas petition. The district court granted relief as to two criminal impersonation counts, denied relief as to the seven other criminal impersonation counts, and denied relief as to the ten forgery counts. No. 15-cv-1709, 2016 WL 297726 (S.D.N.Y. Jan. 21, 2016) (“Golb VII”). The parties cross-appeal.

II

AEDPA instructs federal courts in habeas cases to give great deference to state court decisions when those decisions are “on the merits.” 28 U.S.C. § 2254(d). In such cases, we may grant a habeas petition only if the state court decision:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. The standard is deliberately “difficult to meet and highly deferential,” *Contreras v. Artus*, 778 F.3d 97, 106 (2d Cir. 2015) (internal punctuation omitted), and permits the grant of habeas “in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

However, this deference arises only as to “any claim that was adjudicated on the merits in State court proceedings.” 28 U.S.C. § 2254(d). The question whether Golb’s various claims were “adjudicated on the merits” in the New York courts requires considerable analysis. Two Supreme Court cases provide most of the governing law on whether state court decisions were decided on the merits. In *Harrington*, 562 U.S. 86, the Supreme Court said that a state court had adjudicated a claim “on the merits” notwithstanding that the appeal was rejected in a single-sentence summary order. As the Court explained, a state court need not give reasons for rejecting a claim:

When a federal claim has been presented to a state court and the state court has denied relief, it may

be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely.

Id. at 99–100 (internal citations omitted). The presumption was not overcome in that case, and the Court did not specify what it might take to do so.

Two years later, in *Johnson v. Williams*, 568 U.S. 289, (2013), the Court considered the petition of a defendant who had argued parallel state and federal claims to the state court. Although the state court explicitly rejected only the state claim, the Supreme Court held that AEDPA deference was nevertheless owed on the federal claim because there were any number of reasons the state court might not have felt the need to explicitly mention a federal claim when rejecting a collateral attack or an appeal. *Id.* at 293. However, the Court made clear that the presumption that claims were adjudicated on the merits is “strong” but “not irrebuttable”: a footnote cited *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) for the proposition that, “when a defendant does so little to raise his claim that he fails to fairly present it in each appropriate state court, the [] presumption is fully rebutted.” *Id.* at 302 n.3 (internal citation and quotation marks omitted).

Accordingly, when a state court denies a claim that was squarely presented, there is a strong presumption that the denial is “on the merits.” On the other hand, there is no such automatic presumption if the petitioner failed to squarely present the claim in state court. We might still conclude that a state court rejected an argument on the merits even if a petitioner did not raise it—a court might sua sponte raise and reject a claim, for example—but no presumption arises.

Ordinarily, such a rule does a petitioner no good. Exhaustion requirements and procedural default rules prevent a petitioner from securing de novo habeas review of federal claims not properly raised before the state court. In an unusual case, however, a petitioner may pass between obstacles—as in Golb’s *Shuttlesworth* claim. Golb’s direct appeal briefs failed to squarely present the *Shuttlesworth* claim to the Court of Appeals because his *Shuttlesworth* claim first came into being when that court issued its opinion narrowing the criminal impersonation statute in Golb III. By its nature, a *Shuttlesworth* claim will usually arise only “where a State Supreme Court narrows an unconstitutionally overbroad statute.” *Osborne v. Ohio*, 495 U.S. 103, 118 (1990). This is therefore the rare case in which there is both no failure of exhaustion and no presumption that the Court of Appeals rejected the federal claim on the merits.

The prosecutors advance two reasons why we nevertheless owe AEDPA deference on the *Shuttlesworth* claim. First, they argue that the Court of Appeals implicitly raised and rejected any *Shuttlesworth* claim on its own in Golb III by upholding certain criminal impersonation counts of conviction under its narrowed construction. We are not persuaded.

If Golb III rejected a *Shuttlesworth* challenge sua sponte, we would expect it to reference *Shuttlesworth* directly or indirectly. It does not. In limiting the scope of the statute, the Court of Appeals found “sufficient evidence to support the jury’s finding that defendant’s emails impersonating Schiffman, Seidel and Cross were more than a prank intended to cause temporary embarrassment or discomfiture, and that [Golb] acted with intent to do real harm.” Golb III, 23 N.Y.3d at 466. That wording does not respond to the *Shuttlesworth* question. Sufficiency under a curtailed version of the statute does not bear upon whether we are sure “that defendants are convicted under the statute as it is subsequently construed and not as it was originally written,” as *Shuttlesworth* requires. *Osborne*, 495 U.S. at 118. It is the difference between whether a reasonable jury *could* have convicted given the right instruction, and whether there is assurance beyond a reasonable doubt that a jury *would* have done so. *See Chapman v. California*, 386 U.S. 18, 24 (1967). We cannot conclude that Golb III rejected the

Shuttlesworth claim “on the merits.”

The prosecutors also point out that Golb explicitly raised a *Shuttlesworth* claim in an unsuccessful motion for reargument based on the Court of Appeals’ narrowed interpretation. According to the prosecutors, Golb IV’s rejection of that motion in four words—“Motion for reargument denied”—is a decision “on the merits.” However, in the New York Court of Appeals (a court of discretionary jurisdiction), the “denial of a motion for leave to appeal is not equivalent to an affirmance and has no precedential value.” *Calandra v. Rothwax*, 65 N.Y.2d 897, 897 (1985). The rule is the same in the United States Supreme Court: “the denial of a writ of certiorari imports no expression of opinion upon the merits of the case.” *Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal quotation marks and citation omitted). By analogy, the Court of Appeals’ discretionary denial of rehearing was not a decision “on the merits,” and we accordingly owe no deference on the *Shuttlesworth* claim.

We reach a different conclusion as to Golb’s facial challenges to the criminal impersonation and forgery statutes. Golb squarely presented his facial challenges to the Court of Appeals in his first set of briefs. Although that court’s opinion in Golb III did not explicitly say why it rejected those challenges, “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas

court must presume that the federal claim was adjudicated on the merits[.]” *Johnson*, 568 U.S. at 301. That presumption can sometimes be rebutted, *id.*, but Golb has not done nearly enough to rebut it here. When a state court rejects a constitutional claim without explanation, as here, our job is to “determine what arguments or theories supported or ... *could have supported* [] the state court’s decision,” and then “ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.” *Harrington*, 562 U.S. at 102 (emphasis added).

