STATE OF WISCONSIN
IN THE SUPREME COURT
Case No. 2007 AP 1289 – CR

STATE OF WISCONSIN

Plaintiff-Appellant

v.

CHRISTOPHER BARON

Defendant-Respondent-Petitioner

ON REVIEW FROM A PUBLISHED DECISION
OF THE COURT OF APPEALS DISTRICT 4
REVERSING THE DECISION OF THE
CIRCUIT COURT OF JEFFERSON COUNTY
THE HONORABLE RANDY R. KOSCHNICK, PRESIDING

BRIEF AND APPENDIX
OF DEFENDANT-RESPONDENT-PETITIONER
CHRISTOPHER BARON

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STATEMENT ON ORAL ARGUMENT

Oral argument is requested because it may be helpful in fully developing and resolving the issues involved.

STATEMENT OF THE ISSUE

Does Wisconsin's identity theft statute, Wis. Stat. § 943.201, violate petitioner Christopher D. Baron's First Amendment right to defame a public official by criminalizing Baron's unauthorized use of a public official's personal identifying information to send email messages intended to defame that public official?

In a published decision, the court of appeals held that the statute is not unconstitutional as applied to Baron's conduct. The court held that the identity theft statute criminalizes "the whole act of using someone's identity without their permission plus using the identity for one of the enumerated purposes, including harming another's reputation." Because the court found that the statute does not criminalize the specific act of defaming a public official, it held that the statute did not violate Baron's First Amendment rights.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Christopher D. Baron worked as an Emergency Medical Technician for the City of Jefferson (Ct. App. Op. ¶ 2). His supervisor, Mark Fisher, was the director of Jefferson's Emergency Medical Service (EMS) program (Ct. App. Op. ¶ 2). During the course of his employment, Baron became aware

that Fisher was engaging in an extramarital affair with Amy Zimmerman (29:19). At that time, Zimmerman was applying to work for the Jefferson EMS (16: 11-13). Baron was also aware that Fisher was using the city-owned ambulances and a city-owned apartment to engage in this affair (16:16-23).

As Baron admitted to investigators, Fisher had previously given Baron his email password (Ct. App. Op. ¶ 4). Baron then used this password to access Fisher's email account and obtain several email messages sent between Fisher and Zimmerman (Ct. App. Op. ¶ 3). These messages contained sexual innuendo, as well as attempts to set up meetings to engage in their affair (Ct. App. Op. ¶ 3). These emails also showed that Fisher was engaging in these affairs in the Jefferson EMS apartment and the EMS ambulance (Ct. App. Op. ¶ 3). After viewing these messages, Baron decided to expose Fisher's malfeasance by disseminating the messages to members of the community (29:16).

To disseminate these messages, Baron compiled them into a series of email packages (29:12-13). The subject lines of the email packages were "What's Mark been doing," "What's Mark been up to," and "O boy this doesn't look good" (1:2). Baron then "blinded" the emails so that they would appear to come from Fisher and sent them to various local and county EMS employees, as well as to Fisher's wife (Ct. App. Op. ¶¶ 3-4). Baron admitted to investigators that he did so in order to show people "what [Fisher] was doing and what he was like" (1:3).

II. PROCEDURAL POSTURE

A criminal complaint was filed charging Baron with six counts: criminal defamation, contrary to Wis. Stat. § 942.01(1); two counts of obstructing an officer, contrary to Wis. Stat. § 946.41(1); identity theft, contrary to Wis. Stat. § 943.201(2)(c); and two counts of computer crimes, contrary to Wis. Stat. § 943.70(2) (Ct. App. Op. ¶ 5). Following a preliminary hearing, Baron was bound over for trial and an information charging the same six counts was filed (5:1-2; 29:39).

Baron filed a motion to dismiss the criminal defamation count on the ground that the criminal defamation statute, Wis. Stat. § 942.01, violated the First Amendment on its face and as applied to his conduct (Ct. App. Op. ¶ 6). Baron contended that Mr. Fisher was a "public official" within the meaning of cases such as New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Garrison v. Louisiana, 379 U.S. 64 (1964); that the criminal defamation statute is facially overbroad because it criminalizes true statements about public officials and false statements about public officials that are not made with actual malice; and that the criminal defamation statute was unconstitutional as applied to his communication of true information about a public official (11:2; 12:1-15; 14:1-5).

In response, the State filed a motion to dismiss the criminal defamation charge based on its conclusion that the criminal defamation statute was unconstitutional as applied to Baron's conduct (18:1). On March 9, 2007, the court entered an order dismissing the criminal defamation count (18:1).

Baron then filed a motion to dismiss the identity theft charge on the ground that the identity theft statute was unconstitutional as applied to his conduct (20:1-2; 22:1-13). Baron argued that to convict him of identity theft, the State had to prove that he used Fisher's identity with the intent of harming Fisher's reputation (20:1). Because Baron had a First Amendment right to attack Fisher's reputation, Baron argued that it was unconstitutional for the identity theft statute to criminalize his dissemination of the defamatory information (20:2). The State claimed that the statute was not unconstitutional as applied, because it prohibited only Baron's unauthorized use of Fisher's identity to harm Fisher's reputation and not Baron's dissemination of the defamatory information itself (23:2-5).

Following a motion hearing, the circuit court granted Baron's motion to dismiss (30:31). The court held that one of the elements of the identity theft statute had "the purpose of using the information to defame another or actually did use the information for that purpose" and that this element was "substantially the same as the criminal defamation statute" (30:26-27). The court found that applying that element to Baron's conduct would impair his right to communicate defamatory information about a public official (30:29). The circuit court entered an order dismissing the identity theft charge on May 25, 2007 (25:1). The State then appealed from that order (27:1-2).

In a published opinion dated May 29, 2008, the court of appeals reversed the decision of the circuit court, holding that the identity theft statute is not

unconstitutional as applied to Baron's conduct (Ct. App. Op. ¶ 1). The court held that the identity theft statute criminalizes "the whole act of using someone's identity without their permission plus using the identity for one of the enumerated purposes, including harming another's reputation" and "does not criminalize each of its component parts standing alone." (Ct. App. Op. ¶ 10). Because the court found that "the identity theft statute does not criminalize the act of defaming a public official, and therefore does not violate Baron's First Amendment rights" to defame a public official with true information, it found that the statute was constitutional as applied to Baron's case (Ct. App. Op. ¶ 1).

ARGUMENT

I. STANDARD OF REVIEW

A. The constitutionality of a statute is a question of law that an appellate court reviews *de novo*.

The constitutionality of a statute is a question of law that an appellate court reviews *de novo*. State v. Zarnke, 224 Wis. 2d 116, 124, 589 N.W.2d 370 (1999); State v. Konrath, 218 Wis. 2d 290, 302, 577 N.W.2d 601 (1998).

B. Because application of Wisconsin's identity theft statute implicates petitioner Baron's First Amendment rights, the State bears the burden of proving the statute constitutional beyond a reasonable doubt.

In most cases challenging the constitutionality of a statute, courts afford statutes a presumption of constitutionality. Konrath at 302. However, when a statute implicates First Amendment rights, the State bears the burden of proving the statute constitutional beyond a reasonable doubt. Zarnke at 124.

In this case, petitioner Christopher Baron is challenging the constitutionality of Wisconsin's identity theft statute, Wis. Stat. § 943.201(2)(c). Specifically, Baron argues that the identity theft statute

infringes on his First Amendment right to defame a public official with true information by criminalizing his unauthorized use of that public official's name when disseminating the defamatory information. As applied in this case, the identity theft statute implicates Baron's First Amendment rights and the State therefore bears the burden of proving the statute constitutional beyond a reasonable doubt.

C. Wisconsin's identity theft statute must be analyzed using strict or exacting scrutiny because it regulates core political speech and is content-based.

Since application of the identity theft statute to Baron's conduct implicates protected speech, the court must determine what standard of scrutiny must be used to evaluate the constitutionality of the statute. Where the actual content of the speech at issue is the type of core political speech that the First Amendment seeks to protect, such speech is entitled to the most stringent First Amendment protections. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 337 (1995). "[I]nformation relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment." Butterworth v. Smith, 424 U.S. 624, 632 (1990). Therefore, the appropriate standard for reviewing a law infringing on core political speech is strict or exacting scrutiny. See McIntyre, 514 U.S. at 337.

In this case, Baron was attempting to expose Fisher's corruption by disclosing evidence of Fisher's misconduct to the community. Baron knew

that Fisher, whose official duties as director of the Jefferson EMS program included supervising the hiring and day-to-day scheduling of Emergency Medical Technicians, was engaging in an extramarital affair with an aspiring job applicant (16: 6). In addition, Fisher was using city-owned property, including the EMS apartment and the ambulance, to conduct these affairs (16: 16-23). Baron believed that these acts of misconduct were having a negative impact on the operation of the EMS program, as well as opening up the city to numerous lawsuits (29: 26).

Additionally, speech restrictions are subject to a heightened level of scrutiny when they are content-based. U.S. v. Brock, 863 F. Supp. 851, 857, 860-61 (E.D. Wis. 1994). A statute is content-based when it "regulates speech based on the ideas or messages it expresses." DiMa Corp. v. Town of Hallie, 185 F.3d 823, 827 (7th Cir. 1999). Content-based speech restrictions are presumptively invalid and are permissible only if the government can show the restriction serves a compelling state interest and is narrowly drawn to achieve that interest. Brock, 863 U.S. at 861.

As applied to the speech at issue in this case, the statute is content-based. Baron is charged under Wis. Stat. 943.201(2)(c), which prohibits unauthorized use of an individual's personal identifying information to disseminate information intended "to harm the reputation, property, person, or estate of the individual." In other words, if the emails that Baron disseminated had not contained defamatory information about Mark Fisher, he could not have been prosecuted under this section. Because the identity theft statute, as applied in this case, regulates Baron's speech only because

of the defamatory message it expresses, the statute is content-based and must be subject to strict scrutiny.

II. BARON HAS A FIRST AMENDMENT RIGHT TO DEFAME A PUBLIC OFFICIAL WITH TRUE INFORMATION REGARDLESS OF DEFECTS IN HIS METHOD OF DISSEMINATION.

As the State has conceded at the circuit court level and at the court of appeals, Baron had a constitutional right to communicate defamatory information about Mark Fisher. When voluntarily dismissing the criminal defamation charge previously filed against Baron, the State acknowledged that punishing Baron for his disclosure of this defamatory information would have violated Baron's First Amendment right to criticize a public official. It is not disputed for purposes of this appeal that Fisher was a "public official" for purposes of defamation law, that the information Baron communicated was true, and that the information related to Fisher's conduct in public office. Fisher himself originally composed the emails, and they showed that Fisher was having an extramarital affair with an aspiring applicant for his department and was using the EMS facilities and vehicles to do so.

Despite these concessions, the State has argued that it can prosecute Baron for identity theft because of defects in his method of dissemination. Specifically, the State wishes to charge Baron for disseminating the emails under Fisher's name when he disclosed the defamatory information. As applied by the State, Wisconsin's identity theft statute criminalizes not only the theft of Fisher's identity but the act of disseminating the defamatory information and Baron's intent to defame Fisher with that information.

This is an unconstitutional infringement of Baron's First Amendment rights.

A. Baron has a First Amendment right to defame a public official with true information.

Defamation law seeks a balance between constitutionally protected freedom of speech and the rights of citizens in this country to protect their reputations against false statements of fact. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). A citizen's right to protect his or her reputation "reflects no more than our basic concept of the essential dignity and worth of every human being - - a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. at 92 (Stewart, J. concurring). However, when defamatory statements concern the conduct of a public official, the right to speak freely on matters of public concern trumps that official's right to protect his or her reputation from true but defamatory information. See New York Times v. Sullivan, 376 U.S. 254, 269 (1964).

The difference in treatment of private citizens and public officials under defamation law is based on recognition that restricting the exercise of free speech is particularly dangerous when discussing public affairs, a fundamental right in a republican system of government:

> "Those who won our independence believed... that public discussion is a political duty; and that this should be a

> fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form."

Whitney v. California, 274 U.S. 357, 375-376 (1927) (Brandeis, J. concurring).

In addition to the right to uninhibited public debate, there are two other justifications for a greatly diminished need to protect public officials: the increased ability of public officials to remedy the defamation through self-help, and their increased exposure to public scrutiny through seeking public office. Gertz at 344. First, public officials "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." Id. Since private individuals have a comparatively limited ability to rebut such attacks, they are more vulnerable to injury and the state has a much greater interest in protecting

their reputation. Id. Second, as an unavoidable consequence of seeking public office, public officials are necessarily subjected to greater public scrutiny. Id. As the U.S. Supreme Court stated in Garrison v. Louisiana, "Where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the constitution, in the dissemination of truth." 379 U.S. at 77. Accordingly, courts have a much lower interest in protecting the reputations of public officials, and they distinguish between private plaintiffs and public officials when setting the standard for establishing liability in defamation cases. Gertz at 344.

It is in this context that we must review the State's prosecution of Baron for identity theft, because as applied to Baron's conduct, Wisconsin's identity theft statute directly implicates his right to defame a public official.

B. U.S. Supreme Court precedent supports Baron's right to defame a public official with true information regardless of defects in his method of dissemination.

Although this is a case of first impression in Wisconsin, the U.S. Supreme Court has previously addressed the appropriate balance between a citizen's First Amendment right to defame a public official with true information and the privacy rights of the public official. Although the State seeks to distinguish between Baron's right to publish defamatory

information about Fisher and Baron's right to publish defamatory information about Fisher using "illegal" means, the U.S. Supreme Court has long upheld the right to publish true but defamatory information about a public official even when that information was obtained illegally. See, e.g., New York Times v. U.S., 403 U.S. 713 (1971) (regarding publication of the Pentagon Papers); Bartnicki v. Vopper, 532 U.S. 514 (2001) (regarding dissemination of information obtained in violation of state and federal wiretapping laws).

In New York Times v. U.S., the U.S. government sought to enjoin the New York Times and the Washington Post from reprinting selections from the Pentagon Papers, which were formally titled *United States–Vietnam Relations, 1945–1967: A Study Prepared by the Department of Defense*. New York Times v. U.S., 403 U.S. at 713. The Pentagon Papers were a top-secret history of U.S. involvement in the Vietnam War, obtained illegally by Daniel Ellsberg and passed to the New York Times for publication. Id. Ellsberg said the documents "demonstrated unconstitutional behavior by a succession of presidents, the violation of their oath and the violation of the oath of every one of their subordinates," and that he had leaked the papers in the hopes of getting the nation out of "a wrongful war." Id.

In Bartnicki v. Vopper, a union president and chief union negotiator brought suit when an unidentified person intercepted, recorded and made public a cell phone call made between the two men regarding ongoing collective-bargaining negotiations. Bartnicki v. Vopper, 532 U.S. 514

(2001). The negotiations had been contentious and received significant media attention, and during the phone call, the men talked about the need for a dramatic response to the school board's demands. Id. The recording was played after the negotiations were concluded on a radio show whose host had been historically critical of the union. Id. The union president and chief union negotiator filed claims under a federal wiretapping law that prohibits an individual from disclosing the contents of an electronic communication when he or she knows or has reason to know that the information was obtained through an illegal interception. Id.

In both New York Times v. U.S. and Bartnicki v. Vopper, the U.S. Supreme Court upheld a citizen's right to disseminate information of public concern obtained from documents or electronic communications stolen by a third party. 403 U.S. 713; 532 U.S. 514. In making this decision, the Court focused on the character of the stolen communications and the consequences of public disclosure, rather than the fact that the communications were obtained illegally. Id. Although the Court acknowledged a government interest in minimizing harm to persons whose communications have been illegally intercepted, the Court found that the privacy concerns of public officials give way when balanced against a citizen's interest in publishing matters of public importance. Id.

Although neither of these cases involves an identity theft statute, they are analogous to Baron's case in other ways. As in the cases cited above, the State concedes here that Baron would have the right to disseminate the true but defamatory information about Fisher *except for* an

alleged defect in his method of dissemination. This assertion conflicts with prior U.S. Supreme Court precedent because it focuses on the fact that the communications were disseminated improperly and not on the character of the stolen communications themselves and the consequences of public disclosure.

On its face, Baron's case may appear to differ from the U.S. Supreme Court cases cited above, which involve misconduct by the person who obtained the communications and not by the person or entity who disseminated the communications. To date, the U.S. Supreme Court has not addressed whether the government may prosecute a citizen who *obtained* communications illegally for the subsequent act of *publishing* those communications. See Bartnicki, 532 U.S. 514.

However, as noted in the statement of facts, Baron has not been charged with using Fisher's personal identifying information to *obtain* Fisher's communications illegally. Instead, Baron is charged with improperly using Fisher's personal identifying information at the time he *disseminated* those communications. Because Baron's misconduct allegedly occurred at the time he disseminated the communications, his case should be addressed under the framework already established by the U.S. Supreme Court for similar situations.

As applied by the State, Wisconsin's identity theft statute conflicts with a long line of United States Supreme Court cases regarding a citizen's right to disseminate information of public interest, regardless of its

defamatory nature or defects in the method of dissemination, including New York Times v. Sullivan, 376 U.S. 254 (1964), New York Times v. U.S., 403 U.S. 713 (1971), and Bartnicki v. Vopper, 532 U.S. 514 (2001). By structuring the identity theft statute the way it has, the Wisconsin legislature has promulgated a statute which makes it criminal to "out" or publish defamatory but true statements, letters, emails or other information about a public official. The legislature has set up an illegal system of prior restraint by choosing to punish, not the illegal taking of the information, but the publication or dissemination of the information itself.

III. WISCONSIN'S IDENTITY THEFT STATUTE IS UNCONSTITUTIONAL AS APPLIED BECAUSE IT IMPERMISSIBLY REGULATES BARON'S PROTECTED SPEECH.

A. The identity theft statute directly regulates protected speech by punishing Baron for his defamatory intent.

Under Wisconsin's identity theft statute, an individual may be punished for identity theft only for specific, delineated uses of personal identifying information. Wis. Stat. § 943.201. One of these uses, the use for which Baron is charged, is virtually indistinguishable from criminal defamation and the State has so conceded. Wisconsin Stat. § 943.201(2) provides in relevant part:

> (2) Whoever, for any of the following purposes, intentionally

> uses, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual, including a deceased individual, without the authorization or consent of the individual and by representing that he or she is the individual, that he or she is acting with the authorization or consent of the individual, or that the information or document belongs to him or her is guilty of a Class H felony:
>
> > (c) To harm the reputation, property, person, or estate of the individual.

