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No First Amendment Violation in E-Mail Impersonation Case

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This is the Raphael Golb (Dead Sea Scrolls) case that has been much talked about over the last few years. Here is analysis in today's *People v. Golb* (N.Y. App. Div. Jan. 29, 2013):

> *Defendant's convictions arise out of his use of emails to impersonate actual persons. Nothing in this prosecution, or in the court's jury charge, violated defendant's First Amendment or other constitutional rights.*
>
> *Defendant is the son of an expert on the Dead Sea Scrolls. Defendant set up email accounts in which he pretended to be other scholars who disagreed with defendant's father's opinion on the origin of the Scrolls. Among other things, defendant sent emails in which one of his father's rivals purportedly admitted to acts of plagiarism.*
>
> *Defendant's principal defense was that these emails were only intended to be satiric hoaxes or pranks. However, as it has been observed in the context of trademark law, "[a] parody must convey two simultaneous — and contradictory — messages: that it is the original, but also that it is not the original and is instead a parody" (Cliffs Notes, Inc. v Bantam Doubleday Dell Pub. Group, Inc., 886 F2d 490, 494 [2d Cir 1989]). Here, the evidence clearly established that defendant never intended any kind of parody. Instead, he only intended to convey the first message to the readers of the emails, that is, that the purported authors were the actual authors. It was equally clear that defendant intended that the recipients' reliance on this deception would cause harm to the purported authors and benefits to defendant or his father.*
>
> *The court's charge, which incorporated many of defendant's requests, fully protected his constitutional rights, and the court was not required to grant defendant's requests for additional instructions. The court*

carefully informed the jury that academic discussion, parody, satire and the use of pseudonyms were protected by the First Amendment.

The court also ensured that the jury understood the terms "fraud" and "defraud" by expanding their definition and advised the jury that "without the intent to deceive or defraud as to the source of the speech with the intent to reap a benefit from that deceit, there is no crime." The 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 (see People v Kase, 76 AD2d 532, 537-538 [1st Dept 1980], affd 53 NY2d 989 [1981]). The court also properly employed the statutory definition of "benefit" as "any gain or advantage" to defendant or to another person (Penal Law § 10.00[17]).

Defendant argues that it is constitutionally impermissible to include an intent to influence a constitutionally-protected academic debate within the concept of fraud, injury or benefit, that allowing injury to reputation to satisfy the injury element would effectively revive the long-abandoned offense of criminal libel, and that, in any event, the alleged truth of the content of the emails should have been permitted as a defense. However, the evidence established that defendant intended harm that fell within the plain meaning of the term "injure," and that was not protected by the First Amendment, including damage to the careers and livelihoods of the scholars he impersonated. Defendant also intended to create specific benefits for his father's career. The fact that the underlying dispute between defendant and his father's rivals was a constitutionally-protected debate does not provide any First Amendment protection for acts that were otherwise unlawful.

Defendant was not prosecuted for the content of any of the emails, but only for giving the false impression that his victims were the actual authors of the emails. The First Amendment protects the right to criticize another person, but it does not permit anyone to give an intentionally false impression that the source of the message is that other person (see SMJ Group, Inc. v 417 Lafayette Restaurant LLC, 439 F Supp 2d 281 (SD NY 2006]).

> *We have considered and rejected defendant's remaining arguments concerning the court's charge. We similarly reject his claims that the statutes under which he was convicted were unconstitutionally vague or overbroad. None of these statutes was vague or overbroad on its face or as applied (see People v Shack, 86 NY2d 529, 538 [1995]; Broadrick v Oklahoma, 413 US 601, 611-616 [1973]). The People were required to prove that defendant had the specific fraudulent intent to deceive email recipients about his identity, and to obtain benefits or cause injuries as a result of the recipients' reliance on that deception. The statutes criminalized the act of impersonation and its unlawful intent, not the content of speech falsely imputed to the victims....*

The key point is this: "The First Amendment protects the right to criticize another person, but it does not permit anyone to give an intentionally false impression that the source of the message is that other person." And I think that's quite right, even after *United States v. Alvarez* (the Stolen Valor Act case).

Intentionally trying to make others believe that someone did something (write an e-mail) that he did not inflicts specific harm on that other person, whether by harming his reputation or at least by making others think that he believes something that he doesn't (which will often be civilly actionable under the false light tort). To be sure, that usually leads to civil liability, but nothing in the Court's decision suggests that criminal liability in such cases is impermissible, especially when the law is limited to relatively clearly identifiable falsehoods, such as falsely claiming to be someone you are not.

Such liability is authorized under the intermediate scrutiny test set forth by the *Alvarez* two-Justice concurrence (and even more clearly under the views of the three-Justice dissent). And it might even be permissible in the eyes of the *Alvarez* plurality, which suggested that restrictions on knowing falsehoods that consist of "invasion of privacy" might be permissible — that appears to be a reference to the false light tort. Though that tort is often labeled a branch of the "invasion of privacy," it is indeed broad enough to cover false attribution of sentiments even about nonprivate matters — consider this example from the Restatement (Second) of Torts § 652E:

> *3. A is a renowned poet. B publishes in his magazine a spurious inferior poem, signed with A's name. Regardless of whether the poem is so bad as to subject B to liability for libel, B is subject to liability to A for invasion of privacy.*

That seems pretty close to signing another's name to an e-mail, intending to deceive readers about who is the true author. And given that the Court in *Alvarez* showed no sign of reversing the precedents upholding the false light tort (at least to knowing falsehoods), *Time, Inc. v. Hill* (1967) and *Cantrell v. Forest City Publishing* (1974), it seems to me that such impersonation is therefore indeed unprotected — as I said, against criminal punishment as well as civil liability.