III

Golb raises three challenges to his convictions. The first, based on *Shuttlesworth*, is not subject to AEDPA deference. It succeeds as to some of his criminal impersonation counts and fails as to others. The second, a facial challenge to the criminal impersonation statute, must overcome AEDPA deference. That challenge fails entirely. The third, a facial challenge to the forgery statute, must also overcome AEDPA deference. But because the statute as interpreted by the Court of Appeals is unconstitutionally overbroad, we narrow it and grant the habeas petition as to five of the ten forgery convictions.

A. The *Shuttlesworth* Claim

In *Shuttlesworth*, an African-American civil rights

leader was convicted after a bench trial of violating a broad anti-loitering law. *Shuttlesworth*, 382 U.S. at 89. Two years later in a separate case, the Court of Appeals of Alabama construed the statute narrowly, thereby avoiding constitutional overbreadth. See *Middlebrooks v. City of Birmingham*, 42 Ala.App. 525, 170 So.2d 424 (1964). Meanwhile, Shuttlesworth's ensuing appeal of his conviction worked its way to the United States Supreme Court. The Court held that the anti-loitering statute, as narrowed by the Alabama Court, was constitutional. But it also ruled that Shuttlesworth's own conviction must be vacated: "Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction under [the loitering statute] cannot stand." *Shuttlesworth*, 382 U.S. at 92. The Supreme Court has since clarified that holding: "*Shuttlesworth*, then, stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written." *Osborne*, 495 U.S. at 118. But how sure must courts be that a petitioner was "convicted under the statute as it is subsequently construed and not as it was originally written"? *Id.* In a habeas case, the standard of review is whether "the constitutional violation had a substantial and injurious effect or influence in determining the jury's verdict." *Jackson v. Conway*, 763 F.3d 115, 140 (2d

Cir. 2014) (internal quotation marks and citation omitted).

The prosecutors here argue that *Shuttlesworth* applies only when a State Supreme Court narrows a statute on *constitutional* grounds, whereas the New York Court of Appeals narrowed the statute on state law grounds (not because of the First Amendment). They misread both the Court of Appeals' opinion and *Shuttlesworth* itself. While the majority opinion did not explicitly cite the First Amendment in narrowing the criminal impersonation statute, Golb's arguments about the statute were based on the First Amendment, the dissent was about the First Amendment, and the majority did not explain its result on a ground of state law. The most reasonable way to read the opinion is as a narrowing construction to save the statute from violating the First Amendment. In any event, the Bill of Rights has more than one Amendment. Even if the Court of Appeals had narrowed the statute on a state law ground, a conviction under a statute that never criminalized the conduct of conviction would violate the Fifth Amendment right to Due Process.

The criminal impersonation statute criminalizes "[i]mpersonat[ing] another ... with intent to obtain a benefit or to injure or defraud another." N.Y. Penal Law § 190.25(1). The trial court, over objection, declined to define "injure" for the jury, allowing the jurors to convict for any conceivable interpretation of

what it means to intend to “injure.” The Court of Appeals found that the term “cannot be construed to apply to *any* injury;” it is limited to intent to cause 1) “a tangible, pecuniary injury,” 2) “interfere [nce] with governmental operations,” or 3) harm to “reputation.” Golb III, 23 N.Y.3d at 465–66 (emphasis in original). The *Shuttlesworth* inquiry in this case is whether the difference in interpretation between the Court of Appeals and the trial court might reasonably have led to Golb’s wrongful conviction on any of the criminal impersonation counts. Those counts can be grouped into four categories.

1. Five counts are based on emails sent under the name Lawrence Schiffman. In these emails, Golb-as-Schiffman confessed to plagiarism and misrepresentation, and asked recipients, including a student newspaper, to suppress the facts of his misdeeds in order to protect him. These emails were clearly sent with the intent to damage Schiffman’s reputation. Indeed, Golb sent the Schiffman emails at the same time that he emailed NYU administrators from a separate pseudonymous account requesting that they investigate the possible plagiarism—with the result that those administrators pursued the allegations of misconduct. As Golb acknowledged during his trial, plagiarism “is one of the more serious forms of unethical conduct anybody can engage in in the academic world.” Joint App’x at 643. The only alternate theory Golb puts forward is that the jury might have convicted on the theory that he simply

intended to *embarrass* Schiffman; but that is too implausible to require a grant of habeas relief. *See Jackson*, 763 F.3d at 140. The district court denied habeas as to these convictions, and we affirm.

2. Two counts are based on emails sent under the name Jonathan Seidel, disparaging Golb's father. (The emails refer to Norman Golb and his views as "filth." Joint App'x at 1045, 1064.) The defendant's intent in sending these emails is obscure: Golb—as Seidel sent other emails seemingly relying on Seidel's good repute. We therefore lack sufficient confidence that the jury convicted based on the narrower meaning of "injure," as opposed to a mere desire to antagonize. The district court granted the habeas petition as to these convictions, and we affirm its judgment. *See Jackson*, 763 F.3d at 142 (stating that habeas relief is proper where the court has "grave doubt about whether a trial error ... had substantial and injurious effect or influence in determining the jury's verdict ..." (internal quotation marks omitted)).

3. A single count is based on an email that Golb sent under the name Jonathan Seidel to the Royal Ontario Museum's Board of Trustees. The email asked whether the Museum intended to have Golb's father lecture at an exhibit about the Scrolls. The district court upheld this conviction on the theory that Golb intended to get a benefit—a speaking role for his father—rather than that Golb intended to injure. That is possible, but the email also attacks various

individuals in a way likely to cause consternation, rather than any tangible, pecuniary, or reputational impact. The jury may well have impermissibly convicted Golb on this count under the theory that he intended to cause annoyance rather than a culpable injury. We therefore reverse the judgment of the district court and grant the habeas petition as to this conviction.