The jury instruction for identity theft also identifies the second element of the offense as use of "personal identifying information of the individual to harm the reputation, property, person, or estate of the individual." Wis JI-Criminal 1458. When applied to the facts of this case, this element of the offense, "to harm the reputation of the individual," is substantially the same as criminal defamation: that Baron intended to harm Fisher's reputation by defaming him with true information. The facts supporting this element, that Baron admitted to sending the emails with the purpose of hurting Fisher's image and to show people "what he was doing and what he was like," are the same facts that supported the criminal defamation charge (1: 3).

Accordingly, at the hearing on the motion to dismiss, the State conceded that Baron's purpose of harming Fisher's reputation was

equivalent to Baron's intent to defame Fisher:

The Court: Do you agree with Mr. Dunn's characterization that the intent to harm reputation is tantamount to defamation?

Mr. Kassel: Well, I certainly agree that the sub. C to harm reputation, yes, is equivalent because I believe the criminal defamation statute used similar language, but I don't recall it offhand.

The Court: Sub. C is basically the same as defamation?

Mr. Kassel: Yes.

The Court: Thank you.

Mr. Kassel: For all practical purposes in our analysis.

The Court: Okay.

(30: 17).

The trial court agreed with this analysis, reasoning that "[T]he second element as it's characterized in the jury instruction for a violation of this statute, does have a defamation component; that is, the defendant either

had the purpose of using the information to defame another or actually did use the information for that purpose. And the First Amendment of the United States Constitution does protect the right of individual citizens to disseminate or communicate defamatory information about public officials. The elemental requirements of 943.201(2)(c) are substantially the same as the criminal defamation statute," (30: 26-27).

The drafting of the identity theft statute reflects an understanding of how important purpose is to this crime. The Wisconsin legislature did not create a general crime of identity theft. Instead, it defined three categories of purpose that each offender must fit into. In order to commit the crime of identity theft, every offender must have acted with one of the following purposes:

(a) To obtain credit, money, goods, services, employment, or any other thing of value or benefit;

(b) To avoid civil or criminal process or penalty; or

(c) To harm the reputation, property, person or estate of the individual.

Wis. Stat. § 943.201(2)

The significance of this is that if the identity theft is not committed for one of these purposes, *there is no crime*. In other words, the purpose is

what makes the conduct criminal. In Baron's case, if not for his defamatory intent, he could not be punished for the theft of Fisher's identity. The legislature did not prohibit identity theft on its own; they prohibited identity theft only with one of the specifically enumerated purposes. See Wis. Stat. § 943.201(2). Therefore, purpose is inextricably intertwined with the conduct, and is in no way incidental to the crime. Punishing the conduct necessarily punishes the purpose, because without the purpose, there would be no crime.

In this case, the State seeks to prosecute Baron under an identity theft statute that directly punishes him for his intent to defame Fisher and indirectly punishes him for his dissemination of defamatory information about Fisher. Baron's intent to defame Fisher and expose him as corrupt was the singular motivation in the theft of Fisher's identity. If Baron did not intend to harm Fisher's reputation, he would not have disseminated the emails regarding Fisher's sexual misconduct. Furthermore, if he had not intended to harm Fisher's reputation, his dissemination of the emails *could not have been* prosecuted under the identity theft statute at all. In these ways, the identity theft punishes Baron, not for his improper use of Fisher's name to disseminate the emails, but his intent to injure Fisher's reputation. Because Baron has a First Amendment right to disseminate true but defamatory information of public interest about a public official, the State's criminalization of this conduct is unconstitutional.

B. The identity theft statute implicates protected speech by

indirectly regulating the act of disseminating defamatory information.

In addition to effectively criminalizing the defendant's defamatory intent, the identity theft statute as applied in this case also impermissibly regulates the act of disclosing the defamatory information. As set out in the statement of facts, the act that the State alleges is prohibited by the identity theft statute is Baron's unauthorized use of Fisher's personal identifying information, specifically his name, for the purpose of harming Fisher's reputation through dissemination of defamatory information about Fisher.

The information alleges that the personal identifying information Baron used was "the individual's name" (5: 1). Baron used Fisher's name, according to the State, when Baron disseminated the emails in such a way that the recipients thought Fisher had sent them (29: 37). This distinction is illustrated by an exchange at the Preliminary Hearing between the Jefferson County District Attorney and the court, as the court attempted to discern exactly which facts supported the charge:

> Mr. Wambach: The testimony is that the E-mails went out under the name of Mark Fisher and were blinded as such so they would appear to have come from Mark Fisher. That's the name.
>
> The Court: You are ahead of me already. What I have to do is establish first of all that one would intentionally use, in

this case, identifying information or a personal identification document. So, it would be an assertion that the person used personal identifying information - -

Mr. Wambach: Right.

The Court: (Continuing) - - which would be the name because the testimony is that the E-mails went out under the name of Mark and not Christopher?

Mr. Wambach: Correct.

(29: 37).

This is the only use of Fisher's personal identifying information alleged by the State. There is no allegation that Baron used a particular personal identifying document of Fisher's, that Baron used any other personal identifying information such as his social security number, or even that Baron used Fisher's name in another instance. Therefore, the crime, as alleged, is that Baron committed identity theft when he disclosed the emails, purporting to be from Fisher, for the purpose of harming Fisher's reputation.

Accordingly, the act of disclosing the emails is an essential component of the crime. **The crime of identity theft had not been**

committed until the disclosure. The "unauthorized use" occurred only when Baron sent the emails under Fisher's name. Therefore, application of the identity theft statute to Baron's conduct would effectively prohibit this disclosure of defamatory information, and create a chilling effect on his right to criticize a public official.

The act of disseminating that defamatory information is an integral component of the unauthorized use of Fisher's personal identifying information and, by criminalizing one, the State necessarily criminalizes the other. As the U.S. Supreme Court held in Garrison, imposing criminal sanctions on the dissemination of truthful information that defames a public official is unconstitutional. 379 U.S. at 74-75.

Admittedly, the identity theft statute only regulates the disclosure of the information indirectly. However, the fact that a law regulates protected speech only indirectly does not shield it from First Amendment scrutiny. See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (special tax on ink and paper used in production of a newspaper violates First Amendment).

For a more factually similar example, the U.S. District Court for the district of New Hampshire held that a law barring the transmission or use of prescriber-identifiable information for certain commercial purposes was an unconstitutional infringement of First Amendment rights. IMS Health Inc., et al., v. Ayotte, 490 F. Supp. 2d 163, 2007 DNH 61. The plaintiffs in this case were data mining companies that collected data capable of identifying

which health care providers prescribed which pharmaceutical products, and sold this data to interested purchasers, primarily pharmaceutical companies. IMS Health Inc. at 165-166. They challenged New Hampshire's Prescription Information Law, which banned the use of this prescriber-identifiable data for certain enumerated commercial purposes, on the grounds that it violated protected commercial speech. Id. at 174. In relevant part, the statute reads:

> "Records relative to prescription information containing patient-identifiable and prescriber-identifiable data shall not be licensed, transferred, used, or sold by any pharmacy benefits manager, insurance company...electronic transmission intermediary...or other similar entity, for any commercial purpose[.] ...Commercial purpose includes, but is not limited to, advertising, marketing, promotion, or any activity that could be used to influence sales or market share of a pharmaceutical product..."

N.H. Rev. Stat. Ann. §§ 318:47-f, 318:47-g, 318-B:12(IV) (2006).

The New Hampshire Attorney General argued that the Prescription Information Law did not restrict speech because it only regulated the "use" of prescriber-identifiable information rather than the disclosure of such information. IMS Health Inc. at 175. The District Court rejected this argument, asserting that the statute prohibited the licensing, use, transferral, or selling of this data, and that since transfer of information to a third party

is a form of disclosure, the statute directly regulated speech. Id. The court went on to declare that even if the statute did not directly regulate the disclosure of the data, the law was not safe from First Amendment scrutiny:

> "A law is not automatically exempt from the First Amendment merely because it regulates protected speech only indirectly. Here, the challenged law restricts speech by preventing pharmaceutical companies from using prescriber-identifiable information both to identify a specific audience for their marketing efforts and to refine their marketing messages. Such laws are subject to First Amendment scrutiny because they affect both the speaker's ability to communicate with his intended audience and the audience's right to receive information."

Id. at 175 (citations omitted).

Likewise, application of the identity theft statute to Baron's conduct effectively prohibits him from communicating the defamatory emails to the public, as well as preventing the public from receiving information that would expose the misconduct of public official. This is an important distinction that demonstrates why the State's analogies to the bribery and election fraud statutes fail: the free speech at issue in this case is more than just an element of the statute. As applied to Baron's conduct, the identity theft punishes not only his intent to defame Fisher, but also the act of disclosing the defamatory information. As argued in section (b), *supra*, the

defamatory purpose is what makes the identity theft criminal in this case, because unless the identity theft is committed with that prohibited purpose, there is no violation of the statute. And as illustrated above, if Baron had not disclosed the defamatory emails, there would have been no identity theft as charged. As with the defamatory intent, the disclosure was central to the crime. Therefore, the identity theft statute implicates protected First Amendment speech.

C. The identity theft statute does not pass strict or exacting scrutiny because it is not narrowly tailored.

As noted in section I.C, *supra*, the strict or exacting scrutiny test should be applied in this case because it regulates core political speech and is content-based. Therefore, the question becomes whether the statute at issue is narrowly tailored to meet a compelling state interest. We do not contest the fact that the State has a compelling interest in protecting the victims of identity theft. We also acknowledge that the State has, in the appropriate circumstances, a legitimate interest in protecting the reputations of identity theft victims. However, those appropriate circumstances do not include protecting the reputation of a public official from truthful yet defamatory information nor would they include protecting the reputation of a public official from false information published without actual malice. Wisconsin's identity theft statute effectively regulates these as well, and thus is not narrowly drawn to meet a compelling state interest.

The legislature could have drawn an identity theft statute that recognizes the state's disparate interests in protecting the reputations of private citizens and public officials that federal courts have made repeatedly in the years following New York Times and Garrison, but has chosen not to. As a result, the statute was not drawn narrowly enough to avoid infringing on protected speech. This is also consistent with the fact that Wisconsin's criminal defamation statute still does not distinguish between defamation of private individuals and public officials. See Wis. Stat. § 942.01 (2007-2008). In fact, the legislature has amended this law no less than four times since the developments of New York Times and Garrison, but has not afforded any privilege to criticism of public officials. See 1977 Senate Bill 14; 1979 Assembly Bill 459; 1993 Wisconsin Act 486; and 2005 Wisconsin Act 253. As with the criminal defamation statute, it is now up the judiciary to construe the statute in such a way that it does not violate Baron's First Amendment right to defame a public official with true information.

CONCLUSION

Under the U.S. Constitution, Christopher Baron has a First Amendment right to defame a public official with true information. The State has conceded, in front of the trial court and for purposes of this appeal, that Mark Fisher was a public official and that the information Baron disseminated about him was true. However, the State still seeks to punish Baron for his defamatory intent by prosecuting him under Wisconsin's identity theft statute for the sole act of disseminating this information under the name of Mark Fisher rather than his own name.

Because the State must prove the identity theft statute's "purpose" element of intent to harm an individual's reputation, the statute directly punishes Baron for his intent to defame Fisher and indirectly punishes him for his dissemination of defamatory information. As applied to Baron's act of dissemination, the identity theft statute limits Baron's First Amendment rights in a way contradictory to existing U.S. Supreme Court precedent. The identity theft statute, as applied in this case, directly implicates Baron's First Amendment rights and the burden therefore falls to the State to prove it constitutional beyond a reasonable doubt. Furthermore, because it also implicates Baron's core political speech and is content-based, the Court should apply strict or exacting scrutiny in determining its constitutionality. Where the identity theft statute is applied to punish the act of disseminating true but defamatory information about a public official using that public official's name, the State cannot meet its burden and the statute must be found unconstitutional as applied to Baron's conduct.

Respectfully submitted this 22nd day of September, 2008.

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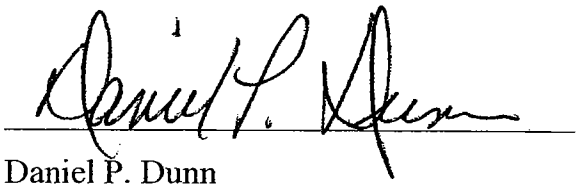
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 7,996 words.



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APPENDIX

A. **Opinion of the Court of Appeals**

B. **Decision and Order of the Circuit Court**

C. **Written Order of Dismissal**

CERTIFICATION REGARDING APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a), Stats., and that contains, at a minimum, a table of contents, the findings or opinion of the Circuit Court and the Court of Appeals, and portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the Circuit Court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1289-CR **Cir. Ct. No. 2006CF496**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CHRISTOPHER BARON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Reversed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 BRIDGE, J. This case involves the application of Wisconsin's identity theft statute to a person who misappropriates the identity of a public official. The circuit court ruled that the identity theft statute, WIS. STAT.

APPENDIX A

§ 943.201(2)(c) (2005-06),[1] which in part prohibits the unauthorized use of a person's identity for the purpose of harming an individual's reputation, is unconstitutional as applied in the present case. The court reasoned that because the person whose identity Christopher Baron misappropriated was a public official, application of the identity theft statute violated Baron's First Amendment right to defame a public official with true information. We conclude that the identity theft statute does not criminalize the act of defaming a public official, and therefore does not violate Baron's First Amendment rights. Accordingly, we reverse.

BACKGROUND

¶2 Christopher Baron worked as an Emergency Medical Technician (EMT) for the City of Jefferson. His boss, Mark Fisher, was the director of Jefferson's Emergency Medical Service (EMS) program. The criminal complaint against Baron alleges that he hacked into Fisher's work computer and sent emails he found in Fisher's email account to about ten people. The forwarded emails purported to have come from Fisher.

¶3 The forwarded emails were originally sent from Fisher to a female EMT, and suggested that Fisher was having an extramarital affair. The content of the emails consisted primarily of sexual innuendoes between Fisher and the female EMT, as well as attempts to set up meetings to engage in the affair. The emails also indicated that Fisher was using an apartment owned by the EMS Department to conduct the affair. Baron sent the emails to various local and county EMS

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

workers, as well as to Fisher's wife. The day after Baron sent the emails, Fisher committed suicide.

¶4 Baron admitted to investigators that he had sent the emails and that he had done so to get Fisher in trouble. He stated that he knew Fisher's password because he had helped Fisher with Fisher's computer. Baron told investigators that he used his personal computer at his home to access Fisher's work computer. Baron "blinded" the emails so that it would not be possible to determine who had actually sent them. He said that he originally intended to send the emails only to Fisher's wife, but then decided to send them to other people so they could see that Fisher was not "golden."

¶5 Baron was charged with six counts: criminal defamation in violation of WIS. STAT. § 942.01(1); two counts of obstructing an officer in violation of WIS. STAT. § 946.41(1); identity theft in violation of WIS. STAT. § 943.201(2)(c); and two counts of computer crimes in violation of WIS. STAT. § 943.70(2). The State voluntarily dismissed the criminal defamation charge.

¶6 Baron then filed a motion to dismiss the identity theft charge on the ground that the identity theft statute is unconstitutional as applied to his conduct. The circuit court granted the motion. The State appeals.

STANDARD OF REVIEW

¶7 The constitutionality of a statute is a question of law, which we review de novo. ***State v. Zarnke***, 224 Wis. 2d 116, 124, 589 N.W.2d 370 (1999). In most circumstances, the party challenging the constitutionality of a statute has the burden of proving that the statute is unconstitutional beyond a reasonable doubt. ***Id.*** However, because the statute at issue implicates First Amendment

rights, the State has the burden of proving beyond a reasonable doubt that the statute is constitutional. ***Id.*** at 124-25.

DISCUSSION

¶8 The parties agree that, as the Jefferson EMS director, Fisher was a "public official" as that term is used in defamation law. *See* ***Miller v. Minority Bhd. of Fire Prot.,*** 158 Wis. 2d 589, 601, 463 N.W.2d 690 (Ct. App. 1990). The parties also agree that Baron had a First Amendment right to disseminate defamatory information about Fisher's performance as a public official if either the information was true or, if the information was false, Baron did not act with "actual malice." *See* ***New York Times Co. v. Sullivan,*** 376 U.S. 254, 279-80 (1964) (public official may not recover damages from a defamatory falsehood related to official conduct unless the official proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not).

¶9 In order to convict Baron of identity theft, the State had to prove that Baron: (1) intentionally used Fisher's personal identifying information (2) for the purpose of harming Fisher's reputation (3) by intentionally representing that he was Fisher (4) without Fisher's consent.[2] *See* WIS JI—CRIMINAL 1458. It is

[2] WISCONSIN STAT. § 943.201(2), Wisconsin's identity theft statute, provides in relevant part:

(continued)

undisputed that Baron's purpose in misappropriating Fisher's identity was to harm Fisher's reputation. Baron argues that because the "purpose" element of harming an individual's reputation is an element of identity theft that the State must prove, the statute directly punishes him for his intent to defame and indirectly punishes him for his disclosure of defamatory information, in violation of his First Amendment rights. We disagree.

¶10 The flaw in Baron's logic is that it focuses on the "purpose" element viewed in isolation. Instead, what is criminalized by the identity theft statute is the *whole* act of using someone's identity without their permission *plus* using the identity for one of the enumerated purposes, including harming another's reputation. The statute does not criminalize each of its component parts standing alone. Wisconsin statutes are replete with provisions that criminalize conduct that may otherwise be constitutionally protected, if that conduct is carried out in an unlawful manner. For example, one has a constitutional right to travel, *see* ***United States v. Guest***, 383 U.S. 745, 757-59 (1966), but not to exceed the speed limit

---

> (2) Whoever, for any of the following purposes, intentionally uses or, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual, including a deceased individual, without the authorization or consent of the individual and by representing that he or she is the individual, that he or she is acting with the authorization or consent of the individual, or that the information or document belongs to him or her is guilty of a Class H felony:
>
> (a) To obtain credit, money, goods, services, employment, or any other thing of value or benefit.
>
> (b) To avoid civil or criminal process or penalty.
>
> (c) To harm the reputation, property, person or estate of the individual.

when doing so. One also has a constitutional right to keep and bear arms, WIS. CONST. art. I, § 25, but not to use them to commit homicide.