4. A single count is based on an email Golb sent under the name “Frank Cross” which said that “Bart has gone and put his foot in his mouth again.” Joint App’x at 1066. The district court upheld this conviction on the theory that it was intended to hurt Professor Bart Ehrman’s reputation. But the email is so mild and puerile that it might have been intended to embarrass Ehrman without actual injury to his reputation, and at no point in the trial did the prosecutors argue that it was intended to hurt Ehrman. In light of our substantial concern that the jury impermissibly convicted Golb on this count based on the overbroad interpretation of injure, we therefore reverse the judgment of the district court and grant the habeas petition as to this conviction.

B. Golb’s Facial Challenge to the Criminal Impersonation Statute

We owe AEDPA deference on Golb’s facial challenge to the constitutionality of the criminal impersonation statute, *see supra* at 98–99, an issue we reach because five criminal impersonation convictions survive

Shuttlesworth review. Golb argues that the statute is unconstitutional both because it is overbroad and because the narrowing of it—by including damage to reputation as an “injury”—makes it unconstitutionally vague.

[We reject the overbreadth challenge. A statute is facially overbroad

if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep. Invalidity for overbreadth is strong medicine that is not to be

casually employed.

United States v. Williams, 553 U.S. 285, 292–93 (2008) (internal citations and quotation marks omitted; emphasis in original).

Golb implicitly concedes that the criminal impersonation statute constitutionally criminalizes some core conduct; there is no doubt that the state may properly forbid (for example) impersonating a pawnshop customer in order to redeem an object of value. But he argues that there are categories that the statute improperly criminalizes: in particular, some types of satire and parody. Specifically, he argues that the statute is facially overbroad because it would criminalize hypothetical parodies that the Constitution protects.

The First Amendment protects parody, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), but Golb misunderstands the genre. While it is true that a parody enjoys First Amendment protection notwithstanding that not everybody will get the joke, it is also true that parody depends on *somebody* getting the joke; parody succeeds only by its recognition as parody. An author who intends to fool everyone may be pulling a prank or perpetrating a hoax, but the result is not a parody. Parody thus differs from “impersonat[ion]” as the term is used in the criminal impersonation statute.

And even if we did accept Golb's understanding of parody, an overbreadth challenge succeeds only if a statute "prohibits a *substantial* amount of protected speech." *Williams*, 553 U.S. at 292 (emphasis added). The overbreadth must "be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* (emphasis in original). The criminal impersonation statute has substantial legitimate sweep, and Golb's argument is limited to parody with the intent to injure. That overbreadth would be insufficient to invalidate the statute; in any event, a parodist caught up in prosecution could bring an as-applied challenge to conviction. Finally, we owe AEDPA deference on the overbreadth challenge, and it is certainly not the case that the statute is *clearly* unconstitutionally overbroad.³

Nor is it unconstitutionally vague. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A fairminded jurist could find that the Court

³ Insofar as Golb argues that the statute was overbroad as applied to him, we agree with the Court of Appeals that the statute was not unconstitutionally applied with regard to the remaining criminal impersonation convictions related to the Schiffman emails. The evidence of Golb's intent to harm Schiffman's reputation was overwhelming.

of Appeals' interpretation is sufficiently well-defined to meet both elements, and that is enough to compel AEDPA deference. *See Harrington*, 562 U.S. at 102.

The statute criminalizes impersonation with the intent to harm another's reputation. Reputation is not so elusive a concept that the ordinary person would fail to understand it, particularly in a professional context (such as this one) where the potential injury is evident. Nor is the statute so ill-defined that every fairminded jurist would find that it allows prosecutors to arbitrarily determine whether or not individuals have committed criminal impersonation. The criminal impersonation statute criminalizes a large swath of conduct, but it is fairly clear what conduct falls within. A fairminded jurist could easily conclude that the prosecutorial power it affords is broad but not arbitrary.⁴

Because the criminal impersonation statute is not unconstitutionally vague or overbroad, the five

⁴ Golb also cites *Skilling v. United States*, 561 U.S. 358 (2010), for the proposition that any statute criminalizing an intangible harm is automatically vague. He misreads the case. *Skilling* actually relied on the Supreme Court's assessment that the "honest-services *decisions* preceding *McNally v. United States*, 483 U.S. 350 (1987)]," were "not models of clarity or consistency." *Skilling*, 561 U.S. at 405 (emphasis added). In *Skilling*, the Court hewed closely to those cases' core interpretations of the statute at issue so as to avoid constitutional questions.

convictions which survived our *Shuttlesworth* review stand.

C. Golb's Facial Challenge to the Forgery Statute

We owe AEDPA deference on Golb's facial challenge to the constitutionality of the forgery statute, which criminalizes "falsely mak[ing], complet[ing] or alter[ing] a written instrument" when done "with intent to defraud, deceive or injure another." N.Y. Penal Law § 170.05. The Court of Appeals affirmed those counts on the ground that Golb "deceived people," *Golb III*, 23 N.Y.3d at 468, and the holding treats the phrase "intent to [] deceive" to mean an intent to make another believe something that is false, regardless of whether there was intent to cause any possible harm. *Id.* Such a boundless interpretation renders the statute so overbroad that any fairminded jurist would find it unconstitutional. Pseudonymous product reviews would be criminalized, as would the use of false names by corporate or governmental whistleblowers to avoid detection and retaliation. Even the use of a pen-name is sometimes a benign deception. George Sand, George Eliot, and Currer Bell were noms de plume used to deceive readers into believing that they were men; under the Court of Appeals' interpretation, the authors could all be prosecuted.

Clearly established federal law is to the contrary: "[g]reat works of literature have frequently been

produced by authors writing under assumed names. ... [A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Because the Court of Appeals' interpretation of the statute violated "clearly established Federal law, as determined by the Supreme Court of the United States,"—i.e., in *McIntyre*—that interpretation is unconstitutional despite AEDPA deference. 28 U.S.C. § 2254(d)(1).