¶11 A particularly apt example is WIS. STAT. § 946.10(1), which prohibits bribery of public officers. The statute is violated when the defendant gives or promises to give something of value for the purpose of influencing the action of a public official on a matter which by law is pending or might come before the official. *See* ***State v. Rosenfeld***, 93 Wis. 2d 325, 335, 286 N.W.2d 596 (1980). There are four elements to this offense:

> The first element requires that (name of officer) was a public officer.
>
> ....
>
> The second element requires that the defendant transferred property to (name of officer).
>
> The third element requires that (name of officer) was not authorized to receive the property for the performance of official duties.
>
> The fourth element requires that the defendant intended to influence the conduct of (name of officer) in relation to any matter which by law was pending or might have come before (name of officer) in an official capacity.

WIS JI—CRIMINAL 1721 (footnotes omitted).

¶12 The fourth element requires that the defendant intended to engage in conduct that, were it not accompanied by a bribe, would be protected by the First Amendment.[3] As the State observes, under the reasoning urged by Baron, the

[3] The petition clause of the First Amendment, which guarantees "the right of the people ... to petition the Government for a redress of grievances," U.S. Const. amend. I, protects the right of individuals to communicate their wishes to public officials. *See* ***McDonald v. Smith***, 472 U.S. 479, 482 (1985).

bribery statute would be unconstitutional because one of the elements that the State would have to prove—that the defendant intended to influence the official action of a public official—constitutes conduct protected by the First Amendment. However, the fact that this otherwise protected conduct is an element of the bribery offense does not necessarily mean that the bribery statute is unconstitutional.

¶13 Baron argues that our decision in ***State v. Ramirez***, 2001 WI App 158, 246 Wis. 2d 802, 633 N.W.2d 656, supports his interpretation of the statute. In that case, Ramirez had been charged under an older version of the identity theft statute.[4] ***Id.***, ¶3. He argued that the statute as applied represented an ex post facto law because it did not create a continuing offense. ***Id.***, ¶8. In the course of concluding that the statute was ambiguous, we observed that although the statute "may be clear enough as to what it criminalizes, it is not so clear as to whether it creates a continuing offense." ***Id.***, ¶12. Baron argues that by this dicta, we suggested that the statute criminalized each element of the identity theft statute. However, the analysis in ***Ramirez*** regarding whether a statute creates a recurring and not an isolated offense bears no relationship to the analysis in the present case regarding whether a statute criminalizes the component parts of the offense. We fail to see how ***Ramirez*** supports Baron's argument.

---

[4] Ramirez was charged pursuant to WIS. STAT. § 943.201(2) (1999-2000), which provided:

> Whoever intentionally uses or attempts to use any personal identifying information or personal identification document of an individual to obtain credit, money, goods, services or anything else of value without the authorization or consent of the individual and by representing that he or she is the individual or is acting with the authorization or consent of the individual is guilty of a Class D felony.

¶14 In sum, the identity theft statute neither prohibited Baron from disseminating information about Fisher nor prevented the public from receiving that information. Instead, the statute prohibited Baron from purporting to be Fisher when he sent the emails.

¶15 We conclude that the identity theft statute as applied to Baron does not criminalize his constitutionally protected right to defame a public official.[5] Accordingly, we conclude that the State has met its burden of proving beyond a reasonable doubt that the statute is constitutional. For the foregoing reasons, we reverse the circuit court's order dismissing the charge against Baron under WIS. STAT. § 943.201(2)(c).

By the Court.—Order reversed.

Recommended for publication in the official reports.

[5] Because we conclude that the identity theft statute does not impose any cognizable burden on political speech, we reject Baron's argument that the statute is subject to strict scrutiny.

STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY
BRANCH 4

STATE OF WISCONSIN,
Plaintiff,

-vs- Case No. 06-CF-496

CHRISTOPHER BARON,
Defendant,

FILE

MOTION HEARING

Thursday, May 17, 2007

HONORABLE RANDY R. KOSCHNICK
Presiding Judge

A P P E A R A N C E S:

Mr. Jeffrey J. Kassel, Assistant Attorney General,
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Appeared on behalf of the State of Wisconsin.

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Mr. Daniel P. Dunn, Attorney at Law,
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Appeared on behalf of the Defendant,
Christopher Baron, who appeared in person.

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APPENDIX B

(Commenced, 11:04 a.m.)

THE COURT: The Court calls Case Number 06-CF-496, State vs. Christopher Baron.

Who appears, please?

MR. WAMBACH: David Wambach appears on behalf of the State of Wisconsin as to all issues other than the constitutional issue, your Honor.

MR. KASSEL: Assistant Attorney General Jeffrey Kassel appearing on behalf of the Attorney General under section 806.0411 to address the constitutional challenge to count 4.

MR. DUNN: Your Honor, the defendant is here in person with counsel Daniel Dunn. Also present at counsel table is my very able associate, Cole Ruby, R-u-b-y.

MR. WAMBACH: If it please the Court, the parties are in agreement that it would be appropriate to have the constitutional issue addressed first, so that then assistant AG Kassel can be on his way after the Court makes whatever ruling the Court is going to make after hearing whatever argument and takes whatever action the Court is going to take on that issue.

THE COURT: Mr. Dunn?

MR. DUNN: I have no objection to proceeding in that manner, your Honor.

THE COURT: That's what we will do.

MR. DUNN: Okay.

THE COURT: This is Mr. Dunn's motion.

I will start with you, Mr. Wambach, on the procedural issue. There is a time requirement issue and Mr. Dunn has filed a motion to enlarge the time limits so that this motion can be filed and heard today.

Do you have any objection to that motion?

MR. WAMBACH: No.

THE COURT: Okay. And I don't think that it would be reasonable to prevent the motion for time limit reasons given the procedural history of the case and the fact that the trial is several months out. We will proceed today to consider the merits of the motion.

I have read the briefs. I think there is just one brief from each side.

You filed a brief, Mr. Dunn, and the attorney general filed a brief yesterday.

Am I right, Mr. Kassel?

MR. KASSEL: Correct, your Honor.

THE COURT: I have read that and read the supporting documents. You don't need to repeat everything therefore, Mr. Dunn, but feel free to highlight or emphasize whatever you would like.

You may go first. Go ahead.

MR. DUNN: Okay. It is my understanding that we have filed a lot of information on the law. I will try to address my remarks and to follow the outline of the attorney general's response, your Honor.

The State in this case says that the defendant had no right to steal and use Mr. Fisher's identification, just because Mr. Baron wanted to harm Fisher's reputation. That's kind of lifted right out of the brief.

The State also says that the actual intent to disseminate the information is not an issue, nor is the actual dissemination an issue. Why? Because the crime is complete, they say, when the identification has been used. In fact, what they do is they try and break it down into conduct and speech.

And as you look at 943.201, sort of what it does, it says, "that whoever for the following purpose," and then it runs off, "intentionally uses, attempts to use, or possessed with intent to use." And then in the subsection A, B, and C you have the following purposes.

And our issue is pretty clear. We feel that the statute as is drafted, and as is applied here, raises speech issues, First Amendment speech issues.

Although the State tries to bifurcate this into conduct and speech and say: Once you've done the

conduct, the crime has been committed, there is no crime committed in this case because the legislature included "with intent to injure reputation," and that has to be proven. That is -- it's not only circumstantial evidence, as the State claims, it is more than that. It has become a part of the criminal statute.

It has to be proven beyond a reasonable doubt, and without that being proven, there can be no conviction.

So, an actor under 943.201(2) can do all of that, and for purposes of this motion I'm assuming that the defendant did all of that, and then you come back to the fact that there can't be a crime until that subsection C, "injure the reputation," has been proven.

As I said, this element may be evidence of other things, but it is protected behavior. The act of dissemination of these materials, the thought or intent to use the documents or the identification has been criminalized by sub. C.

The State is wrong when it says that the statute does not criminalize the harming of the reputation any more than obtaining credit, goods, et cetera, as you would find in subsections A and B. They are simply wrong.

One has no right, no protected right, to these

things, and the attempted analogy to Robins seems to me be a stretch. There is no protected speech implication in Robins.

There is no situation in Robins where the alleged protected behavior is in the statute or has been part of the element of the crime. The analogy fails. Why? Because in Baron, content based thought, content based thought, intent, and speech are implicated.

That's important. Why? There is an entire body of federal law that says so. You cannot apply the Robins rationale in Baron. You simply cannot say that it was only about a person's identity. That it is only about conduct, because it is not.

And I come back to it. You can't get a conviction without admitting and finding that the defendant beyond a reasonable doubt did disseminate for purposes of trying to injure reputation. Reputation in this case, I'm saying, is exactly the same thing as defamation. It is just a way to restate that defamation has become an element of the crime in 943.201.

Let me go to this: As far as distinguishing the Robins case from our own, I would point out that the child enticement statute didn't directly implicate the constitutional protection that the defendant claimed.

In Robins the First Amendment protection

claims by the defendant were for the E-mails and instant messages between himself and the supposedly under age boy. The State was using these as evidence of the defendant's intent to have sex with the child.

In other words, the defendant wasn't claiming that the statute itself contained an element that was protected by the First Amendment, but that the use of the evidence against him was a First Amendment violation.

By contrast, the First Amendment issue we raise is based upon an element of the statute. The speech in our case isn't incidental to the criminal conduct. It is part of the criminal conduct that is being prohibited.

I would say that we can look at an analogy as being something like the felony murder rule as analogous to Robins. The defendant commits a burglary and unintentionally kills the homeowner. He is charged with felony murder. Is this okay? Sure. Why? Because you can prove the homicide occurred during the burglary and, wallah, the murder proves the burglary and the murder is illegal. Okay. The murder is illegal. That's how you get to the conduct.

At bar in Baron, the dissemination or publication of anything gleaned from -- and let's assume

it's gleaned illegally, at least according to sub. 2 of the statute. The dissemination may be evidence of the prohibited conduct of using another's identification, but the publication or dissemination is protected speech. It is. It is criminalized by virtue of making it an element of the crime.

So, when the State argues that it is only conduct and not speech which is implicated by the creation of section 943 -- I'm sorry 943.201(2) and argues that it is only conduct that it is prohibited, that is the use of personally identifying documents, we think they are incorrect.

The defense argues that it is more than conduct that is implicated because one cannot commit this crime without the additional element contained in either subsections A, B and C; and the only one that we are concerned with is the reputation in sub. C.

In our case sub. C puts the issue of reputation, another word for defamation, into the mix. You cannot commit the crime if you only -- if you only pursue the conduct. The conduct in this case, conduct as opposed to speech we would assume for the sake of argument occurred.

Would you be able to punish an intent under this statute? Let's say that the defendant took it and

it was for the purpose of ruining his reputation, for exposing malfeasance in office, but didn't publish. Is there a First Amendment chill? Isn't this a First Amendment chill on content based thought? Don't we have a chilling effect here?

The real question is: Does the statute chill, infringe, or does it conflict with content based thought and content based speech?

The conduct is inextricably linked in this case with the harm to reputation. You can't have one without the other.

As applied to our case, and recognizing that the State has conceded that Mark Fisher was a public official in its brief, you cannot argue with a straight face that speech is not implicated in this case.

Now, the fact is there isn't a lot of case law here, your Honor. In the prior challenge to the misdemeanor defamation statute, there wasn't any case law for a long time. In a lot of other states, but not in Wisconsin. That's the way it's been, and it's clearly unconstitutional.

We believe that this statute suffers from the same problem.

The legislature could have a perfectly good statute here. They could, as long as you left out the

intent to injure reputation. That's what triggers the First Amendment protection.

And all of the case law you see says: Look, it is better that the information be published, it is better that it get out and be part of the public debate than it is to sit on the person who has obtained the information. There could be a theft charge. I am not saying that there couldn't be.

There could be stealing, but this is not the statute because it chills First Amendment speech and it chills First Amendment dissemination of information that is true, that we allege is true, and that bears upon a public official's performance of his job and handling of public things.

I think the issue is pretty complex. I don't think you can just say that if you do the behavior in sub. 2, and you do it for the purpose of something in subparagraph 3, that you can get away with it. You just can't. You have got to think about the First Amendment here, and I believe that the two are inextricably linked and I believe that there is a chill.

THE COURT: May I interrupt?

MR. DUNN: Yes.

THE COURT: The attorney general concedes in his brief that Mr. Fisher was a public official as that term

is used in defamation law.

MR. DUNN: Yes.

THE COURT: And that as a result, Mr. Baron does have a constitutional right to communicate defamatory information about him.

MR. DUNN: And under defamation law that would be without being prosecuted for doing so.

THE COURT: Right.

MR. DUNN: Correct. Under Garrison.

THE COURT: And I think what you are arguing here is that 943.201(2)(c) is not unconstitutional on its face. Rather it's unconstitutional as applied to Mr. Baron, because Mr. Fisher is a public official.

And my question is this: Would your argument be as strong, or the same, if Mr. Fisher were not a public official?

MR. DUNN: If he were not a public official?

THE COURT: Yes.

MR. DUNN: That is why we didn't facially challenge it. Yes. I think it would be different.

THE COURT: If Mr. Fisher is a private citizen, as opposed to a public official, you would not have the same -- your client would not have the same level of constitutional protection for his free speech about Mr. Fisher?

MR. DUNN: I think then -- yes, I would agree with that. I think you do so at your own peril. Now, what that peril is, I can tell you. It's a common law. It's a good will and justifiable ends, and I think that's unconstitutional now as well. But, in answer to your question, I think there is a difference.

THE COURT: You would concede that if Mr. Fisher were not a public official, that you would not be able to make the same challenge that you are making here to this particular statute as applied in this particular case, if I understand you correctly?

MR. DUNN: Yes. That's what I'm saying. We are saying that this case, as applied, because Mr. Fisher is a public official, is different. I think I did indicate that I felt that there were a lot of reasons under sub. A and B that the statute would withstand challenge. So, yes.

THE COURT: Okay. Sorry for interrupting. You may continue with your argument.

MR. DUNN: That's okay. I don't want to beat a dead horse. I want to move on to another part of the statute that might shed some light on what the legislature was doing here. I am not sure.

But they do speak in sub. 3 of an affirmative defense to a prosecution under this section, that if the

defendant was authorized by law to engage in the conduct that he would do so, you know, with immunity.

Now, this is interesting. It's ambiguous at best when you read it as to what it means. There is nothing in case law absolutely and my question to the Court would be --

My statement to the Court would be: I think you need to look at this in order to take a look at what the entire statute meant, because there is clearly a federal body of law that allows a person to publish or disseminate truthful information about a public official that is germane to his public duty.

It really doesn't matter if he stole it or if he came by it like the New York Times and somebody gave it to him, or like People Magazine, if they pay for it. You can still disseminate and publish. So, that would be in my opinion an affirmative defense authorization by law, case law, judge law, court law.

So, it is possible for the Court to say: Well, you know, the legislature has made an attempt here to keep the reputation issue in there but give you the right to a jury instruction that would effectively state the law and you could argue that if he did this, it doesn't matter if he stole it. You can't convict him.

I raise that because it's an issue going to

come up depending on which way you rule on this issue, and I don't know what the statute means. I think in looking at the case law, there was one case that said they didn't know either, and I can't remember which one it was. It did come up, but it wasn't in a case and it wasn't a holding in a case.

So, the statute is ambiguous. There is no case law to let us know what that sub. 3 means, and I raise that because, obviously, we would be asking if you do not find in our favor on this motion, for an instruction consistent with the person's right to disseminate any truthful information about a public official if it was germane to his conduct and truthful.

So, we are asking that you find that we have -- that the State has not met its burden here and that we have overcome the State's burden and have shown you that this statute is unworkable as it is written.

Thank you.

THE COURT: Thank you. Mr. Kassel, I will give you a chance to respond. There is one topic I would like you to address, and that is the standard to be applied.

If I understand the defendant's brief correctly, he takes the position that because First Amendment rights are implicated, that the burden in this instance is upon the State to prove that the statute is

constitutional beyond a reasonable doubt and that I think is an exception to the general rule of analysis which is that there is a presumption of constitutionality. Go ahead.

MR. KASSEL: I will address that first, your Honor. That's certainly the case when a statute has been facially challenged as being in violation of the First Amendment. There are many cases that say that.

I have looked to see whether I could find a case that says there is that same burden shifting to the state in the case of an applied challenge. I know I have looked previous times I have litigated, but it's my understanding that that is correct as well as an applied challenge.

THE COURT: You would agree for purposes of today's analysis that the burden is on the State to prove constitutionality of the statute beyond a reasonable doubt?

MR. KASSEL: I do.

THE COURT: I assume you are willing to accept that standard as well, Mr. Dunn?

MR. DUNN: Yes.

THE COURT: Okay. Go ahead.

MR. KASSEL: Your Honor, as you know, the issue of Mr. Baron's right to disseminate information about

Mr. Fisher first arose in the context of the criminal defamation charge, and in reviewing Mr. Baron's motion to dismiss that charge, our office looked carefully at the criminal defamation statute, looked at the facts of this case and came to the conclusion that Mr. Fisher was indeed a public official, official as that term is specifically defined for purposes of defamation law; and that the criminal defamation statute cannot be constitutionally applied to the facts of this case.

It is now Mr. Baron's position that, essentially, the identity theft statute is also criminal defamation law, that the same analysis that applies to the challenge to the criminal defamation law carries over to this statute.

It's our position that this statute punishes different conduct. The conduct that this statute punishes is the unauthorized use of identity.

Now, the statute does not in view of our office punish, per se, harming reputation; nor does it punish obtaining credit, money, goods, services and so on under sub. A.

The statute as written, sub. 2 says: Whoever for any of the following purposes, and that includes the obtaining money or credit, avoiding civil or criminal processes or harming reputation. Whoever for one of

those purposes intentionally uses personal identification, information without authorization.

And in our view the conduct is the use, the unauthorized use of this personal identifying information with certain intent. And the intent in this case is the harming of the reputation, but the conduct is the unauthorized use of the personal information.

THE COURT: May I interrupt with a question at this point?

MR. KASSEL: Of course.

THE COURT: Do you agree with Mr. Dunn's characterization that the intent to harm reputation is tantamount to defamation?

MR. KASSEL: Well, I certainly agree that the sub. C to harm reputation, yes, is equivalent because I believe the criminal defamation statute used similar language, but I don't recall it offhand.