A statute, however, is not unconstitutional on its face because a single possible interpretation of it is unconstitutional. Another reading of this statute is more plausible, and it has the virtue of being constitutional. New York's forgery law criminalizes acting "with intent to defraud, deceive or injure." The verb "deceive" has several definitions. Its broadest, most common meaning, which the Court of Appeals adopted, is to "cause to believe what is false." "Deceive," *The New Shorter Oxford English Dictionary* (1993). Another definition (albeit more narrow and more rare) is to "cheat, defraud, [or] deprive of by deception." *Id.* Three rules of statutory interpretation counsel adoption of that narrower, less common definition. First, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and [] an alternative interpretation of the statute is fairly possible, we are

obligated to construe the statute to avoid such problems.” *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (internal citations and quotation marks omitted). A broader reading of “deceive” makes the statute unconstitutional, while the narrower reading saves it. Second, in the statute, “deceive” appears in series with “defraud” and “injure.” Under the interpretative canon noscitur a sociis, the word “deceive” is deemed to share relevant characteristics with “defraud” and “injure,” both of which entail harm. Third, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Rewis v. United States*, 401 U.S. 808, 812 (1971).

The Court of Appeals affirmed Golb’s forgery convictions on the basis of deception, Golb III, 23 N.Y.3d at 468, but the jury instructions on forgery failed to define the term. An uninstructed jury would likely understand “deceive” in its commonest definition: to “cause to believe what is false,” without the stipulation of harm. That unconstitutionality requires scrutiny of the forgery convictions. Five of the forgery convictions were based on emails falsely attributed to Schiffman, and those convictions survive because the evidence so clearly supports Golb’s intent to deceive and cause injury. As to the other five forgery convictions, however, it is so likely that the jury applied the law in an unconstitutional way to convict Golb that habeas relief is required.

Accordingly, we affirm the district court as to counts 8, 11, 14, 17, and 20; and we reverse (and grant the habeas petition) as to counts 27, 31, 35, 39, and 46.

CONCLUSION

For the foregoing reasons, the order of the district court is AFFIRMED IN PART and REVERSED IN PART.

APPENDIX B

NEW YORK STATE COURT OF APPEALS

The PEOPLE of the State of New York, Respondent.

v.

Raphael GOLB, Appellant.

23 N.Y.3d 455

Decided: May 13, 2014

ABDUS-SALAAM, J.

University of Chicago Professor Norman Golb is a scholar of the Dead Sea Scrolls. This case involves an Internet campaign by Golb's son, Raphael Golb, to attack the integrity and harm the reputation of other Dead Sea Scrolls academics and scholars, while promoting the views of his father.

To accomplish his goal of discrediting and harming these individuals, defendant, using pseudonyms and impersonating real academics and scholars, sent emails to museum administrators, academics and reporters. He published anonymous blogs. He concocted an elaborate scheme in which he used a

pseudonym to engage one professor in an email exchange, and then impersonated a different scholar to criticize that professor's emails. Defendant impersonated a New York University (NYU) professor and sent emails to NYU students and NYU deans indicating that the professor had plagiarized the work of Professor Golb.

A New York County grand jury charged defendant with 51 counts of identity theft, criminal impersonation, forgery, aggravated harassment and unauthorized use of a computer. He proceeded to a jury trial, where 31 counts were submitted for the jury's consideration. The jury convicted on 30 counts: two counts of identity theft in the second degree; 14 counts of criminal impersonation in the second degree; 10 counts of forgery in the third degree; three counts of aggravated harassment in the second degree; and one count of unauthorized use of a computer. Defendant was sentenced to six months in jail and five years of probation on the identity theft counts and to concurrent lesser terms on the remaining counts. The Appellate Division modified the Supreme Court judgment to the extent of vacating the identity theft conviction in the first count of the indictment and dismissing that count, and otherwise affirming the judgment (102 A.D.3d 601 [1st Dept.2013]). A Judge of this Court granted defendant leave to appeal (20 N.Y.3d 1099 [2013]). For the reasons that follow, we affirm the convictions for nine counts of criminal impersonation in the second degree

and all of the convictions for forgery. We vacate the conviction for identity theft in the second degree; five of the convictions for criminal impersonation in the second degree; all of the convictions for aggravated harassment in the second degree, and the conviction for unauthorized use of a computer.

I.

The Dead Sea Scrolls and Defendant's Internet Campaign

As was explained at the trial, the Dead Sea Scrolls are a collection of ancient religious writings dating from the second and third century B.C.E. to the first century C.E.¹ They were discovered in 1948 in caves near Qumran, in the West Bank. Norman Golb, defendant's father, is a professor at the University of Chicago, and a scholar on the subject of the Scrolls. There is disagreement among scholars and experts about who wrote the Scrolls. One view, known as the Qumran–Sectarian theory or Sectarian theory, is that the Scrolls were writings of a Jewish sect, living in or near Qumran.

Norman Golb and others disagree with the Qumran–Sectarian theory. They believe that the Scrolls were writings of various groups and that the writings were

¹ B.C.E. (Before the Common Era) and C.E. (the Common Era) are the equivalent of B.C. and A.D., respectively.

rescued from libraries in Jerusalem and brought to the caves for safekeeping at the time of the siege and sacking of the city by Roman troops in 70 C.E. (the Jerusalem libraries theory). Professor Golb challenges the Qumran–Sectarian theory as unsupported by any actual evidence. In his 1995 book, *Who Wrote the Dead Sea Scrolls?*, Professor Golb discusses not only the history of Scroll research, but criticizes what he believes to be unethical research practices regarding the Scrolls.

Beginning in September 2006, the Dead Sea Scrolls became the subject of a series of museum exhibits. Defendant engaged in an Internet campaign to criticize those involved in the exhibits because, in defendant’s opinion, the exhibits did not present his father’s theories about the origin of the Scrolls. One of defendant’s targets was Robert Cargill, who at the time was a graduate student at the University of California in Los Angeles (UCLA) working toward his Ph.D. in near eastern languages and culture. Cargill had published on the topic of the Scrolls. In 2007, the Scrolls were 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 a silent tour of the site where the Scrolls were discovered, and he wrote a script to be read in conjunction with the movie. The script did not describe Professor Golb’s view of the Scrolls’ origins.