THE COURT: Sub. C is basically the same as defamation?

MR. KASSEL: Yes.

THE COURT: Thank you.

MR. KASSEL: For all practical purposes in our analysis.

THE COURT: Okay.

MR. KASSEL: So, the question is: What does this

statute punish and does it chill free speech?

Our position is it does not punish the dissemination of information. That's what the criminal defamation statute does. This punishes the unauthorized use of personal information.

Now, the State has to prove that the intent was to do one of the enumerated such sections. The State does not have to prove that the reputation was harmed. All the State has to prove is that in using the personal identification and that was the defendant's purpose, and the speech is certainly evidence of that intent, and that's why we drew the analogy to the Baron case.

THE COURT: You mean the Robins case?

MR. KASSEL: Excuse me. The Robins case, yes.

I don't, frankly, see an argument of the First Amendment chill here. This statute does not prohibit anyone from disseminating harmful information about a public official.

What it prohibits is someone from the unauthorized use of personal identifying information to do so. And this statute no more chills dissemination of information than it would to punish criminally a reporter who broke into a building to obtain some records and the defense was: Well, my intent was to

publish newsworthy information.

The publication of that information may or may not be lawful, but the act of unlawfully obtaining the information may still be punished.

There is no First Amendment defense to unlawfully obtaining information just as it is our position that there is no First Amendment defense to unauthorized use of personal information under the identity theft statute merely because the intent was to defame a public official in so doing.

That is my argument in a nutshell. I think Mr. Dunn makes a good point in terms of the authority out there. There really is not much authority on point. I think Robins provides the closest analogy that I could find, but I think Robins is instructive in directing the Court to closely scrutinize the statute to determine exactly what conduct is being prohibited.

And as I said, it is our position that the conduct prohibited here is not protected by the First Amendment.

THE COURT: I have a few more questions for you, Mr. Kassel.

MR. KASSEL: Of course.

THE COURT: Mr. Dunn didn't use the word element, but he described in practical terms the requirements of

paragraph C as an element of the crime or something that must be proven beyond a reasonable doubt at trial. I think element is a good word to describe that requirement.

Would you agree that the language in sub. 2, sub. C is an element of the offense charged?

MR. KASSEL: I would agree that an element is -- I think to find the element you have to read it in conjunction with the first sentence of sub. 2 itself: Who for any of the following purposes does this. So, I think the element is not harming the reputation. I think the element would be that the intent is to harm the reputation.

THE COURT: I agree with that reading.

Do you, Mr. Dunn?

MR. DUNN: I think it would be both, and Wisconsin jury criminal instruction 1458 lists this as part of the second element of the crime.

I have it handy, Judge.

MR. KASSEL: I have a copy.

MR. DUNN: All right.

THE COURT: All right. I don't see what is wrong with Mr. Kassel's characterization that reading the language in paragraph C in conjunction with the first line of paragraph 2 is for any of the following

purposes. I think you said either. That leads me to believe there are two different ways that you read this particular element.

MR. DUNN: I'm sorry. I missed that.

THE COURT: I asked Mr. Kassel if sub. C was an element. He said: If read in conjunction with the first line of paragraph 2 and he said yes. I agreed with that. I thought you said you could read it either way like there is an alternative reading. Maybe I misunderstood you.

MR. DUNN: I don't think so. My position is that it is an element of the crime. Here it is charged, I believe, as used as opposed to intent to use. I was just looking --

Did intentionally use personally identifying information is how it's charged in count 4 of the information, your Honor.

THE COURT: Okay. The jury instruction number 1458 identifies this as the second element. So, I will refer to it as the second element, and you are free to do the same.

MR. DUNN: Okay.

MR. KASSEL: I can make two points on that.

One, Mr. Dunn in his brief I think correctly characterizes it on page 4 of his brief where he says:

In order to convict the defendant of violating the statute, the State must prove that the defendant intentionally used the identity of Mark Fisher with the intent to harming Fisher's reputation, and I think that's a correct statement of the law.

For what it's worth, I think that second element in the jury instruction is not as clearly written as it could be.

Again, I don't ask the Court to attribute any weight to this. I brought it to the attention of one of my colleagues who is on the jury instruction committee and I said: This really should be clarified. It just says "for the purpose of," because that's how the statute reads.

THE COURT: I agree. The instruction is not as precise as it could be, and I'm going to be relying on the statutory language. I wanted to just establish that the language in sub. C, when read in conjunction with the first line of paragraph 2, is an elemental proof.

MR. KASSEL: Yes. I agree with that.

THE COURT: Okay. Here is the next question I have for you, Mr. Kassel. You analogized a reporter breaking into a private building somewhere to obtain information that he would later publish.

I agree that breaking in and stealing would be

illegal, regardless of the reporter's intent at that point. But this statute is different from the burglary statute, because the burglary statute doesn't have any requirement that the theft be committed with intent to defame.

It simply requires entering without consent and with intent to steal, and I wonder if this statute isn't problematic because of the elemental proof.

In other words, you can't obtain a conviction here unless you prove the second element. So, part of the proof is necessarily that the defendant used the personally identifying information for the purpose of, essentially, defaming Mr. Fisher.

So, without the defamation or intent to defame, you don't have a conviction. Now, if the legislature wrote the statute to not require sub. C, that would be different.

If the statute said: Anybody who intentionally uses or obtains personally identifying information of another without consent, or as described in the remainder of paragraph 2, but without requiring the defamatory element, you would have a different statute.

I think in that situation, clearly, there would not be a legitimate First Amendment challenge,

because it wouldn't matter what the person is going to use the information for. If he obtains it without consent, basically he is guilty.

Do you see the distinction I'm drawing?

MR. KASSEL: I absolutely do. The analogy I made to the burglary is imperfect for the reason you identify.

I think my purpose in making it was to respond to the argument that somehow this statute chills criticism or dissemination of information about public officials. And my response is, this statute does not, because it does not come into play unless that dissemination -- it comes into play when that dissemination is an intent element in the conduct of use of private information and identification.

THE COURT: The statute doesn't punish in the absence of the defamatory element; correct?

MR. KASSEL: The defamatory intent, that's right.

THE COURT: Mr. Baron can be punished under other charges. For example, the misdemeanor charges, two of them in this case, I think, deal with unlawful access to or dissemination of computer data; right?

MR. KASSEL: I haven't heard any challenge to that on constitutional grounds.

THE COURT: I'm assuming those are not

constitutionally infirm because they have not been challenged.

It is not as if this statute is the only statute that would govern the improper use of personally identifying information.

MR. KASSEL: Well, I would have to look at the computer data statute. I don't know if that is limited to personal identification information. This is the statute that gets it out about stealing someone else's identity.

THE COURT: It's stealing somebody else's identity and using it for one of the designated purposes.

MR. KASSEL: Yes.

THE COURT: If the legislature simply wrote it to stealing identity, it would be different. It wouldn't require the defamation proof; right?

MR. KASSEL: Correct.

THE COURT: The legislature could criminalize improper use of personally identifying information?

MR. KASSEL: Then I guess the question is: How would the legislature then define the improper uses? And here it selected several potential improper uses. I think clearly you would want to have some limitation on such a statute that it's not punishing all uses, many of which would not be socially harmful.

THE COURT: Did you have additional comments? I don't have any more questions right now.

MR. KASSEL: I have nothing further right now.

THE COURT: Thank you.

Mr. Dunn, response if any. We have covered it pretty thoroughly, but if you need to respond, go ahead.

MR. DUNN: We have. I think that in following up on the last point, the legislature can define purposes but did not include in that definition constitutionally protected activity in this case whether it's speech or publication. You know, it did that. And as such, our position is that as applied here it is unconstitutional.

THE COURT: The Court has already established with the consensus of counsel that the burden here is on the State to prove that the statute is constitutional beyond a reasonable doubt.

I believe that is the correct standard because First Amendment rights are arguably implicated.

The State has also conceded that for purposes of this analysis, Mr. Fisher was a public official as that term is used in defamation law.

And as has been discussed extensively today, the second element as it's characterized in the jury instruction for a violation of this statute, does have a defamation component; that is, the defendant either had

the purpose of using the information to defame another or actually did use the information for that purpose.

Xxx and the First Amendment of the United States Constitution does protect the right of individual citizens to disseminate or communicate defamatory information about public officials. The elemental requirements of 943.201(2)(c) are substantially the same as the criminal defamation statute.

The State argues at page 2 of its brief in responding to a defense argument that: It does not follow that Baron had a constitutional right to steal and use Mr. Fisher's identity because his purpose in doing so was to harm Mr. Fisher's reputation.

I would agree with that assertion that the purpose behind the theft of the identity or misappropriation of the identity does not excuse the misappropriation. However, the statute, as I've indicated, already does have as one of it's elemental proofs essentially this defamation element.

The Court does find that the statute in question, 943.201(2)(c), as applied in this particular case to this particular defendant, does interfere with Mr. Baron's First Amendment constitutional right to free speech.

I cannot find, based on the arguments

presented, that the State has proven beyond a reasonable doubt that the statute is constitutional. So, I have doubts. This is far from a clear cut case. There is no case law. It is a complex issue. Both sides have done an admiral job of briefing and arguing.

There are reasonable arguments on both sides, but I have concerns about the chilling effect that enforcement of this statute in this particular case would have on the First Amendment rights which have been referred to several times today.

Stealing the identifying information is not proper in any sense. The theft of the information or the misappropriation of the information is not justified because the intent was to harm the reputation of Mr. Fisher.

But the fact is that the very content of the communications involved here, the E-mails, the electronic information, is what is at issue when we are talking about the second element. The content of the speech is inextricably intertwined, as Mr. Dunn says, with the proofs that the State would be required to establish at trial.

This is not the same as a reporter breaking into somebody's private residence to steal information on a computer or otherwise and attempting to justify it

later as claiming freedom of speech.

As I indicated in my questions to Mr. Kassel, the burglary statute has no elemental requirement that there be an intention to disseminate. Breaking in with intent to steal is enough for a burglary.

This statute is much different, however. This requires, before a conviction can be obtained, that the State prove as one of the elements that the defendant had the purpose, essentially, of using the information to defame another person.

That element of the crime as applied here violates Mr. Baron's right under the case law, which I am required to apply, to freedom of speech, specifically to communicate defamatory information about a public official.

Without proving defamation or defamatory intent, the State would not be able to obtain a conviction in this case. The content of the speech is more than merely incidental to the criminal conduct.

I will distinguish Robins on that basis. In Robins, the child enticement statute was at issue. There the punishment was designed to, well, punish or deter, as the case may be, enticement of children for improper purposes by adults.

But in this case, what the statute is designed

apparently to deter is not only the misappropriation of the information but the dissemination or use of the information to harm the reputation of another.

Now, if Mr. Fisher were not a public official, as my questions to Mr. Dunn suggested, I don't think we would have the same problem. The statute is not constitutionally invalid on its face.

If Mr. Fisher were not a public official, then the person who committed the violation of sub. 2, sub. C would not have the same level of constitutional protection under the First Amendment.

So, my holding is very limited and that is that the statute is unconstitutional as applied to the defendant in this case. Many of the same arguments that were made about the criminal defamation statute that was charged in this case originally can be made here in this case on count 4. That defamation logic or reasoning is actually a subset of the statute.

So, the defamation charge was unconstitutional in its entirety as applied, but in this particular case count number 4 contains, in essence as a subset, a defamation element; and that is an essential element to a conviction.

If it is a penalty enhancement, I could easily disallow it. I suppose I could consider rewriting the

statute to write that element out, but the law doesn't allow me to do that. I won't do that. I won't rewrite the legislation. That is not my function.

I have considered the ways that I could read the statute to protect Mr. Baron's constitutional rights, but I can't do it without substantially changing the character of the statute. The law does not allow me to rewrite the statute in that manner.

So, the Court grants the defense motion and count 4 in the information is dismissed on those grounds.

MR. WAMBACH: Your Honor, at this point then, I would ask the Court for a stay of proceedings. This is a decision that is appealable as of right to the State, and I would like to be able to pursue that right and respectfully ask for a stay of proceedings while that pursuit is taken.

THE COURT: Mr. Dunn?

MR. DUNN: We have no objection, your Honor.

THE COURT: Okay. Now, I intend to grant that request. It's obviously a close case. Reasonable minds can disagree, obviously. I want to give both sides the right to fully litigate all the issues in the case.

I don't know that I really want to cancel the trial date unless it's clear that the litigation is

going to take us beyond the trial date.

In other words, is there a possibility that the Court of Appeals and the Supreme Court would decline to hear this or do they have to hear it?

MR. WAMBACH: It's my understanding that they have to. The Court of Appeals has to take it. They don't have any right to sort through it. They don't have to grant it, obviously.

MR. DUNN: This would be a final order.

THE COURT: There is a right to appeal, Mr. Kassel?

MR. KASSEL: Yes. Under 974.05 the State has a right to appeal a final order, and there is case law that has stated that the dismissal of a single count in a multi-count prosecution is an order that is appealable as of right. So, were the State to appeal, the Court of Appeals does not have discretion. It is not a discretionary appeal.

THE COURT: There is really no way we will have the trial go as scheduled, because the State is going to appeal; right, Mr. Wambach?

MR. WAMBACH: Well, the process is that I am required to write a letter to the attorney general's office asking them to take an appeal. Obviously they haven't granted that, but given the fact that the attorney general's office has been here litigating,

arguing in favor of the statute, I don't know why there would be any reason, and then in my prior discussions with Mr. Kassel, he didn't really envision any reason why the State, the attorney general's office representing the State, would throw its hands up at this point without any lack of respect to the Court's decision.

THE COURT: I understand completely. As a matter of fact, I invite the appeal. I would like to see how it turns out.

What about if I grant a stay conditioned upon the State making a final decision to pursue an appeal? In other words, when you submit that letter to me, Mr. Wambach, stating that it will be pursued as an official notice, you could include an order staying proceedings. Would that be acceptable?

MR. WAMBACH: Yes. I think it's acceptable, your Honor, for the Court to hold my motion for a stay in abeyance until the Court has been satisfied that the attorney general's office is, in fact, going to on behalf of the State pursue the appeal.

I intend to draft my letter to the head of the appellate division today and fax it up to him so that we can expedite getting an answer.

For purposes of this discussion, would it be

enough if the Court simply received either from me or through Attorney Kassel or his supervisor a letter saying we intend to do what we need to do, or do you need to wait until their brief is filed?

THE COURT: No. I think a letter would be enough.

Don't you agree, Mr. Dunn?

MR. DUNN: Yeah, I would, your Honor. The only concern I have is that it be done fairly quickly. We are about eight weeks from trial, and I have just gotten all my subpoenas ready to go and we are working on jury instructions. If we are going to stop, I would rather stop than have to do this twice and bill my client.

THE COURT: Right. I understand. I don't want to stop if they are not going to pursue this.

Do you need about a week?

MR. KASSEL: Unfortunately, I don't know. First there needs to be an entry of a written order. We cannot just appeal a decision.

THE COURT: Right. You can assume that's forthcoming. If Mr. Dunn doesn't file one for some reason, you are going to file one, and I will sign whichever one I get first.

MR. KASSEL: The process, as Mr. Wambach stated, is that he makes a request to our unit, the criminal appeal unit. We make a recommendation. I think it is likely

that the recommendation will be to appeal it but it has to work its way up the bureaucracy. We can try to move it on fairly quickly, but a week may not do it. Depending on whether the appropriate people in the administration are around or available. I certainly would hope that within a couple weeks we would have a final decision.

THE COURT: Can you commit to me that you will personally do whatever is necessary reasonably to move this along?

MR. KASSEL: Absolutely.

THE COURT: Mr. Dunn, I think the bottom line is, I can't order them to do it within a certain time period.

Your request is reasonable, and I have Mr. Kassel's commitment that he will personally shepherd it through promptly. Okay.

When the State, either through the DA's office or the attorney's general office files a letter with the Court indicating that they do intend to appeal this decision, they will submit an order staying proceedings at that time, and I will sign the order.

Once they indicate their official intention, then I would stay the proceedings at that point and both parties can stop preparing for the trial that is currently scheduled.

I understand there are resources involved and that's a big issue. On the flip side, as I've indicated, I don't want to cancel the trial date if the State is not going to go forward. So, we will just proceed on that basis.

There was a question about jury questionnaires, and I don't want to take that up today because my clerk of courts is not here today and it is not officially on the calendar. I would actually like to see if this is going to be appealed before we get to talking about questionnaires.

Is that okay with you, Mr. Dunn?

MR. DUNN: It is, but I think we learned from your clerk that they send these out, what, two months in advance. They would have to be ready to go -- one month. I'm sorry. One month.

THE COURT: It will be close, but if they are not going to appeal, we will know it by June 1st. The clerk told me that the first week in June it has to go out. If they decide not to appeal, we will get you back in here quick and talk about the questionnaires.

MR. DUNN: Thank you.

THE COURT: You're welcome.

Anything else today, Mr. Kassel?

MR. KASSEL: Just one other additional point.

Statutorily the State's deadline for appealing is forty-five days. Again, as I said, it would be my intention to do what I can to move this along.

THE COURT: I understand, and I can't change the deadline, so I won't. I will just ask you to be cooperative here. State resources are also being expended preparing for trial. We all have an interest, and I have other things I can do with the time.

Anything further from you, Mr. Wambach?

MR. WAMBACH: No, your Honor. Thank you.

THE COURT: Mr. Dunn?

MR. DUNN: We have an issue on discovery, but I think we took care of it today.

MR. WAMBACH: That was my feeling.

MR. DUNN: I will just hold my motion in abeyance for now.

THE COURT: Okay. That's fine. Thank you, gentlemen, again for doing an excellent job arguing and briefing and thank you for remaining civilized as well.

Recess.

(Concluded, 12:02 p.m.)

STATE OF WISCONSIN)
) SS
COUNTY OF JEFFERSON)

I, Deidre A. Thies, do hereby certify that I am an Official Court Reporter, that as such I recorded the foregoing proceedings, later transcribed same, and that it is true and correct to the best of my knowledge and ability.