Using pseudonyms, defendant sent emails to UCLA

media addresses including newsmedia@ucla.edu, a UCLA professor, Cargill's doctoral advisor, many other "ucla.edu" addresses, and an entertainment company with which Cargill had signed a contract, criticizing Cargill and questioning his scholarship. Cargill testified that everyone in his department, people in the press room, the Provost of UCLA, and his dean asked him "what the hell is going on, what is this all about?" On a number of occasions, defendant used an anonymous blog to post his grievances about the San Diego exhibit and the Cargill movie.

When the Dead Sea Scrolls exhibit moved to Raleigh, North Carolina, defendant targeted Stephen Goranson, a library clerk at Duke University who had published articles on the Scrolls. Goranson disagreed with Professor Golb's theories and criticized them in public Internet forums. In July 2008, 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 library, complaining about Goranson's purported Internet attacks on Professor Golb and suggesting that they consider whether this conduct was appropriate for a Duke employee. The Provost responded that a supervisor was speaking to Goranson and advising him of his obligations. Defendant also created an email account under the name of "steve.goranson@gmail.com."

Defendant also undertook an elaborate scheme

involving the impersonation of Dead Sea Scrolls scholar and retired Harvard Professor Frank Cross. The first layer of the scheme was to assume the pseudonym of “Jerome Cooper” to engage in an email exchange with University of North Carolina Professor Bart Ehrman (who had been slated to lecture at the Raleigh exhibit) about the origin of the Scrolls. Defendant then anonymously published a blog denouncing the selection of Ehrman as lecturer and publishing the emails from Professor Ehrman to “Jerome Cooper,” which defendant said Cooper had been “good enough to forward to me.” Defendant’s next step was to create the email address “frank.cross2@gmail.com” and send four separate but identical messages to four University of North Carolina scholars. In those emails from the “Frank Cross” email address, defendant attached links to his anonymous blog entries containing Ehrman’s emails, and stated that “Bart” had “put his foot in his mouth again.” He signed those emails “Best, Frank Cross.”

The Scrolls were put on exhibit at the Jewish Museum in New York City in the fall of 2008, and NYU Professor Lawrence Schiffman was scheduled as a lecturer. Defendant used the pseudonym “Peter Kaufman” to publish an article about Schiffman on the social news website NowPublic entitled “Plagiarism and the Dead Sea Scrolls: Did NYU department chairman pilfer from Chicago historian’s work?” Defendant as “Kaufman” wrote of a “little-known case of apparent academic quackery.” He

complained of Schiffman's failure to credit Professor Golb for ideas expressed in Schiffman's articles about the Scrolls, and Schiffman's repeated plagiarisms of Golb's work.

Using NYU computers, defendant sent emails from another account he created—"larry.schiffman@gmail.com"—to four of Schiffman's students and multiple NYU addresses of Schiffman's colleagues that included a link to the article. The emails stated, among other things, that "someone is intent on exposing a minor failing of mine that dates back almost fifteen years ago" and that "[t]his is my career at stake." He signed those emails "Lawrence Schiffman." Additionally, defendant sent identical emails from the Schiffman email address to the Provost of NYU and the Dean of NYU Graduate School of Arts and Science. Defendant, as Schiffman, asked what action he could take "to counter charges of plagiarism that have been raised against me" and stated:

"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.”

He signed those emails “Lawrence Schiffman, professor.”

NYU’s Senior Vice Provost responded to this email, stating that he had assigned the matter to a dean for further investigation. Defendant, as “Schiffman,” forwarded that email from the Vice Provost (including defendant’s email to the Provost) to five NYU school newspaper email addresses, asking that they not mention this matter and stating that his “career is at stake.” He signed those emails “Lawrence Schiffman.”

In the fall of 2008, the Scrolls exhibit was scheduled to move to the Royal Ontario Museum (ROM) in Toronto. Dr. Jonathan Seidel, a rabbi in Oregon and a professor of Judaic studies at the University of Oregon, had studied with Professor Schiffman at NYU. Defendant created the email address “seidel.jonathan@gmail.com” and sent an email to the Board of Trustees at the ROM, blind copying numerous other individuals at the museum. That email, among other things, included links to articles concerning the San Diego exhibition of the Scrolls and criticism by Professor Golb of the exhibit, which was curated by Dr. Risa Levitt Kohn, the same individual who was curating the exhibit at the ROM. The email stated that “the San Diego exhibitors set out to confuse the public” and described a quoted statement

from Dr. Kohn defending the exhibit which she had curated as “shockingly obscurantist ... for someone involved in creating a museum exhibit at the ROM.” He signed those emails “With best regards, Jonathan Seidel.”

Using the Seidel email address, defendant also sent an email to Dr. Kohn. It contained a link to defendant’s (anonymous) blog about Dr. Kohn and Michael Hager, the director of the San Diego museum where the Scrolls had been exhibited. The blog pointed out that Hager had been defending Dr. Kohn and the San Diego exhibit. It criticized Hager and Kohn, and pointed out that Professor Golb had subjected the San Diego exhibit to a “searing critique.” The email sought Dr. Kohn’s opinion on the two theories about the Scrolls and asked if she was planning to answer Professor Golb’s critique. It was signed “With best wishes, Jonathan Seidel.”

The same day that he sent the email to Dr. Kohn, defendant sent another email from “Seidel” to 79 Dead Sea Scrolls scholars, asking for help in preparing a response to misinformation which was being spread around the Internet. He included a link to his anonymous blog, and a link and a quotation from an article in the French newspaper *Le Monde*, which defendant (as Seidel) stated was “outrageous.” The quote from *Le Monde* was that “[t]he connection between the Essenes, who were thought to have written the scrolls, and Qumran has been reduced to

nothing, just as the major American historian and paleographer N. Golb had already written.” The email stated that “[t]hese lies about the Chicago filth must be answered as quickly as possible, so please let me know if you’re willing to help out...” In contrast to his email to Dr. Kohn, which promoted the Golb theory, this email appears to be calling Professor Golb “Chicago filth.” It was signed “Best, Jonathan S.” Defendant also used the Seidel email address to contact approximately 85 individuals, many of whom had university email addresses, urging them to “condemn the continuing filth from Chicago, just as Dr. Stephen Goranson of Duke University has had the courage to do.” That too was signed “Best, Jonathan S.”

II.

Criminal Impersonation in the Second Degree

Defendant was convicted of 14 counts of criminal impersonation in the second degree. A person is guilty of this crime when he or she “[i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another” (Penal Law § 190.25 [1]). The criminal impersonation counts related to defendant’s actions against Schiffman, Goranson, Seidel and Cross. Although requested to do so by defendant, the trial court did not limit the statutory terms “benefit” or “injure” in its charge to the jury. The Appellate Division held that “[t]he court was under no

obligation to limit the definitions of ‘injure’ or ‘defraud’—terms used in the forgery and criminal impersonation statutes—to tangible harms such as financial harm” (102 A.D.3d at 602, citing *People v. Kase*, 76 A.D.2d 532 [1st Dept.1980], *aff’d* 53 N.Y.2d 989, 441 N.Y.S.2d 671 [1981]). Defendant maintains that the trial court’s failure to properly limit and define the terms “injure” and “benefit” constituted reversible error because the jury could have interpreted the statute as capturing any benefit or harm. Thus, argues defendant, when literally *anything* can be a legally cognizable benefit or harm, one can be found guilty of violating this law if one, for example, simply causes hurt feelings, mocks or criticizes. Similarly, says defendant, a benefit could be any gain or advantage, no matter how slight.

Cases applying Penal Law § 190.25 have traditionally involved monetary fraud or interference with government operations (*see e.g. People v. Sanchez*, 84 N.Y.2d 440 [1994] [impersonation of an FBI agent]; *People v. Hooks*, 71 A.D.3d 1184 [3d Dept.2010] [after damaging victim’s vehicle, defendant called police station, identifying herself as victim, informing them that she did not want to press charges]; *People v. Nawrocki*, 163 A.D.2d 887 [4th Dept.1990] [defendant used his brother’s name, Social Security number and employment status to apply for and receive a loan from a finance company]; *People v. Chive*, 189 Misc.2d 653 [2001] [conviction for falsely identifying oneself to police and possession of an altered passport]; *People*

v. Bentley, 78 Misc.2d 578 [1974] [woman signed a false name to a supermarket cash register receipt]; *People v. Diamond*, 77 Misc.2d 412 [1974] [conviction for seeking to avoid an arrest by impersonating a transit authority conductor]). The Appellate Division cited *People v. Kase*, 76 A.D.2d 532 (1st Dept.1980), *aff'd* 53 N.Y.2d 989 (1981) in support of its holding that “injure” and “defraud” are not limited to tangible harms such as financial harms involved in the filing of a false instrument. There, Kase argued that Penal Law § 190.25 did not apply where the People had not demonstrated that there had been a pecuniary loss to the State, and the court disagreed, finding that it is sufficient if the fraud impacts the State’s power to fulfill its governmental responsibilities (*id.* at 537).

Here, defendant did not cause any pecuniary loss or interfere with governmental operations. While we agree with defendant that the statutory terms “injure” and “benefit” cannot be construed to apply to *any* injury or benefit, no matter how slight, we conclude that injury to reputation is within the “injury” contemplated by Penal Law § 190.25. Many people, particularly with a career in academia, as relevant to this case, value their reputations at least as much as their property,² and we believe the

² “Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash. ‘Tis something, nothing:
‘Twas mine, ‘tis his, and has been slave to thousands.
But he that filches from me my good name

legislature intended that the scope of the statute be broad enough to capture acts intended to cause injury to reputation.

Accordingly, a person may be found guilty of criminal impersonation in the second degree if he or she impersonates another with the intent to cause a tangible, pecuniary injury to another, or the intent to interfere with governmental operations (*see e.g. People v. Hooks*, 71 A.D.3d 1184 [3d Dept.2010]; *People v. Nawrocki*, 163 A.D.2d 887 [4th Dept.1990]). In addition, a person who impersonates someone with the intent to harm the reputation of another may be found guilty of this crime. Here, there was sufficient evidence to support the jury's finding that defendant's emails impersonating Schiffman, Seidel and Cross were more than a prank intended to cause temporary embarrassment or discomfiture, and that he acted with intent to do real harm.

While we affirm most of the criminal impersonation convictions, we hold that the mere creation of email accounts in the names of Schiffman, Seidel, Goranson and Cross (in contrast to the use of those accounts to send emails) does not constitute criminal conduct under Penal Law § 190.25. The mere creation of email accounts that are not used does no substantial harm

Robs me of that which not enriches him
And makes me poor indeed.”
(Shakespeare, Othello, act. III, scene 3.)

to anyone. Additionally, the email sent from the Seidel email address to Dr. Kohn, asking her opinion on the differing theories about the Scrolls and whether she was planning to answer Professor Golb's critique, is insufficient to support a conviction for criminal impersonation in the second degree. Unlike the other emails, this email sent in another person's name does not prove the requisite intent to cause injury, either to reputation or otherwise. Thus, we vacate the convictions on those counts.

III.

Aggravated Harassment in the Second Degree

Penal Law § 240.30(1)(a) provides that “[a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she ... communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm.” We agree with defendant that this statute is unconstitutionally vague and overbroad, and that his conviction of three counts of aggravated harassment related to his conduct toward Schiffman, Goranson and Cargill must be vacated.

In *People v. Dietze*, 75 N.Y.2d 47 (1989), this Court struck down a similar harassment statute, former

Penal Law § 240.25, which prohibited the use of abusive or obscene language with the intent to harass, annoy or alarm another person. We determined that the statute was unconstitutional under both the State and Federal Constitutions, noting that “any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence” (*id.* at 52).