Dated: Monday, May 21, 2007

DEIDRE A. THIES, RPR
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STATE OF WISCONSIN : CIRCUIT COURT : JEFFERSON COUNTY

STATE OF WISCONSIN,
Plaintiff

-vs-

COURT ORDER

CHRISTOPHER D. BARON,
Defendant

Case No.2006CF496

Whereas the defendant has moved this court for an order dismissing Count 4 of the information, the grounds being that the charge is unconstitutional as applied to the facts of this case; and,

Whereas the parties, including Wisconsin's Attorney General were noticed and have had opportunity to submit briefs and all parties have done so and have had an opportunity to orally argue the issues;

For the specific reasons stated in my oral opinion of the May 17, 2007 hearing, the motion to dismiss Count 4 of the information is granted.

The trial date shall remain July 23, 2007 until further notice of this court.

Dated this 4 day of May, 2007.

/s/ Randy R. Koschnick

Circuit Court Judge Randy R. Koschnick

Jefferson County Courthouse Branch 4
320 S. Main Street
Jefferson, WI 53549

APPENDIX C

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2007AP1289-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER BARON,

Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A FINAL ORDER ENTERED IN THE JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE RANDY R. KOSCHNICK, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2007AP1289-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER BARON,

Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A FINAL ORDER ENTERED IN THE JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE RANDY R. KOSCHNICK, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUE

Is Wisconsin's identity theft statute, Wis. Stat. § 943.201, unconstitutional as applied to defendant-respondent-petitioner Christopher Baron's unauthorized use of a public official's personal identifying information to send emails purporting to be from that public official with the intent of harming that public official's reputation?

The circuit court held that the statute is unconstitutional as applied to Baron's conduct.

The court of appeals reversed, holding that the identity theft statute does not criminalize Baron's constitutionally protected right to communicate defamatory information about a public official.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

This is an appeal by the State of Wisconsin pursuant to Wis. Stat. § 974.05(1)(a) from an order of the Jefferson County Circuit Court granting defendant-respondent-petitioner Christopher Baron's pretrial motion to dismiss a charge of identity theft. The appeal is before the supreme court on a petition by Baron to review the court of appeals' decision reversing that order.

Baron was employed by the City of Jefferson as an Emergency Medical Technician (29:21). The criminal complaint alleges that Baron hacked into the work computer of his boss, Emergency Medical Services Director Mark Fisher, and sent four emails that he found in Mr. Fisher's email account to about ten people (1:2-3). The forwarded emails appeared to have come from Mr. Fisher and had subject lines that read, "What's Mark been up to!," "What's Mark Been Doing?!," "Oh Boy This

Doesn't Look Good!," and "Not A Good Boy" (1:2). The emails suggested that Mr. Fisher was having an extramarital affair and that he was using an apartment owned by the EMS Department to conduct the affair (16:16-24). The day after Baron sent those emails, Mr. Fisher committed suicide (1:3).

Baron acknowledged to sheriff's department investigators that he had had some work disagreements with Mr. Fisher but initially denied that he had sent the emails, suggesting two other individuals as possible suspects (1:2). He later admitted to investigators that he had sent the emails and that he had done so to get Mr. Fisher in trouble (1:2-3). Baron said that he knew Mr. Fisher's password because he had helped Fisher with Fisher's computer (1:3). Baron told investigators that he used his personal computer at his home to access Mr. Fisher's work computer (*id.*). He said that he originally intended to send the emails only to Mr. Fisher's wife but then decided to send them to another ten people so they could see that Fisher was not "golden" (*id.*). Baron "blinded" the emails so that it would not be possible to determine where they had actually been sent from (*id.*). Baron admitted that he sent the emails to hurt Mr. Fisher's image (*id.*).

A criminal complaint was filed charging Baron with six counts: criminal defamation, contrary to Wis. Stat. § 942.01(1); two counts of obstructing an officer, contrary to Wis. Stat. § 946.41(1); identity theft, contrary to Wis. Stat. § 943.201(2)(c); and two counts of computer crimes, contrary to Wis. Stat. § 943.70(2) (1:1-3). Following a preliminary hearing, Baron was bound over for trial and an information charging the same six counts was filed (5:1-2; 29:39).

Baron filed a motion to dismiss the criminal defamation count on the ground that the criminal defamation statute, Wis. Stat. § 942.01, violates the First Amendment on its face and as applied to his conduct (11:2; 12:1-15; 14:1-5). Baron contended that Mr. Fisher was a "public official" within the meaning of cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Garrison v. Louisiana,* 379 U.S. 64 (1964); that the defamation statue is facially overbroad because it criminalizes true statements about public officials as well as false statements about public officials that are not made with actual malice; and that the statute was unconstitutional as applied to his communication of true information about a public official (11:2; 12:1-15; 14:1-5).

In response, the State filed a motion to dismiss the criminal defamation charge based on its conclusion that the criminal defamation statute was unconstitutional as applied to Baron's conduct (18:1). On March 9, 2007, the court entered an order dismissing the criminal defamation count (*id.*).

Baron then filed a motion to dismiss the identity theft charge on the ground that the identity theft statute was unconstitutional as applied to his conduct (20:1-2; 22:1-13). Baron argued that to convict him of identity theft, the State had to prove that he used Mark Fisher's identity with the intent of harming Mr. Fisher's reputation (20:1). He contended that because Mr. Fisher was a public official, he had a First Amendment right to attack Mr. Fisher's reputation (20:2). The identity theft statute was unconstitutional as applied to his conduct, Baron argued, because it criminalized his constitutionally protected right to attack the reputation of a public figure (*id.*).

The Attorney General, appearing pursuant to Wis. Stat. § 806.04(11), opposed the motion (23:1-7). The State agreed that Mr. Fisher was a "public official" under defamation law, that the State may not punish Baron for communicating true information about a public official relating to the official's public duties, and that it could not punish him for communicating false information about a public official unless the statement was made with "actual malice," as that term is used in defamation law (23:2). The State argued, however, that the identity theft statute was not unconstitutional as applied to Baron's conduct because conduct prohibited by the identity theft statue was not the harming of an individual's reputation but the unauthorized use of another person's identity for that purpose (23:2-5).

Following a hearing on the motion, the circuit court granted Baron's motion to dismiss (30:31; Pet-App. B31). The court held that one of the elements of the charged identity theft was that Baron had "the purpose of using the information to defame another or actually did use the information for that purpose" and that that element was "substantially the same as the criminal defamation statute" (30:26-27; Pet-App. B26-27). The court said that applying that element to Baron's conduct would impair Baron's right to communicate defamatory information about a public official (30:29; Pet-App. B29). The court concluded that while "[t]his is far from a clear cut case," the State had not carried its burden of proving beyond a reasonable doubt that the statute is constitutional (30:27-28; Pet-App. B27-28).

The circuit court entered an order dismissing the identity theft charge on May 25,

2007 (25:1; Pet-App. C1). The State appealed from that order (27:1-2). Baron filed a petition to bypass the court of appeals, which the supreme court denied.

In a decision entered on May 29, 2008, the court of appeals reversed the circuit court's order. *State v. Christopher Baron*, 2008 WI App 90, __ Wis. 2d __, 754 N.W.2d 175; Pet-App. A1-8. The court of appeals said that the "flaw in Baron's logic is that it focuses on the 'purpose' element viewed in isolation." *Id.* at ¶10; Pet-App. A5. The statute "does not criminalize each of its component parts standing alone," the court held. *Id.* "Instead, what is criminalized by the identity theft statute is the *whole* act of using someone's identity without their permission *plus* using the identity for one of the enumerated purposes, including harming another's reputation." *Id.* The court noted that "Wisconsin statutes are replete with provisions that criminalize conduct that may otherwise be constitutionally protected, if that conduct is carried out in an unlawful manner." *Id.*

The court of appeals said that "the identity theft statute neither prohibited Baron from disseminating information about Fisher nor prevented the public from receiving that information. Instead, the statute prohibited Baron from purporting to be Fisher when he sent the emails." *Id.* at ¶14; Pet-App. A8. The court concluded, therefore, that "the identity theft statute as applied to Baron does not criminalize his constitutionally protect right to defame a public official." *Id.* at ¶15; Pet-App. A8.

STATUTE INVOLVED

The identity theft statute, Wis. Stat. § 943.201, provides in relevant part:

> **943.201 Unauthorized use of an individual's personal identifying information or documents.** (1) In this section:
>
> * * *
>
> (b) "Personal identifying information" means any of the following information:
>
> 1. An individual's name.
>
> * * *
>
> **(2)** Whoever, for any of the following purposes, intentionally uses, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual, including a deceased individual, without the authorization or consent of the individual and by representing that he or she is the individual, that he or she is acting with the authorization or consent of the individual, or that the information or document belongs to him or her is guilty of a Class H felony:
>
> (a) To obtain credit, money, goods, services, employment, or any other thing of value or benefit.
>
> (b) To avoid civil or criminal process or penalty.
>
> (c) To harm the reputation, property, person, or estate of the individual.

Wis. Stat. § 943.201 (1), (2) (2005-06).

ARGUMENT

Wisconsin's identity theft statute, Wis. Stat. § 943.201, prohibits the unauthorized use of another person's identity for certain purposes, including obtaining something of value, avoiding process, or, as is alleged in this case (1:1-3), harming the reputation of the individual whose identity has been misappropriated. The defendant in this case, Christopher Baron, argues that the identity theft statute is unconstitutional as applied to his conduct because the individual whose identity he used and whose reputation he intended to harm, Mark Fisher, was a public official.

Baron contends that he had a First Amendment right to disseminate truthful information about a public official, even if his intent was to harm that official's reputation. Baron argues that because one of the elements that the State must prove as an element of identity theft – his intent to harm Mr. Fisher's reputation – is protected by the First Amendment, application of the identity theft statute to his conduct punishes him for engaging in constitutionally protected activity (*id.*).[1]

As the court of appeals recognized, the flaw in Baron's argument is that it focuses on the intent element in isolation. *See Baron*, 2008 WI

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[1]As Baron acknowledged below (22:4 n.1), the intent to harm an individual's reputation would not be constitutionally protected if the person whose reputation the defendant intends to harm is a not a public official and the speech does not involve a matter of public concern. *See Denny v. Mertz*, 106 Wis. 2d 636, 659-61, 318 N.W.2d 141 (1982). Baron's as-applied challenge to the identity theft statute thus rests on the fact that his victim was a public official.

App 90, ¶10; Pet-App. A5. The conduct prohibited by the identity theft statute is the unauthorized use of another person's identity, not the intent associated with that use. While the State must prove that Baron's intent when he used Mr. Fisher's identity was to harm Fisher's reputation, the conduct for which Baron would be punished were he to be found guilty is the unauthorized use of Fisher's identity. Because the identity theft statute punishes Baron's unauthorized use of Mr. Fisher's identity rather than his intent to harm Mr. Fisher's reputation, and because the identity theft statute does not prohibit Baron from communicating defamatory information about Mr. Fisher, application of the statute to Baron's conduct does not violate Baron's right under the First Amendment to criticize the actions of a public official.

I. STANDARD OF REVIEW.

The constitutionality of a statute is a question of law that an appellate court reviews *de novo*. *See State v. Zarnke*, 224 Wis. 2d 116, 124, 589 N.W.2d 370 (1999). Ordinarily, there is a presumption of constitutionality for a legislative enactment. *See id.* In most cases, therefore, the party challenging the constitutionality of a statute has the burden to prove that the statute is unconstitutional beyond a reasonable doubt. *See id.* However, when a statute implicates First Amendment rights, the State has the burden of proving beyond a reasonable doubt that the statute is constitutional. *See id.*

II. THE IDENTITY THEFT STATUTE IS CONSTITUTIONAL AS APPLIED TO BARON'S CONDUCT.

A. The conduct prohibited by the identity theft statute is the unauthorized use of another person's identity.

The State agrees with Baron's underlying assertions regarding his constitutional right to communicate defamatory information about public officials. Specifically, the State agrees that it may not punish Baron for communicating true information about a public official relating to the official's public duties, nor may it punish him for communicating false information about a public official unless the statement was made with "actual malice," as that term is used in defamation law. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Garrison v. Louisiana,* 379 U.S. 64, 72-73 (1964). The State also agrees that Mark Fisher, who was the Jefferson EMS director, was a "public official" as that term is used in defamation law. *See Miller v. Minority Brotherhood of Fire Protection*, 158 Wis. 2d 589, 601, 463 N.W.2d 690 (Ct. App. 1990). It was for those reasons that the State concluded that the criminal defamation statute was unconstitutional as applied to Baron's conduct and moved to dismiss that charge (18:1).

It does not follow, however, that Baron had a constitutional right to misappropriate and use Mark Fisher's identity because his purpose in doing so was to harm Mr. Fisher's reputation. Unlike the criminal defamation statute, which prohibits the act of communicating defamatory information, *see* Wis. Stat. § 942.01, the act

prohibited by the identity theft statute is the unauthorized use of another person's identity for certain purposes. The identity theft statute provides in relevant part:

> (2) Whoever, for any of the following purposes, intentionally uses, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual, including a deceased individual, without the authorization or consent of the individual and by representing that he or she is the individual, that he or she is acting with the authorization or consent of the individual, or that the information or document belongs to him or her is guilty of a Class H felony:
>
> (a) To obtain credit, money, goods, services, employment, or any other thing of value or benefit.
>
> (b) To avoid civil or criminal process or penalty.
>
> (c) To harm the reputation, property, person, or estate of the individual.

Wis. Stat. § 943.201(2).[2]

Under the identity theft statute, the conduct that is prohibited is the unauthorized use, attempted use or possession with intent to use an individual's identity (*i.e.*, "any personal identifying

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[2]An earlier version of the identity theft statute was limited to the unauthorized use of personal identifying information or a personal identifying document to obtain credit, money, goods, services or anything else of value. *See State v. Peters*, 2003 WI 88, ¶15, 263 Wis. 2d 475, 665 N.W.2d 171 (holding that the misappropriation of another person's identity to obtain lower bail violated the statute); *State v. Ramirez*, 2001 WI App 158, ¶10, 246 Wis. 2d 802, 633 N.W.2d 656 (discussing elements of the offense under the prior version of the statute).

information or personal identification document of an individual") for one of several enumerated purposes: to obtain credit, money, goods, etc.; to avoid civil or criminal process or penalty; or to harm the reputation, property, person or estate of the individual. *Id.* The statute does not criminalize the harming of reputation, just as it does not criminalize obtaining credit, money, goods, services, employment or other thing of value. Rather, it criminalizes the unauthorized use of another person's identity for one of those purposes.

That reading of the identity theft statute is confirmed by comparing it to a statute that is similarly constructed: Wis. Stat. § 948.07, the child enticement statute. The offense of child enticement is defined as:

> Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony:
>
> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085 or 948.095.
>
> (2) Causing the child to engage in prostitution.
>
> (3) Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10.
>
> (4) Recording the child engaging in sexually explicit conduct.
>
> (5) Causing bodily or mental harm to the child.

> (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Wis. Stat. § 948.07.

This court has held that the conduct criminalized by the child enticement statute is not the underlying intended sexual or other misconduct but the act of causing or attempting to cause a child to go to a secluded place. *See State v. Derango*, 2000 WI 89, ¶17, 236 Wis. 2d 721, 613 N.W.2d 833. The court held in *Derango* that the child enticement statute, "by its straightforward language, creates one offense with multiple modes of commission." *Id.* The court said that the statute "criminalizes the act of causing or attempting to cause a child to go into a vehicle, building, room or other secluded place with *any* of six possible prohibited intents." *Id.* "The act of enticement is the crime," the court held, "not the underlying intended sexual or other misconduct." *Id.*

The identity theft statute is drafted in a manner that parallels the child enticement statute. Like the child enticement statute, it criminalizes a specific act (unauthorized use of another individual's personal identifying information or personal identification document) done with one of several purposes (obtaining credit, money, goods, services, employment, or any other thing of value or benefit; avoiding civil or criminal process or penalty; or harming the reputation, property, person, or estate of the individual). Like the child enticement statute, the identity theft statute creates "one offense with multiple modes of commission." *Derango*, 236 Wis. 2d 721, ¶17. Under the identity theft statute, the act of unauthorized use of personal identifying

information is the crime, not the underlying intended purpose. *See id.*

This court's decision in *State v. Robins*, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, illustrates the importance of carefully identifying the conduct prohibited by a criminal statute when a defendant argues that the statute is unconstitutional as applied to his or her conduct. In *Robins*, the defendant was charged with attempted child enticement arising from an Internet "sting" operation conducted by the Wisconsin Department of Justice. *Id.*, ¶1. The defendant argued that the child enticement statute was unconstitutional as applied to enticements initiated over the Internet. *Id.*, ¶39. The court rejected that argument because, it held, the child enticement statute regulates conduct, not speech. *Id.*, ¶43. The court explained that the fact that an act of child enticement is carried out in part by means of language or the fact that some of the proof in the case consisted of Internet speech did not mean that the prosecution implicated First Amendment rights.

> The United States Supreme Court has rejected the contention that the First Amendment extends to speech that is incidental to or part of a course of criminal conduct. *Giboney v. Empire Storage*, 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.").
>
> It is not "an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502 (citing *Fox v.*

> *Washington*, 236 U.S. 273, 277 (1915), and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). Given today's technology, we would add electronic language to this list.
>
> The child enticement statute regulates conduct, not speech. The statute protects against the social evil and grave threat presented by those who lure or attempt to lure children into secluded places, away from the protection of the general public, for illicit sexual or other improper purposes. [*State v.*] *Derango*, 2000 WI 89, ¶¶17-19[, 236 Wis. 2d 721, 613 N.W.2d 833]. That an act of child enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny.
>
> Robins' internet conversations and e-mails with "Benjm13" do not by themselves constitute the crime of child enticement. Rather, Robins' internet conversation and e-mails are circumstantial evidence of his intent to entice a child, which, combined with his actions in furtherance of that intent, constitute probable cause for the crime of attempted child enticement. That some of the proof in this case consists of internet "speech" does not mean that this prosecution, or another like it, implicates First Amendment rights. Simply put, the First Amendment does not protect child enticements, whether initiated over the internet or otherwise.

Robins, 253 Wis. 2d 298, ¶¶41-44 (footnotes omitted).

The same rationale applies here. The identity theft statute regulates conduct – the unauthorized use of another person's identity – not speech. The prohibited conduct under the identity theft statute is not the communication of information harmful to an individual's reputation, but the unauthorized use of a person's identity for

the purpose of harming the person's reputation. Baron's defamatory communications do not by themselves constitute the crime of identity theft. Rather, as in *Robins*, Baron's "speech" – the emails that he sent that purported to come from Mr. Fisher – is evidence of his intent when he engaged in the unlawful use of Mr. Fisher's identity. That some of the proof of Baron's purpose or intent consists of Baron's email communications does not mean that the identity theft prosecution implicates Baron's First Amendment rights. *See id.* at ¶44. The identity theft statute is not unconstitutional, therefore, as applied to Baron's unauthorized use of Mr. Fisher's identity.