The reasoning applied in *Dietze* applies equally to our analysis of Penal Law § 240.30(1)(a). The statute criminalizes, in broad strokes, any communication that has the intent to annoy. Like the harassment statute at issue in *Dietze*, “no fair reading” of this statute’s “unqualified terms supports or even suggests the constitutionally necessary limitations on its scope” (*id.* at 52; *see also People v. Dupont*, 107 A.D.2d 247, 253 [1st Dept.1985] [observing that the statute’s vagueness is apparent because “(i)t is not clear what is meant by communication ‘in a manner likely to cause annoyance or alarm’ to another person”]). And, as in *Dietze*, “we decline to incorporate such limitations into the statute by judicial construction” because that would be “tantamount to wholesale revision of the Legislature’s enactment, rather than prudent judicial construction” (*id.* at 52, 53).

Three federal judges have already found this statute unconstitutional (*see Vives v. City of New York*, 305

F.Supp.2d 289, 299 [S.D.N.Y.2003, Scheindlin, J.], *rev'd on other grounds* 405 F.3d 115 [2d Cir.2005] ["where speech is regulated or proscribed based on its content, the scope of the effected speech must be clearly defined"]; *see also Vives*, 405 F.3d 115, 123–124 [2d Cir.2005, Cardamone, J., dissenting in part, concurring in part] [Penal Law § 240.30(1) unconstitutional on its face and as applied]; *Schlagler v. Phillips*, 985 F.Supp. 419, 421 [S.D.N.Y.1997, Brieant, J.], *rev'd on other grounds* 166 F.3d 439 [2d Cir.1999] [statute is "utterly repugnant to the First Amendment of the United States Constitution and also unconstitutional for vagueness"]).

Accordingly, we conclude that Penal Law § 240.30(1) is unconstitutional under both the State and Federal Constitutions, and we vacate defendant's convictions on these counts.

IV.

The Convictions for Forgery in the Third Degree, Identity Theft in the Second Degree and Unauthorized Use of a Computer

"A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument" (Penal Law § 170.05). There was sufficient evidence to show that defendant deceived people by sending emails from accounts in the names of Schiffman, Seidel and Cross, and accordingly we

affirm his convictions on those counts.

However, we vacate the convictions on the remaining counts of unauthorized use of a computer and identity theft in the second degree. Under Penal Law § 156.05, “[a] person is guilty of unauthorized use of a computer when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization.” The term “without authorization” is defined as “to access a computer ... without the permission of the owner ... or after actual notice to such person that such use or access was without permission....” (Penal Law § 156.00[8].)

Defendant asserts that he had permission to access the NYU computers as an alumnus who joined the “Friends of Bobst Library Program.” The People argue that using the computer to commit a crime cannot be an authorized use. However, the definitions and wording of the statute and the legislative history indicate that the statute is intended to reach a person who accesses a computer system without permission (i.e., a hacker) and the language does not appear to encompass defendant’s conduct here. “[I]f two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity” (*People v. Green*, 68 N.Y.2d 151, 153 [1986] [internal quotation marks and citation omitted]). Thus, the People did not sustain their burden of proof that defendant was guilty of unauthorized use of the NYU

computers, and we therefore vacate defendant's conviction under Penal Law § 156.05.

Lastly, as pertinent here, a person commits identity theft in the second degree "when he or she 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" "commits or attempts to commit a felony" (Penal Law § 190.79[3]). The attempted felony at issue here is first-degree falsifying of the business records of NYU. That crime is committed when a person "commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof" (Penal Law § 175.10). According to the People, defendant sought to falsify NYU business records by manufacturing a subtle admission of plagiarism purportedly from Schiffman, with the intent that NYU would open an investigation of Schiffman. Although defendant sent damning emails in Schiffman's name to NYU addresses, that does not constitute the creation or falsification of an NYU business record that is "kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity" and the People have not pointed to any proof that defendant falsified any such records (Penal Law § 175.00[2]). Because there is insufficient evidence to support this

conviction, it must be vacated.

Accordingly, the order of the Appellate Division should be modified by vacating the convictions for counts 2, 3, 5, 23, 29, 40, 42, 44, 48, and 51, dismissing those counts of the indictment, and remitting to Supreme Court for resentencing, and, as so modified, affirmed.

Chief Judge LIPPMAN (concurring in part and dissenting in part).

It would be difficult to find the conduct by defendant detailed in the majority opinion admirable. But our very different task is to decide whether that conduct was properly treated as criminal. While I see no constitutional impediment to prosecuting conduct similar to defendant's targeting Professor Schiffman as second degree identity theft—which requires for its proof evidence of intent to cause highly specific injury of a non-reputational sort—the particular counts of identity theft with which defendant was charged in the indictment's top two counts were not sufficiently proved.

Turning to the remaining welter of convictions—all for misdemeanors—I agree with the majority that defendant's convictions for aggravated harassment, must be vacated and the corresponding counts of the indictment dismissed, since the statute under which those convictions were obtained, Penal Law §

240.30(1)(a), is unconstitutionally overbroad. I also agree that there was a failure of proof as to whether defendant's use of NYU computers was unauthorized within the meaning of Penal Law § 156.05. I, however, part company with the majority as to its dismissal of only some of the indictment's criminal impersonation counts and its determination to leave defendant's third-degree forgery convictions undisturbed.

In dismissing some, but not all, of the second-degree criminal impersonation (Penal Law § 190.25) counts, the majority expresses the view that, in addition to addressing impersonation intended to cause economic injury or to interfere with government operations—the objectives traditionally understood to inform the misdemeanor—the crime may also be premised on an intent to cause reputational injury. The statute, the majority holds, should be read to protect reputation when more than a prank is involved, since many people value reputation more than money, and since, as Iago in a moment of famous irony remarks to Othello, “he that filches from me my good name Robs me of that which not enriches him And makes me poor indeed.” There is, of course, nothing in the language of the statute to prevent its use in the manner proposed by the majority—but that is the problem. The statute, as written, allows a criminal conviction for impersonation provided only that it is meant to be harmful or beneficial in any way. It is hard to imagine any pseudonymous communication that could not be prosecuted under this statute. And, in an age in which

pseudonymous communication has become ubiquitous, particularly on the Internet, this statute, literally understood, criminalizes a vast amount of speech that the First Amendment protects.