B. That Baron's intent to harm Mr. Fisher's reputation is an element of the offense does not render the application of the identity theft statute unconstitutional.

The circuit court distinguished *Robins* on the ground that the speech at issue in *Robins* did not constitute one of the elements of child enticement, but merely provided evidence of the defendant's intent to have sexual contact, while Baron's constitutionally protected speech (or, more precisely, his intent to make a constitutionally protected defamatory communication) is one of the elements the State must prove under the identity theft statute (30:26-30; Pet-App. B26-30). However, the fact the State must prove that a defendant intended to engage in constitutionally protected activity does not bar the State from punishing the defendant for engaging in conduct that is not constitutionally protected. As *Derango*

demonstrates, the fact that something (whether a mental state, status, or conduct) is one of the elements of the offense does not mean that that element is what is criminalized by the statute. *See Derango*, 236 Wis. 2d 721, ¶17 (holding that the underlying intent, while an element of child enticement, is not the crime punished by the child enticement statute).

That principle holds true even when an element of the offense is the defendant's intent to engage in conduct that is otherwise constitutionally protected. Consider, for example, Wis. Stat. § 946.10(1), which prohibits bribery of public officers. That statute is violated when the defendant gives or promises to give something of value for the purpose of influencing the action of a public official on a matter which by law is pending or might come before him or her. *See State v. Rosenfeld*, 93 Wis. 2d 325, 335, 286 N.W.2d 596 (1980). There are four elements to this offense:

> The first element requires that (name of officer) was a public officer.
>
> * * *
>
> The second element requires that the defendant transferred property to (name of officer).
>
> The third element requires that (name of officer) was not authorized to receive the property for the performance of official duties.
>
> The fourth element requires that the defendant intended to influence the conduct of (name of officer) in relation to any matter which by law was pending or might have come before (name of officer) in an official capacity.

Wis JI-Criminal 1721 (1995) (footnotes omitted).

The fourth element of bribery requires that the defendant intended to engage in conduct that, were it not accompanied by a bribe, would be protected by the First Amendment. The Petition Clause of the First Amendment, which guarantees "the right of the people . . . to petition the Government for a redress of grievances," U.S. Const. amend. I, protects the right of individuals to communicate their wishes to public officials. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985).[3] If the reasoning employed by Baron and the circuit court were sound, the bribery statute would be unconstitutional because one of the elements that the State would have to prove – that the defendant intended to influence the official action of a public official – constitutes conduct protected by the First Amendment. But the fact that this otherwise protected conduct is an element of the bribery offense does not mean that the bribery statute is unconstitutional.

Although there is no Wisconsin case on point, courts in other jurisdictions have rejected First Amendment challenges to bribery prosecutions. In *State v. Agan*, 384 S.E.2d 863 (Ga. 1989), for example, the defendant was convicted of bribery under a statute that is very similar to Wisconsin's. Georgia's bribery statute proscribes giving or offering any benefit, reward or consideration to a public official with the purpose of influencing the official in the performance of any official act. *See id.* at 865. The defendant in *Agan* argued that unless the bribery statute were interpreted to require that the official agreed to perform an official act in exchange for the payment, the statute would impose an

[3]The Wisconsin Constitution similarly guarantees the "right of the people . . . to petition the government." Wis. Const. art. I, § 4; *see State ex rel. Khan v. Sullivan*, 2000 WI App 109, ¶5, 235 Wis. 2d 260, 613 N.W.2d 203.

impermissible restraint on his First Amendment rights. *See id.* at 867. The Georgia Supreme Court rejected that argument.

> Citizens of Georgia have every right to try to influence their public officers – through petition and protest, promises of political support and threats of political reprisal. They do *not* have, nor have they ever had, the 'right' to buy the official act of a public officer.

Id.

Similarly, in *United States v. Tutein*, 82 F. Supp. 2d 442 (D.V.I. 2000), the defendant was convicted of violating a statute that made it an offense to offer money, property, or value to a public officer with intent to influence the officer's official act. *See id.* at 446 n.5. Rejecting the defendant's claim that the bribery statute violates the First Amendment, the court held the statute did not proscribe protected speech. *Id.* at 447. The court explained that "[a] private party has no First Amendment right to petition the Government by means of . . . payment of bribes." *Id.* (brackets and quoted source omitted).

Wisconsin's election fraud statute provides another example of a criminal statute in which an element of the offense is the intent to engage in conduct that is otherwise constitutionally protected. That statute makes it a felony to "[i]mpersonate[] a registered elector or pose[] as another person for the purpose of voting at an election." Wis. Stat. § 12.13(1)(d); *see also* Wis. Stat. § 12.60(1) (violation of Wis. Stat. § 12.13(1) is a Class I felony).

For purposes of Baron's constitutional argument, the election fraud offense defined by

Wis. Stat. § 12.13(1)(d) is indistinguishable from the identity theft statute. The right to vote is constitutionally protected. *See McNally v. Tollander*, 100 Wis. 2d 490, 500, 302 N.W.2d 440 (1981). Thus, the election fraud statute, like the identity statute as applied in this case, prohibits the use of someone else's identity with the purpose of engaging in conduct that is constitutionally protected. Under Baron's and the circuit court's reasoning, the election fraud statute is unconstitutional because, to prove a violation, the State would have to prove that the defendant had the purpose of voting at an election.

It is difficult to imagine a defendant asserting the argument, must less successfully asserting the argument, that he or she may not be prosecuted for election fraud because his or her purpose when using a false identity was the constitutionally protected act of voting. The State acknowledges that it has been unable to find any case that has addressed such a claim. However, this may be a scenario in which, "[a]s is true for many legal points, the paucity of support in appellate opinions does more to show that the proposition is too clear to be questioned than to show that it is debatable." *Ueland v. United States*, 291 F.3d 993, 997 (7th Cir. 2002).

The bribery and election fraud examples discussed above involve statutes that, like the identity theft statute as applied here, require the State to prove that the defendant acted with the intent or purpose to engage in speech or conduct that was otherwise constitutionally protected. The State does not believe, however, that the constitutionality of those statutes depends on the fact that the State need prove only that the defendant intended to engage in protected

conduct, as opposed to actually engaging in protected conduct.

To illustrate, consider another provision of the election fraud statute that makes it an offense to vote more than once in the same election. *See* Wis. Stat. § 12.13(1)(e). To prove that the defendant voted more than once, the State necessarily would have to prove that the defendant voted once before voting a second time. Yet even if the defendant's first vote were entirely lawful, and thus enjoyed full constitutional protection, it could not reasonably be argued that the State could not prosecute the defendant for voting a second time because the State was required to prove as an element of the offense that the defendant voted the first time. That is so because the conduct that is prohibited by the statute is not the first vote but the second vote.

In its decision in this case, the court of appeals observed that "Wisconsin statutes are replete with provisions that criminalize conduct that may otherwise be constitutionally protected, if that conduct is carried out in an unlawful manner." *Baron*, 2008 WI App 90, ¶10; Pet-App. Appendix A, p. 5. It cited several examples of such statutes and described the bribery statute as a "particularly apt example" of that principle. *Id.* at ¶11; Pet-App. 6. However, Baron's brief in this court does not acknowledge the court of appeals' point regarding the implication of his reasoning. Rather, Baron simply ignores the fact that his reasoning would render unconstitutional a host of other criminal statutes whose constitutionality would seem beyond question.

To support his contention that he has a First Amendment right to defame public official "regardless of defects in his method of

dissemination," Baron's brief-in-chief at 20, Baron cites a pair of United States Supreme Court decisions, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), and *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Neither of those cases support Baron's position.

The issue in *New York Times v. United States* – more familiarly known as the *Pentagon Papers* case – was whether an injunction prohibiting the *New York Times* and the *Washington Post* from publishing a classified report on the Vietnam war violated the First Amendment. *See New York Times*, 403 U.S. at 714. The Supreme Court, in a three paragraph per curiam decision, held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," *id.* (quoted source omitted), and concluded that the government had not met its heavy burden of showing a justification for imposing a prior restraint. *See id.*

The concurring opinions all emphasized that the dispositive feature of the case was that it involved a prior restraint on publication that was presumptively unconstitutional. *See id.* at 722-23 (Black, J., concurring); *id.* at 725-26 (Brennan, J., concurring); *id.* at 730-31 (White, J., concurring). Two of those concurring opinions, however, drew the distinction between an unconstitutional prior restraint and a prosecution after the fact for violating a criminal statute. Justice White observed that the "failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way." *See id.* at 733 (White, J.,

concurring). And Justice Brennan, who was no First Amendment slouch, did not foreclose a criminal prosecution for violated federal criminal statutes protecting government property and secrets that were "of very colorable relevance to the apparent circumstances of these cases." *See id.* at 730 (Brennan, J., concurring).

This case, of course, does not involve a prior restraint on Baron's speech. The *New York Times* decision does not support Baron's argument.

Neither does the Court's decision in *Bartnicki*. In *Bartnicki*, two individuals whose cell phone conversation had been intercepted and taped by an unknown party sued media defendants who broadcast the tape and an individual who had given the tape to the media in violation of federal and state wiretapping laws. *See Bartnicki*, 532 U.S. at 517-21. The issue before the Court was: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in the chain?" *Id.* at 528 (quoted source omitted). The Court stated that it had narrowly construed the question presented based on its "repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment." *Id.* at 529. The Court held that, under the facts of the case, the interests served by the statutory prohibition against knowing and intentional disclosure of unlawfully intercepted communications did not outweigh the First Amendment rights of "one not involved in the initial illegality." *Id.*

Baron acknowledges that, unlike this case, *Bartnicki* "involve[d] misconduct by the person who obtained the communications, and not [misconduct] by the person or entity who disseminates the communications." Baron's brief-in-chief, p. 23. Baron does not think that distinction important, *see id.*, but the Supreme Court did.

> The Government identifies two interests served by the statute-first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted. *We assume that those interests adequately justify the prohibition in § 2511(1)(d) against the interceptor's own use of information that he or she acquired by violating § 2511(1)(a),* but it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends.

Bartnicki, 532 U.S. at 529 (emphasis added); *see also id.* at 532 n.19 ("Our holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully").

Baron also compares the identity theft statute to a New Hampshire statute barring the transmission of data about prescriptions that a federal district court recently held unconstitutional. *IMS Health, Inc. Ayotte*, 490 F.Supp.2d 163 (D.N.H. 2007), *appeal docketed*, No. 07-1945 (1st Cir. June 20, 2007). The New Hampshire statute prohibits the transmission or use of prescriber-identifiable data for certain commercial purposes. *See id.* at 171. In the portion of the district court ruling relied upon by Baron, the court held that the restriction on the use of that data was subject to First Amendment

scrutiny because it affects both the speaker's ability to communicate with his intended audience and the audience's right to receive information. *See id.* at 175.

Baron argues that "[l]ikewise, application of the identity theft statue to Baron's conduct effectively prohibits him from communicating the defamatory emails to the public, as well as preventing the public from receiving information that would expose the misconduct of [a] public official." Baron's brief-in-chief at 33. But, as the State has pointed out, the identity theft statute neither prohibited Baron from disseminating information about Mr. Fisher nor prevented the public from receiving that information. All the statute did was to prohibit Baron from purporting to be Mr. Fisher when he sent out the emails. *See Baron*, 2008 WI App 90, ¶14; Pet-App. A8.

The conduct that is being prosecuted in this case is not Baron's communication of defamatory information about Mr. Fisher but his unauthorized use of Mr. Fisher's identity. Because application of the identity theft statute to Baron's conduct does not punish him for the exercise of his First Amendment rights, the statute is not unconstitutional as applied to his conduct.

C. Application of the identity theft statute to Baron's conduct does not chill the right to free speech.

The circuit court expressed concern that enforcing the identity theft statute in this case would have a chilling effect on the exercise of First Amendment rights (30:28; Pet-App. B28). The

State respectfully disagrees. The statute does not impair Baron's ability to disseminate information about Mr. Fisher that would damage Mr. Fisher's reputation. Putting aside the question of whether Baron obtained the information lawfully, Baron was not precluded by the identity theft statute from disseminating that information. He was free to do so under his own name, a pseudonym, anonymously, or, for that matter, the name of any person other than Mr. Fisher.[4]

It cannot reasonably be argued that the bribery statute chills the exercise of the constitutionally protected right to petition the government because the government must prove in a bribery prosecution that the defendant acted with the intent to influence a public official when he offered a bribe. Nor can it reasonably be argued that the election fraud statute chills the exercise of the constitutionally protected right to vote because one of elements that the State must prove in an election fraud prosecution is that defendant's intent was to vote in an election. Just as those criminal statutes do not impair the exercise of any constitutional right, the application of the identity theft statute to punish Baron for the unauthorized use of Mr. Fisher's identity does not chill Baron's exercise of his First Amendment right to criticize a public official.

The identity theft statute does not prohibit Baron from disseminating any information about a public official. Rather, it prohibits Baron from

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[4]The statute prohibits the unauthorized use of personal identifying information of "an individual" with the purpose of harming the reputation of "the individual." Wis. Stat. § 943.201(2)(c). The State reads that language to apply only when the person whose reputation the actor intends to harm is the same person whose identity the actor has used.

using that official's identity with the purpose of harming that person's reputation. Application of the identity theft statute to Baron's conduct does not chill his ability, or anyone else's, to disseminate information about public officials.

III. EVEN IF THE IDENTITY THEFT STATUTE WERE SUBJECTED TO STRICT SCRUTINY, THE STATUTE IS CONSTITUTIONAL AS APPLIED TO BARON'S CONDUCT.

Baron argues that because the identity theft statute burdens core political speech, it is subject to strict scrutiny. *See* Baron's brief-in-chief at 14-15. He contends that the statute does not meet that standard as applied to his conduct because the statute is not narrowly tailored to meet a compelling state interest. *See id.* at 34-35.

The court of appeals concluded, correctly in the State's view, that the identity theft statute does not impose any cognizable burden on political speech and is not, therefore, subject to strict scrutiny. *See Baron*, 2008 WI App 90, ¶15 n.5; Pet-App. A8. But were this court to apply strict scrutiny to the identity theft statute as it has been applied, it would find that the statute withstands that challenge.

Laws that burden core political speech are subject to strict or "exacting" scrutiny. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).[5] To withstand strict scrutiny, a

[5]"Strict" scrutiny and "exacting" scrutiny are synonymous. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995).

statute must be narrowly tailored to meet a compelling state interest. *See Dane County D.H.S. v. Ponn P.*, 2005 WI 32, ¶20, 279 Wis. 2d 169, 694 N.W.2d 344.

Baron recognizes that "the State has a compelling interest in protecting the victims of identity theft." Baron's brief-in-chief at 34. That acknowledgement is appropriate. *See Valov v. Department of Motor Vehicles*, 34 Cal. Rptr. 3d 174, 185 (Cal Ct. App. 2005) ("Nor can it be seriously doubted that our state has a compelling interest in protecting its citizens against fraud and identity theft."). Wisconsin's statute protects its citizens not only against those who would use their identity to obtain something of value, but also against "the malicious thief who intends harm or embarrassment but does not intend to obtain a product or other value." Holly K. Towle, *Identity Theft: Myths, Methods, and New Law*, 30 Rutgers Computer & Tech. L.J. 237, 307 (2004).

Baron argues that the identity theft statute is not narrowly tailored because it prohibits the dissemination of truthful yet defamatory information about a public official and false information about a public official that was published without actual malice. *See* Baron's brief-in-chief at 34. That argument fails to recognize that the scope of the identity theft statute is much more narrow than that. The statute applies only when the defendant "intentionally uses, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual, including a deceased individual, without the authorization or consent of the individual and by representing that he or she is the individual." Wis. Stat. § 943.201(2). The statute thus is narrowly tailored to apply only

when the defendant's conduct involves the use of the victim's misappropriated identity.

Baron is being prosecuted because, the State alleges, he intentionally and falsely represented himself to be Mr. Fisher, without Mr. Fisher's consent, when he sent the emails in question (1:1-3). The First Amendment does not protect a statement made with knowledge that it is false. *See Garrison v. Louisiana,* 379 U.S. 64, 74 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *see also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) ("Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly."). While the information in the emails relating to Mr. Fisher's conduct may have been true, Baron's assertion in the emails that Mr. Fisher was the person sending the emails was false.

The United States Supreme Court's decision in *McIntyre*, which Baron cites, is instructive on this point. At issue in *McIntyre* was an Ohio statute that prohibited the distribution of anonymous campaign literature. *See McIntyre*, 514 U.S. at 336. The Court held that the ban was unconstitutional, stating that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 357.

One of the interests that Ohio advanced in support of the statute was its interest in preventing false statements during campaigns. *See id.* at 349. The Court agreed that this interest "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *Id.* It held, however, that the prohibition

against anonymous campaign literature encompassed documents that were not even arguably false or misleading. *See id.* at 351.

The Court observed that Ohio's election code also included a variety of specific prohibitions against making or disseminating false statements during political campaigns. *See id.* at 349. One of the specific prohibitions mentioned by the Court, which echoes the concerns of the identity theft statute, was a statute that provided that no person may "[f]alsely identify the source of a statement, *issue statements under the name of another person without authorization*, or falsely state the endorsement of or opposition to a candidate." *Id.* at 349 n.12 (emphasis added).

The Supreme Court stated that it had no occasion to evaluate the constitutionality of that or the other specific prohibitions against fraudulent election activity, but cited them to emphasize that Ohio had addressed directly the problem of election fraud. *Id.* But the Court concluded its discussion by reiterating that while Ohio had not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all anonymous campaign speech, "[t]he State may, and does, punish fraud directly." *Id.* at 357.

To the extent that it is possible to characterize Wisconsin's identity theft statute as a law regulating speech, it is a law that is narrowly tailored to prohibit only speech that falsely identifies the speaker as the person whose reputation the speaker intends to harm. If strict scrutiny applies in this case, the identity theft statute withstands that scrutiny.

CONCLUSION

For the reasons stated above, the court should affirm the decision of the court of appeals that reversed the order of the circuit court dismissing the charge of identity theft.

Dated this 7th day of October, 2008.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,436 words.

Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN
IN THE SUPREME COURT
Case No. 2007 AP 1289 - CR

STATE OF WISCONSIN

Plaintiff-Appellant

v.

CHRISTOPHER BARON

Defendant-Respondent-Petitioner

ON REVIEW FROM A PUBLISHED DECISION
OF THE COURT OF APPEALS DISTRICT 4
REVERSING THE DECISION OF THE
CIRCUIT COURT OF JEFFERSON COUNTY
THE HONORABLE RANDY R. KOSCHNICK, PRESIDING

REPLY BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER CHRISTOPHER BARON

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STATEMENT ON ORAL ARGUMENT

Oral argument is requested because it may be helpful in fully developing and resolving the issues involved.

ARGUMENT

I. INTRODUCTION

Wisconsin's identity theft statute, Wis. Stat. § 943.201, prohibits the unauthorized use of another person's identity for certain purposes, including harming the reputation of the individual whose identity has been misappropriated. Petitioner Christopher Baron argues that the identity theft statute is unconstitutional as applied in his case because it criminalizes his intent to defame Mark Fisher, a public official, with true information about Mr. Fisher's conduct (20:1-2; 22:1-13). To convict Baron of identity theft, the State must prove that he used Fisher's identity with the intent of harming Fisher's reputation (20:1). Because Baron has a First Amendment right to attack Fisher's reputation, it is unconstitutional for the identity theft statute to criminalize his intent to defame Mr. Fisher, as well as his actual dissemination of the defamatory information (20:2). The State claims that the statute is not unconstitutional as applied because it prohibited only Baron's unauthorized use of Fisher's identity to harm Fisher's reputation, and not Baron's dissemination of the defamatory information itself (23:2-5).

Baron's argument is composed of three parts: (1) Baron has a First Amendment right to defame a public official with true information; (2) the identity theft statute directly regulates this protected speech by punishing Baron for his defamatory intent; and (3) the identity theft statute implicates protected speech by regulating Baron's dissemination of the defamatory information. The key point in Baron's brief-in-chief is that, because the state must prove the identity theft statute's "purpose" element of intent to harm an

individual's reputation, the statute directly punishes Baron for his intent to defame Fisher and indirectly punishes him for his dissemination of defamatory information about Fisher in violation of his First Amendment rights.

The counter-argument advanced by the State is that the identity theft statute does not criminalize each of its component parts standing alone. Instead, the statute criminalizes the *whole act* of using someone's identifying information without authorization *plus* using the identifying information for one of the enumerated purposes (here, harming another's reputation), and therefore does not function as a defamation statute. However, the subsection of the identity theft statute under which Baron was charged was added in response to serious cases of internet defamation which occurred just before the identity theft statute's revision in 2003. This history demonstrates that the subsection was passed and is prosecuted as a more severe criminal defamation statute than Wisconsin previously possessed. Prosecuting Baron under a statute clearly intended to function as a defamation statute while denying him the protection of First Amendment defenses violates Baron's First Amendment rights, as outlined in his brief-in-chief. Thus, the statute itself is unconstitutional as applied to Baron's conduct.

The State also noted that many Wisconsin statutes criminalize conduct that is constitutionally protected when it is carried out in an unlawful manner and analogized the identity theft statute to a number of other statutes, including the child enticement, bribery, and election fraud statutes. However, these analogies are not instructive because the statutes at issue do not

implicate constitutionally protected conduct in the same way as does the identity theft statute.

II. SUBSECTION (2)(C) OF THE IDENTITY THEFT STATUTE WAS INTENDED TO FUNCTION AND DOES FUNCTION AS A DEFAMATION STATUTE AND, AS SUCH, FIRST AMENDMENT DEFENSES SHOULD APPLY.

In 2003, the Wisconsin Legislature, headed by Representative Mark Gundrum (R-New Berlin), undertook a detailed revision of the identity theft statute.[1] In addition to adding the section at issue in this case, the revisions expanded the definition of "personal identifying information," added "possession with intent to use" to the list of offenses under the statute, expanded jurisdiction over identity theft offenses, added protections for use of personal identifying information by law enforcement officers, and added a new statute relating to theft of identifying information of an entity. See Drafting Request for 2003 Assembly Bill 288.

Although the legislative history of the revision contains detailed reasoning for most of these changes, see, e.g., Bill History for 2003 Assembly Bill 288 (analysis by the Wisconsin Legislative Reference Bureau), there is no explanation for the addition of subsection (2)(c) to the statute, which had previously been a traditional identity theft statute.[2] However, newspapers

[1] Rep. Gundrum filed the drafting request for the revision and his name appears first on the list of sponsors.

[2] Wisconsin's provision prohibiting unauthorized use of personal identifying information to harm the individual's reputation appears to be unique. Most states have enacted statutes similar to the prior Wisconsin identity theft statute, which prohibited unauthorized use of personal identifying information only to obtain money, goods, services, or other things of value.

from this time suggest that a series of high-profile online defamation cases may have influenced adoption of this new provision.

An article in the Milwaukee Journal Sentinel from June 7, 2000, summarized the four cases. In the first and most recent, a disgruntled employee used his former supervisor's personal identifying information to post an offer of sex on an internet site called "Sex on the Side." The victim received many responses and said the incident made her afraid for her safety. In the other three cases, a man who was reported for child molestation posted an ad under the reporter's name soliciting sex, a second man posted nude pictures of his former girlfriend online along with a solicitation for sex, and a third man posed as his former wife's new husband and posted an ad soliciting a "threesome." See Sink, Linda & Linda Spice, Man Charged with Defamation Disgruntled Fired Employee Accused of Posting Ad with Ex-Boss' Name on Internet, Milwaukee Journal Sentinel (June 7, 2000), at B1.

Three of these cases occurred in Waukesha County, which is represented by Rep. Mark Gundrum, and the fourth occurred in Wood County, which is represented by Rep. Marlin Schneider (D-Wisconsin Rapids), who co-sponsored the identity theft revision. Id. When asked about the case, Schneider told the Journal Sentinel that there are "few laws related to harassment and defamation that occurs over the Internet." Id. He pointed out that disorderly conduct and defamation are both misdemeanors and are therefore "weak in terms of dealing with the severity of this type of activity . . . People's reputations are sullied in a very new way, and it's very hard for them to recover from that." The context provided by these statements and events

that occurred contemporaneously with the identity theft statute revision suggest that legislators adopted subsection (2)(c) as a method of addressing online defamation while also passing needed amendments to the identity theft statute. This context also supports Baron's contention that this subsection is intended to function as a more severe and widely applicable online defamation statute, and that his First Amendment defense is applicable.

III. THE CHILD ENTICEMENT STATUTE IS NOT ANALOGOUS TO THE IDENTITY THEFT STATUTE BECAUSE IT DOES NOT CRIMINALIZE CONSTITUTIONALLY PROTECTED CONDUCT.

The State also attempts to demonstrate that the identity theft statute is constitutional as applied by comparing it to the child enticement statute, Wis. Stat. § 948.07, which the State argues is "similarly constructed" (State's Brief at 12). The State also cites State v. Derango, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, and State v. Robins, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, to support this proposition (State's Brief at 13-14). As noted by the State, both of these statutes create one offense with multiple modes of commission (State's Brief at 13). See also Derango, 236 Wis. 2d 721, ¶ 17. However, this structural analysis is inadequate given the issue presented here. A closer look at the child enticement statute, as well as the issues presented in Derango and Robins, reveals that the child enticement statute is not analogous to the identity theft statute for purposes of this case, because no element of the child enticement statute criminalizes constitutionally protected conduct.

The child enticement statute can be used to prosecute any person who, for any of the listed purposes, "causes or attempts to cause any child who has

not attained the age of 18 years to go into any vehicle, building, room or secluded place." Wis. Stat. § 948.07. These purposes include: (1) having sexual intercourse or sexual contact with a child; (2) causing a child to engage in prostitution; (3) exposing a sex organ to a child or causing a child to expose a sex organ; (4) recording a child engaging in sexually explicit conduct; (5) causing bodily or mental harm to a child; or (6) giving or selling to a child a controlled substance or controlled substance analog. Id. None of these purposes implicate constitutionally protected conduct; in fact, each of these purposes is criminalized independently of the child enticement statute.[3] Therefore, even under the analysis Baron advocates, in which a statute is deemed unconstitutional as applied if one element criminalizes constitutionally protected conduct, the child enticement statute would still be constitutional. For this reason, analysis of the child enticement statute cannot be helpful here.

Similarly, analysis of Derango is inapplicable for two related reasons: (1) the cause was brought on a jury unanimity challenge, not a challenge to the statute itself; and (2) the statute does not implicate constitutionally protected conduct, as noted above. Therefore, the case did not present and the court did not have an opportunity to address the issue presented in this appeal.

Gabriel Derango was charged with child enticement in violation of Wis. Stat. § 948.07. Derango, 236 Wis. 2d 721, ¶ 11. The amended information alleged that Derango violated three subsections of the statute,

[3] See Wis. Stat. §§ 948.02 (having sexual intercourse or sexual contact with a child); 948.08 (causing a child to engage in prostitution); 948.10 (exposing a sex organ to a child or causing a child to expose a sex organ); 948.05 (recording a child engaging in sexually explicit conduct); 948.03 (causing physical harm to a child); 948.04 (causing mental harm to a child); ch. 961 (providing or selling controlled substances and controlled substance analogs).

each of which designated a separate mode of commission. Id., ¶ 11. The circuit court had instructed the jury that they could find Derango guilty of child enticement if they found beyond a reasonable doubt that Derango used any of those three modes of commission to entice the victim. Id., ¶ 25. The jury convicted Derango based on these instructions and Derango appealed his conviction for child enticement on the ground that he was denied the right to a unanimous verdict. Id., ¶ 11.

The Supreme Court upheld Derango's conviction, finding that the child enticement statute "creates one offense with multiple modes of commission." Id. The court reasoned that jury unanimity is required "only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and...not...with respect to the alternative means or ways in which the crime can be committed." Id., ¶ 14 (citing Holland v. State, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979)). It was in this context that the court stated that "[t]he act of enticement is the crime, not the underlying intended sexual or other misconduct." Id., ¶ 17.

The State ignores this context by invoking this statement to argue that, for purposes of the identity theft statute, the act of identity theft is the crime and not the underlying purpose of defaming a public official. (State's Brief at 13-14). However, it is context that determines whether the statement is relevant to the current case at all. In Derango, the court found that Derango was not denied his right to a unanimous verdict because each juror found him guilty of child enticement, whether or not they agreed on how he committed the crime. Id., ¶ 14. The court determined that it didn't matter if the jury

agreed on which mode of commission was used, as long as the jurors were in unanimous agreement that the defendant had committed the underlying conduct. Id. For purposes of jury unanimity, the mode of commission is incidental to the conduct. Id.

In contrast, in the present case, Baron is only charged with acting for one of the enumerated purposes. The dispute is not whether Baron committed the offense using one method or another; the dispute is whether Baron committed an offense at all or whether his conduct was constitutionally protected and therefore legal. In this context, the purpose cannot be considered incidental to the crime. If this purpose implicates protected speech and Baron's conduct is constitutionally protected, then there is no crime. Likewise, if unanimity was the issue and the jury couldn't agree that Baron had this specific purpose, then Baron could not be convicted since he did not act for any of the other enumerated purposes. If this purpose cannot be proven, or if the purpose element is found constitutionally defective, then there is no crime. Therefore, the constitutional analysis from Derango, made in the context of jury unanimity, is inapplicable to this case.

Finally, the State's analogy to State v. Robins fails because the speech involved in the present case is an element of the crime, whereas the speech in Robins was simply evidence of the crime. Robins, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287. As noted above, none of the purposes listed in the child enticement statute implicate constitutionally protected rights. Instead, in Robins, the defendant claimed that the child enticement statute was unconstitutional because his allegedly protected "speech" was being used as

evidence that he enticed a child for a statutorily prohibited purpose. 2002 WI 65, ¶ 39. The defendant did not challenge the constitutionality of any specific statutory element; rather he challenged the State's right to prosecute him for criminal conduct carried out, in part, by means of language. Id.

The Supreme Court rejected this approach, holding that First Amendment protections did not extend to internet conversations and emails used in the act of child enticement. Id., ¶ 44. The court stated that "Robins' internet conversations and e-mails with 'Benjm13' do not by themselves constitute the crime of child enticement. Rather, Robins' internet conversations and e-mails are circumstantial evidence of his intent to entice a child." Id.

Conversely, in this case, the constitutionally protected conduct is an element of the offense. To convict Baron, the State has to prove not only that he intended to steal Fisher's identity, but that he intended to defame Fisher by disseminating the emails under Fisher's name. The issue here is not whether the State can use Baron's "speech," the incriminating emails written by Fisher and disseminated by Baron, as evidence that Baron engaged in criminal conduct or whether Baron's conduct is protected simply because it involved language (the defendant's argument in Robins). Instead, the issue is whether the State may criminalize Baron's conduct, disseminating the emails, without infringing Baron's right to engage in a specific category of constitutionally protected activity–disseminating truthful but defamatory information about a public official. Therefore, the court's determination in Robins, that otherwise-

criminal conduct is not constitutionally protected simply because it involves speech or writing, is not dispositive in this case.

IV. JUDICIAL TREATMENT OF THE BRIBERY AND ELECTION FRAUD STATUTES ARE NOT CONTROLLING IN THIS CASE BECAUSE THE STATE'S INTEREST IN THE IDENTITY THEFT STATUTE IS NOT COMPELLING AND THE IDENTITY THEFT STATUTE IS NOT NARROWLY TAILORED.

Next, the State points to several Wisconsin statutes, including the anti-bribery and election fraud statutes, to show that a statute may be constitutional even where one element of the offense implicates constitutionally protected conduct (State's Brief at 16-21). Although there are no Wisconsin cases addressing the constitutionality of these statutes, Baron assumes for purposes of this appeal that anti-bribery and election fraud statutes would be found constitutional. However, this conclusion is based on the relevant standard of review and does not affect Baron's argument regarding the constitutionality of the identity theft statute.

The State points out, correctly, that the anti-bribery statute criminalizes attempts to influence the conduct of a public official (a protected First Amendment right) when that attempt is accompanied by a bribe. The State then notes that, just as the anti-bribery statute allows attempts to influence the conduct of a public official that are *not* accompanied by a bribe, the identity theft statute allows dissemination of defamatory information about a public official as long as the person disseminating the defamatory information does not misappropriate the public official's identifying information in the process.

The State makes a similar argument with regard to the election fraud statute, which criminalizes a person's right to vote (a constitutionally protected right) as one element of the offense when an individual attempts to vote using a false identity or after having voted already in the same election. The State concludes that, because the identity theft statute criminalizes only Baron's misappropriation of the public official's identifying information (his name), the statute was constitutional as applied to Baron's conduct.

Although this analogy to the anti-bribery and election fraud statutes is facially interesting, it is much less persuasive when all three statutes are evaluated under the appropriate standard of review. This standard of review, which Baron argues in his brief-in-chief, should be strict or exacting scrutiny, should require that the State have a compelling interest at stake, and should be narrowly tailored to meet this interest. Although all three statutes are structurally similar, the anti-bribery and election fraud statutes involve a much more compelling state interest and are more narrowly tailored to meet this interest. Therefore, even given the apparent constitutionality of the anti-bribery and election fraud statutes, it is still appropriate that the identity theft statute be found unconstitutional as applied to Baron's conduct.

A. UNLIKE THE ANTI-BRIBERY AND ELECTION FRAUD STATUTES, THE IDENTITY THEFT STATUTE DOES NOT SERVE A COMPELLING STATE INTEREST AS APPLIED IN THIS CASE.

The State interests served by the anti-bribery and election fraud statutes are significantly more compelling than the State interest served by the identity theft statute as applied to Baron's conduct. As stated above, the anti-

bribery statute prohibits an individual from attempting to influence the conduct of a public official through a bribe. This helps ensure that all citizens who exercise their First Amendment right to influence the conduct of their public officials start from a level playing field and attempt to prevent corruption of the political process. The election fraud statute prohibits an individual from casting a vote that the individual is not entitled to cast, for example, because the individual has already voted or is using a false identity. This helps to ensure that each person legally entitled to vote has an equal voice and that legitimate votes are not diluted by illegitimate ones. At heart, therefore, the anti-bribery and election fraud statutes serve what is arguably the most compelling state interest of all, preservation of the democratic process.

The identity theft statute, on the other hand, does not serve a compelling state interest as applied to Baron's conduct. As identified by the State, the State's interest in the subsection of the identity theft statute at issue here is to protect its citizens from "the malicious thief who intends harm or embarrassment but does not intend to obtain a product or other value" (State's Brief at 28, citing Holly K. Towle, Identity Theft: Myths, Methods, and New Law, 30 Rutgers Computer & Tech. L.J. 237, 307 (2004)). While this interest in preventing reputational harm or embarrassment may be strong enough to justify application of the statute in other cases, where the alleged identity theft is committed against a private citizen and therefore subject to a rational-basis standard, it is not the compelling interest required here to criminalize dissemination of true but defamatory information about the conduct of a public official.

Primarily, this is because Mark Fisher, as a public official, did not have an established interest in avoiding reputational harm or "embarrassment" based on dissemination of true information about his conduct as a public official. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964). The State cannot have a compelling interest in protecting a privacy interest that Mr. Fisher did not possess. This is the same flaw that prevented application of the criminal defamation statute to Baron's conduct. The U.S. Supreme Court has conceded on more than one occasion that "privacy concerns give way when balanced against the interest in publishing matters of public importance." Bartnicki v. Vopper, 532 U.S. 514 (2001).

Far from being the "malicious thief" cited by the State, Baron acted to expose unethical and potentially illegal conduct by a public official. There is a public interest in the full and free dissemination of information concerning public issues specifically because this dissemination serves the same compelling interest in preserving the democratic process as do the anti-bribery and election fraud statutes. Given this public interest, Mr. Fisher's non-extant privacy interests should give way and the identity theft statute should be found unconstitutional as applied to Baron's conduct.

B. UNLIKE THE ANTI-BRIBERY AND ELECTION FRAUD STATUTES, THE IDENTITY THEFT STATUTE IS NOT NARROWLY TAILORED.

The anti-bribery and election fraud statutes are also narrowly tailored in a way that the identity theft statute is not. For example, the election fraud

statute is narrowly tailored because there is no situation in which a person can be prosecuted for casting the vote to which he or she is constitutionally entitled. The U.S. and Wisconsin constitutions entitle each person to cast one vote on his or her own behalf and it is only this right that is protected. The election fraud statute may, and does, prohibit a person from casting a second vote or from casting a vote on another person's behalf because no constitutional provision confers those rights.

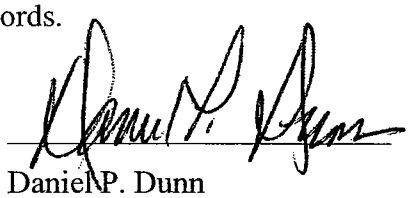
Similarly, the anti-bribery statute is as narrowly drawn as possible, given its purpose. As stated above, the anti-bribery statute is designed to prohibit one specific activity, namely, attempts to unduly influence a public official through bribes. Because influencing a public official is a First Amendment right, it is logically impossible to prohibit bribery without affecting the First Amendment rights of some citizens. Because the State has a compelling interest in preventing citizens who bribe public officials from obtaining undue influence over their public officials and because the anti-bribery statute is drawn as narrowly as possible to serve this interest, the anti-bribery statute meets constitutional scrutiny.

On the other hand, the identity theft statute could easily have been drawn more narrowly to protect the First Amendment rights of citizens who seek to disseminate true information about public officials. If the State's interest is truly in protecting its citizens from reputational harm or embarrassment according to their extant privacy rights, the statute should be written or applied to exclude conduct such as Baron's. As argued above, the statute can hardly be narrowly tailored when it seeks to protect privacy

interests that citizens, namely public officials, do not possess. Because the statute is not narrowly tailored, it should be found unconstitutional as applied.

CERTIFICATION

I hereby certify that this brief and appendix conform to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 5,205 words.



Daniel P. Dunn

APPENDIX

1. Bill History for 2003 Assembly Bill 288

2. Drafting Request for 2003 Assembly Bill 288

3. Linda Sink and Linda Spice, "Man Charged with Defamation...," *Milwaukee Journal Sentinel*, June 7, 2000, at B1

BILL HISTORY FOR ASSEMBLY BILL 288 (LRB -1585)

An Act to renumber and amend 343.237 (1) (a), 943.201 (1) (a) and 943.201 (2); to amend 343.237 (3) (intro.), 343.237 (3) (b), 343.237 (3) (c) (intro.), 343.237 (4) (intro.), 343.237 (4) (a), 343.237 (4) (b), 895.80 (1), 939.03 (1) (intro.) and (a) to (c), 943.201 (title), 946.82 (4), 970.03 (11) and 970.03 (13); and to create 196.23, 343.237 (1) (ag), 343.237 (3) (e), 939.03 (1) (e), 939.32 (1) (f), 943.201 (1) (a) 1., 943.201 (1) (a) 2., 943.201 (1) (a) 3., 943.201 (1) (b) 10. to 15., 943.201 (2) (a), (b) and (c), 943.201 (3) and (4), 943.203, 946.79, 971.19 (11), 971.366 and 971.367 of the statutes; relating to:
identity theft, unlawful use of an entity's identification documents or identifying information, false statements to financial institutions, and access by law enforcement agencies to driver's license and state identification card photographs and providing penalties. (FE)

2003

04–23. A. Introduced by Representatives **Gundrum, Staskunas, Schneider, Musser, M. Lehman, Krawczyk, Suder, Olsen, Albers, Seratti, Pettis, Hahn, Freese, McCormick, Ott, Hines, Ladwig, Hundertmark, Gielow, Gottlieb, Vrakas, Nischke, Plouff, Rhoades, Van Roy, Bies** and **Gunderson**; cosponsored by Senators **Darling, Erpenbach, Lazich, Carpenter, Stepp, Hansen** and **Roessler**.

04–23. A. Read first time and referred to committee on Judiciary 164

04–24. A. Public hearing held.

04–25. A. Fiscal estimate received.

05–01. A. Assembly amendment 1 offered by Representative Staskunas **(LRB a0461)** 178

05–01. A. Executive action taken.

05–01. A. Assembly amendment 1 to Assembly amendment 1 offered by committee on Judiciary **(LRB a0494)** .....

05–01. A. Assembly amendment 2 offered by committee on Judiciary **(LRB a0487)** 203

05–07. A. Fiscal estimate received.

05–07. A. Fiscal estimate received.

05–13. A. Report Assembly Amendment 2 adoption recommended by committee on Judiciary, Ayes 8, Noes 0 .....

05–13. A. Report passage as amended recommended by committee on Judiciary, Ayes 8, Noes 0 205

05–13. A. Referred to committee on Rules 205

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2003
ENROLLED BILL

03en AB-288

ADOPTED DOCUMENTS:

☒ Orig ☐ Engr ___ SubAmdt ___ 03-1585/1

Amendments to above (if none, write "NONE"): AA2 SA1

Corrections – show date (if none, write "NONE"): None

Topic Identity theft

6/26/03
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Pre Topic:

No specific pre topic given

Topic:

Identity theft

Instructions:

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Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	mdsida 01/24/2003						S&L Crime
/P1	mdsida 02/20/2003	kgilfoy 03/05/2003	jfrantze 01/24/2003		sbasford 03/05/2003		S&L Crime

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
			jfrantze 03/05/2003				
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FE Sent For: **04/11/2003, 04/11/2003, 04/11/2003.**

<END>

LRB–1585/1
MGD:kmg:rs

2003 ASSEMBLY BILL 288

April 23, 2003 – Introduced by Representatives GUNDRUM, STASKUNAS, SCHNEIDER, MUSSER, M. LEHMAN, KRAWCZYK, SUDER, OLSEN, ALBERS, SERATTI, PETTIS, HAHN, FREESE, MCCORMICK, OTT, HINES, LADWIG, HUNDERTMARK, GIELOW, GOTTLIEB, VRAKAS, NISCHKE, PLOUFF, RHOADES, VAN ROY, BIES and GUNDERSON, cosponsored by Senators DARLING, ERPENBACH, LAZICH, CARPENTER, STEPP, HANSEN and ROESSLER. Referred to Committee on Judiciary.

AN ACT ***to renumber and amend*** 343.237 (1) (a), 943.201 (1) (a) and 943.201 (2); ***to amend*** 343.237 (3) (intro.), 343.237 (3) (b), 343.237 (3) (c) (intro.), 343.237 (4) (intro.), 343.237 (4) (a), 343.237 (4) (b), 895.80 (1), 939.03 (1) (intro.) and (a) to (c), 943.201 (title), 946.82 (4), 970.03 (11) and 970.03 (13); and ***to create*** 196.23, 343.237 (1) (ag), 343.237 (3) (e), 939.03 (1) (e), 939.32 (1) (f), 943.201 (1) (a) 1., 943.201 (1) (a) 2., 943.201 (1) (a) 3., 943.201 (1) (b) 10. to 15., 943.201 (2) (a), (b) and (c), 943.201 (3) and (4), 943.203, 946.79, 971.19 (11), 971.366 and 971.367 of the statutes; **relating to:** identity theft, unlawful use of an entity's identification documents or identifying information, false statements to financial institutions, and access by law enforcement agencies to driver's license and state identification card photographs and providing penalties.

Analysis by the Legislative Reference Bureau

Identity theft

Current law prohibits identity theft — the unauthorized use of a personal identification document or personal identifying information of an individual (the

victim) to obtain credit, money, goods, services, or anything else of value. To convict a person of this offense, the state must show that the defendant falsely represented that he or she was the victim or was acting with the authorization or consent of the victim (the deception element). Under current law, "personal identification document" is defined to mean a birth certificate or a financial transaction card (which itself is defined to include a credit or debit card, a check–cashing card, and an automated teller machine card). Personal identifying information covered by the identity theft prohibition includes an individual's name, address, telephone number, driver's license number, social security number, and checking or savings account number; the name of an individual's employer; and the maiden name of an individual's mother. A person who commits identity theft may be fined not more than $10,000 or sentenced to a term of imprisonment (consisting of confinement in state prison followed by a term of extended supervision) of not more than six years, or both.

This bill makes a number of changes related to the crime of identity theft. First, the bill revises the definition of "personal identification document" so that it covers any document containing personal identifying information; an individual's card or plate, if it can be used to obtain anything of value or benefit or to initiate a transfer of funds; and any other device that is unique to, assigned to, or belongs to an individual and that permits the individual to access services, funds, or benefits. Second, the bill expands the definition of "personal identifying information" so that it covers: 1) an individual's DNA profile; 2) an individual's code, account number, identification number, or any other means of account access that can be used to obtain anything of value or benefit or to initiate a transfer of funds; 3) biometric data (such as a fingerprint, a voice print, or a retina or iris image); 4) any other information or data that is unique to, assigned to, or belongs to an individual and that permits the individual to access services, funds, or benefits; and 5) any other information that can be associated with a particular individual through one or more identifiers or other information or circumstances. Third, the bill specifies that the prohibition on identity theft applies to a personal identification document or personal identifying information relating to a deceased individual.

Fourth, the bill expands the scope of the prohibition to cover the unauthorized use of an individual's personal identification document or personal identifying information to harm the reputation, property, or person of the individual; to harm the individual's estate if he or she is deceased; to avoid delivery of a summons, subpoena, or similar court paper; or to avoid a penalty imposed by a court. The bill also prohibits a person from possessing a personal identification document or personal identifying information with intent to use it for one of those purposes or to obtain something of value. Fifth, the bill specifies that the state may prove the deception element by proving that a defendant falsely represented that the personal identification document or personal identifying information was his or her own.

Unauthorized use of an entity's identifying documents or information

The bill creates a new crime, prohibiting the unauthorized use of identifying documents or information relating to a corporation, partnership, association, government, or government agency (an entity). The elements of and the maximum penalty for this offense are essentially the same as those for identity theft, with two

exceptions. First, information that relates to an individual but not to an entity (such as a driver's license number, a social security number, or a DNA profile) is not covered by the term "identifying information" for the purposes of this new crime. Second, the prohibition relating to entities does not apply to conduct undertaken for the sole purpose of avoiding delivery of a court document or avoiding a penalty imposed by a court. The bill also permits an entity that is the victim of this offense to bring a civil action against the person committing it in the same way that current law allows victims of identity theft to bring such an action.

Jurisdiction, venue, and procedure for identity theft and unauthorized use of entity–identifying documents or information

Under current law, a person may be prosecuted and punished for a crime under Wisconsin law if, among other things: 1) the person commits a crime and any elements of the crime occur in this state; or 2) while out of this state, the person does an act with intent that it cause, within the state, a consequence set forth in a law defining a crime. This bill specifies that a person may be prosecuted and punished for identity theft if the victim is a Wisconsin resident and for unauthorized use of an entity's identifying documents or information if the entity is located in Wisconsin. The bill also specifies that the case may be brought in the county in which the victim resides, if the victim is an individual, or is located, if the victim is an entity, or in any other county in which the case may otherwise be brought under current law. In addition, the bill permits more frequent use of hearsay and telephonic or televised testimony at preliminary hearings in such cases.

Utility service for victims of identity theft

The bill allows an individual who is a victim of identity theft to obtain service from a public utility if the individual is unable to obtain that service solely because of the identity theft. If the individual furnishes the public utility with an affidavit and law enforcement agency report regarding the identity theft, and if the individual otherwise qualifies for the service, the public utility must provide the service, unless the public utility contests the accuracy of the affidavit or report by filing a petition with the Public Service Commission (PSC). In such a case, the PSC must investigate the petition and may hold a hearing on the matter. Unless the PSC determines that the identity theft did not occur, the public utility must provide the service.

False statements to financial institutions

Current law prohibits making false statements for the purpose of obtaining a financial transaction card. A person who violates that prohibition may be fined not more than $10,000 or sentenced to the county jail for not more than nine months or both. This bill prohibits certain deceptive activities undertaken in connection with a transaction with a financial institution. The prohibited activities include: 1) falsifying or concealing an individual's identity; 2) making a false statement regarding an individual's identity; 3) making or using a writing that contains false information regarding an individual's identity; or 4) using a false personal identification document or false personal identifying information. A person who violates this prohibition may be fined not more than $10,000 or sentenced to a term of imprisonment of up to six years or both.

Law enforcement agency access to driver's license photographs

With limited exceptions, current law requires the Department of Transportation (DOT) to take a photograph of all applicants for a driver's license or state identification card. DOT may keep copies of the photographs for its own use but generally must keep the photographs confidential. DOT, however, may release a photograph to the individual whose photograph was taken. In addition, DOT may release a copy of a photograph taken on or after September 1, 1997, to a Wisconsin law enforcement agency if the agency submits a written request specifying the name of the person whose photograph is requested and stating that the photograph is requested for the purpose of investigating unlawful activity, looking for a missing person, or identifying an accident victim or a deceased person. DOT may also provide a copy of such a photograph to a law enforcement agency of a physically adjacent state if the agency makes a written request in the same manner as a Wisconsin law enforcement agency and if the physically adjacent state provides Wisconsin law enforcement agencies with access to photographs taken for that state's driver's licenses and state identification cards. A law enforcement agency that receives a copy of a photograph from DOT must keep it confidential.

This bill allows DOT to release a copy of a photograph to any state or federal law enforcement agency if the law enforcement agency makes a written request in the same manner as a Wisconsin law enforcement agency. The same restrictions regarding the use and possession of a released photograph that apply to Wisconsin law enforcement agencies also apply to the other state's law enforcement agency or the federal law enforcement agency requesting the photograph from DOT.

Additional information

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.23 of the statutes is created to read:

196.23 Utility service for victims of misappropriated identifying information. (1) If an individual uses personal identifying information of another individual, without the authorization or consent of the other individual, to apply for and receive service from a public utility and, as a result, the individual whose personal identifying information was used without authorization or consent is

ID Theft
In the News

6/7/00 Milwaukee J. & Sentinel 1
2000 WLNR 3077063

Milwaukee Journal Sentinel (W

June 7, 2000

Section: B NEWS

MAN CHARGED WITH DEFAMATION DISGRUNTLED FIRED EMPLOYEE ACCUSED OF POSTING AD WITH EX-BOSS' NAME ON INTERNET

LISA SINK AND LINDA SPICE OF THE JOURNAL SENTINEL STAFF

For all the Internet's potential to enlighten, a businesswoman has found that the brave new world of cyberspace also provides an electronic medium for the base scrawlings once consigned to the walls of the bathroom stall.

In the case of the Internet, however, millions of eyes can peruse the equivalent of cyber graffiti, causing embarrassment and grief to the intended victim.

Such was the case with the Waukesha businesswoman, who received more than 20 responses to an offer of sex allegedly posted by a disgruntled ex-employee in her name at a site called "Sex on the Side."

In its third such investigation, the Waukesha County district attorney's office charged David J. Dabbert of Waukesha with defamation in the case on Tuesday. The office and various state and national groups see an alarming and dangerous increase in cases of the Internet being used to damage other people's good names and otherwise invade their privacy.

"Instead of writing a person's number on a bathroom wall, he (Dabbert) was able to write in on a virtual bathroom wall to reach more people," Karen Coyle, a spokeswoman with Computer Professionals for Social Responsibility in Palo Alto, Calif., alleged. "I really think the behavior is the same. It's just that you can do a lot more damage when you have access to e-mail."

The combination of human emotion and technology is one in which people tend to "make big mistakes much faster," said Coyle, whose non-profit group includes computer scientists and others concerned about the impact of computer technology on society.

"The send button is not reversible. You cannot unsend," she said. "I think many people have sent off messages because it can be so quick before doing the same

thing as counting to 10 that we should all do before losing our tempers."

Coyle's organization is among numerous groups that have formed nationally to research privacy issues involving the Internet. The Federal Trade Commission recently called for national legislation to protect the privacy of Internet users.

Jim Haney of the Wisconsin Department of Justice said that while the state agency is heavily involved in combating Internet crimes, such as child pornography and identity theft, libel and defamation cases have not been part of the mix.

Gov. Tommy G. Thompson has appointed a task force to look at various privacy issues.

Rep. Marlin Schneider (D-Wisconsin Rapids), a task force member, has been active in protecting citizens' privacy issues. He said there are few laws related to harassment and defamation that occurs over the Internet.

Disorderly conduct and defamation, both misdemeanors, are "weak in terms of dealing with the severity of this type of activity," Schneider said.

When a constituent in Wood County called him to complain that a man she had reported for child molestation had posted an ad under her name soliciting sex, "we checked on it and there wasn't much of law that deals with this," he said.

"People's reputations are sullied in a very new way, and it's very hard for them to recover from that," Schneider said.

In Waukesha County, Dabbert is the third person to be investigated for alleged Internet defamation.

The case comes months after Walter Karnstein, 59, of Pewaukee was charged with defamation for allegedly posting nude photographs of his estranged girlfriend with a written solicitation for sexual encounters. His girlfriend was inundated with responses from as far away as Denmark. Karnstein has challenged the charge, saying it violates his First Amendment right to free speech.

And prosecutors are reviewing a third case in which a family therapist allegedly posed as his former wife's new husband and posted an ad on a swingers site, asking interested men to call the couple for a "threesome."

According to the criminal complaint filed Tuesday, Dabbert was fired by the Waukesha woman. He told authorities that in a moment of anger and depression, he clicked on the Las Vegas-based "Sex on the Side" Web site, which says it features "attached" women who are seeking sexual encounters "on the side," the complaint says.

Dabbert posted an ad on the site, using the full name of his former boss and her company e-mail address, the complaint says. Soon after the ad was posted, e-

mail offers poured in.

"We used to just write graffiti on the restroom stalls," said attorney Peter Plaushines, who helped the Waukesha woman obtain a harassment injunction against Dabbert.

"What will we do in the next 10 years? That's what's scary," Plaushines said.

"She has enough to worry about running a business and running her family, let alone having this added distraction and fear," he said.

The woman's name and company are not being disclosed to protect her privacy.

The ad posted in her name described her chest size and hair color and, in part, said: "I'm highly stressed out. I own my own store. I've only been with my hubby. He's gone at work 24 hours at a time . . . I want someone to make me their slut for the night," the complaint says.

Dabbert does not have a listed phone number and could not be reached for comment Tuesday.

After his former boss identified him as a possible suspect, police tracked him down and he confessed, the complaint says. He apologized and removed the ad, according to the complaint.

If convicted of the misdemeanor defamation charge, Dabbert would face a maximum penalty of nine months in jail.