The problem of the statute's substantial overbreadth is not obviated by the Court's pronouncement that the enactment should not be understood to criminalize conduct not intended to cause "real harm." Apart from the fact that the distinction the majority has drawn does not render the statute benign, since many things said using an assumed identity are constitutionally protected from civil or criminal sanction, even though they are more than pranks and are intended to cause real harm or to obtain real benefit,³ this prosecution's use of the statute was not limited in the way the Court now says it should have been.

Although defendant, after the denial of his motion to dismiss on the ground, among others, of statutory overbreadth, sought to have the jury charged so as to limit the statute's reach, the trial court's charge did not do that and there is no basis now to suppose that the convictions at issue were rendered in observance of the distinction this Court has retrospectively drawn; five of the criminal impersonation convictions concededly were not, and it is entirely speculative

³ It is difficult to imagine, for example, that an ill-intended, pseudonymously uttered comment about Iago or his modern equivalent would be actionable civilly, much less criminally.

that the remaining nine were.

The problem with the criminal impersonation convictions is not that they were insufficiently supported. The evidence as to each of the counts was more than adequate to prove the offense as defined in the statute and as charged. The reason that the convictions must be vacated and the corresponding counts dismissed is rather that the statute under which they were obtained is unconstitutionally broad, and substantially so.

The use of the third-degree forgery statute (Penal Law § 170.05) to the same end as the criminal impersonation statute is, I believe, similarly objectionable. Treating pseudonymous emails as forgeries when they are made with some intent to “injure” in some undefined way is no different than penalizing impersonation in Internet communication for the same amorphous purpose. Both treatments give prosecutors power they should not have to determine what speech should and should not be penalized.

If defendant has caused reputational injury, that is redressable, if at all, as a civil tort, not as a crime. Criminal libel has long since been abandoned (*see Garrison v. Louisiana*, 379 U.S. 64, 69 [1964]), not least of all because of its tendency in practice to penalize and chill speech that the constitution protects (*see Ashton v. Kentucky*, 384 U.S. 195, 200–

201 [1966]), and it has been decades since New York's criminal libel statute was repealed. The use of the criminal impersonation and forgery statutes now approved amounts to an atavism at odds with the First Amendment and the free and uninhibited exchange of ideas it is meant to foster.

I would dismiss the indictment in its entirety.

Judges GRAFFEO, READ, SMITH, PIGOTT and RIVERA concur with Judge ABDUS-SALAAM; Chief Judge LIPPMAN dissents in part in an opinion.

Order modified by vacating the conviction on counts 2, 3, 5, 23, 29, 40, 42, 44, 48 and 51 of the indictment, dismissing those counts of the indictment, and remitting the case to Supreme Court, New York County, for resentencing and, as so modified, affirmed.

APPENDIX C

COLLECTED SCHIFFMAN E-MAILS

Subject: plagiarism charges
From: "larry schiffman" <larry.schiffman@gmail.com>
Date: Mon, 4 Aug 2008 22:08:20 -0400
To: mib281@myu.edu, sdl237@myu.edu, ckp212@myu.edu, ays200@myu.edu

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-switch-chicago-historians-work>

Lawrence Schiffman

Subject: Re: Plagiarism charges

From: "larry schiffman" <larry.schiffman@gmail.com>

Date: Tue, 5 Aug 2008 18:24:33 -0400

To: editor@nyunews.com, university@nyunews.com, managing@nyunews.com, campus@nyunews.com, editorial@nyunews.com

The following is self-explanatory. I must ask you not to publish a word about this in the Washington Square News, should it be brought to your attention. -- Lawrence Schiffman

Dear Dean Stimpson,

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

Apparently, someone is intent on exposing conduct of mine that dates back almost fifteen years ago. It is true that I should have cited Dr. Gorb'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-pilfer-chicago-historian-s-work>

Lawrence Schiffman, professor

Subject: Plagiarism charges
From: "larry schiffman" <larry.schiffman@gmail.com>
Date: Tue, 5 Aug 2008 18:15:29 -0400
To: calhame.stimpson@nyu.edu

Dear Dean Stimpson,

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

Apparently, someone is intent on exposing a failing of mine that dates back almost fifteen years ago. It is true that I should have cited Dr. Gorb'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-pilfer-chicago-historian-s-work>

Lawrence Schiffman, professor

Subject: Re: Plagiarism charges
From: "larry schiffman" <larry.schiffman@gmail.com>
Date: Tue, 5 Aug 2008 18:11:28 -0400
To: provost@nyu.edu

Dear Provost McLaughlin,

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

Apparently, someone is intent on exposing a failing of mine that dates back almost fifteen years ago. It is true that I should have cited Dr. Gob's articles, 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-pilfer-chicago-historian-s-work>

Lawrence Schiffman, professor

mailto:provost@nyu.edu

Subject: Plagiarism charges
From: "larry schiffman" <larry.schiffman@gmail.com>
Date: Tue, 5 Aug 2008 17:59:54 -0400
To: rc2@nyu.edu, hnd1@nyu.edu, de2@nyu.edu, ge293@nyu.edu, yfi@nyu.edu, df2@nyu.edu, michah.gottlieb@nyu.edu, rk4@nyu.edu, martonkaplan@yahoo.com, bkg@nyu.edu, amb96@nyu.edu, evan.rapport@nyu.edu, jfo@nyu.edu, mss11@nyu.edu, crw1@nyu.edu, rz17@nyu.edu, rz11@nyu.edu

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...
mailto:rk4@nyu.edu

<http://www.nowpublic.com/culture/plagiarism-and-dead-sea-scrolls-did-nyu-department-chairman-pilfer-chicago-historian-s-work>

Lawrence Schiffman