To Be Argued by:
Ronald L. Kuby
Requested Time:
15 minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

- v –

Ind. No. 2721/09
New York County
Hon. Carol Berkman

RAPHAEL GOLB,

Defendant-Appellant.

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BRIEF OF DEFENDANT-APPELLANT RAPHAEL GOLB

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Dated: New York, New York
March 16, 2011

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QUESTIONS PRESENTED

I. DID THE TRIAL COURT'S REFUSAL TO PROPERLY DEFINE THE TERMS "BENEFIT," "HARM," "INJURY, " AND FRAUD COMPEL THE JURY TO CRIMINALIZE EXPRESSIONS OF DEFENDANT'S OPINION, STATEMENTS OF FACT, AND CAUSING HURT FEELINGS TO VARIOUS SCHOLARS IN VIOLATION OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, §8 OF THE CONSTITUTION OF THE STATE OF THE NEW YORK?

The trial court ruled its instructions were proper.

II. IS THE VERDICT IN COUNT 1 AGAINST THE WEIGHT OF THE EVIDENCE AND INSUFFICIENT AS A MATTER OF LAW?

The trial court answered this question in the negative.

III. DOES THE APPLICATION OF THE FORGERY, CRIMINAL IMPERSONATION AND IDENTITY THEFT STATUTES TO DEFENDANT'S CONDUCT RENDER THEM VAGUE AND OVERBROAD?

The trial court answered this question in the negative.

IV. ARE THE COMMUNICATIONS THAT WERE THE SUBJECT OF COUNTS 3, 40, AND 48 PROTECTED BY THE FIRST AMENDMENT AND CANNOT BE CRIMINALIZED WITHOUT RENDERING N.Y. PENAL LAW §240.30(1) UNCONSTITUTIONALLY VAGUE AND OVERBROAD?

The trial court answered this question in the negative.

V. DID THE PEOPLE'S APPLICATION OF §156.05 TO DEFENDANT'S VIOLATION OF A NEW YORK UNIVERSITY REGULATION RENDER THE STATUTE VOID FOR VAGUENESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The trial court answered this question in the negative.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

- v –

Ind. No. 2721/09
New York County
Hon. Carol Berkman

RAPHAEL GOLB,

Defendant-Appellant.

----------x

STATEMENT PURSUANT TO FIRST DEPARTMENT RULE 600.8(a)(2)

This is an appeal of a final judgment of conviction and sentence of imprisonment of two terms of six months followed by five years probation, and twenty-eight terms of imprisonment of three months, followed by three years probation, all sentences to run concurrently.

An application for a Stay of Execution of Judgment was made on November 18, 2010 to the Hon. Rosalyn H. Richter, a Justice of this Court, and was granted on that day.

INTRODUCTION

The People v. Raphael Golb confronts this Court with a series of novel claims, all of them involving the criminalization of various forms of critical speech—including the use of mockery, ridicule, and pseudonyms to expose perceived unethical conduct—communicated in the context of a

debate over issues of public concern. Neither the surrounding facts, nor the law, nor the content of the communications at stake supports the claim that Raphael Golb engaged in any form of criminal conduct. Rather, the essence of the charges here is an unfounded claim of defamation; Raphael Golb was actually tried for making what the People repeatedly denounced as "false accusations." In other words, he was tried for libel, under the cloak of criminal laws that were never designed for such a purpose.

Beneath this dispute, however, lies a deeper issue. Over the past decade, our society has experienced a radical democratization of the means by which information and opinions are communicated. A culture of anonymity is the norm on the Internet, and the use of pseudonyms, as well as all sorts of criticism—even in the form of mockery and impersonation—is part of that culture. Concerned members of the public now regularly become involved in furious online discussions that often are understood as challenging power structures, including the old ivory tower, with thousands of inflammatory e-mails "ricocheting through cyberspace."[1] One characteristic of online debates concerning deeply controversial matters,

[1] See Ron Robin, Scandals and Scoundrels: Seven Cases that Rocked the Academy (University of California Press, 2004). Professor Robin is an NYU dean. His book praises the many controversial academic hoaxes and e-mail campaigns of the past 15 years—hoaxes and campaigns that express the public's concern with research fraud and abuse of power in the academy.

however, is digital indignation. Verbal displays of indignation are, of course, not limited to the Internet; they have been part of our culture for centuries. And one form they take is mimicry, mockery, or the satirical imitation of individuals for purposes of social criticism. The ease with which such criticism can now be disseminated, the vividness of its impact, is naturally experienced as offensive by influential individuals, including famed researchers, writers and educators who used to rely on journal editors and other academic gatekeepers to filter criticism. The fundamental question for this Court is whether the People will be permitted to silence debate when both the means used—pseudonymous and satirical speech—and the content of that speech—criticism of unethical conduct—have long been protected under the First Amendment.

STATEMENT OF FACTS COMMON TO ALL COUNTS

A. THE INDICTMENT.

Raphael Golb was indicted by a New York County Grand Jury charging two felonies and forty-nine misdemeanors. Twenty misdemeanor counts were dismissed prior to going to the jury on the ground that they were duplicative. According to the Bill of Particulars (A-26), of the remaining thirty-one counts, Counts 1 and 2 charged Identity Theft in the Second Degree (Penal Law §190.79(3)), with the object crimes of Scheme to

Defraud and Falsifying Business Records, respectively. Count 5 charged Criminal Impersonation in the Second Degree (§190.25(1)) based upon Raphael Golb's opening a gmail account on August 3, 2008, entitled larry.schiffman@gmail.com. Count 7 (§190.25(1)) and Count 8 (Forgery in the Third Degree; §170.05) were based on Raphael Golb's sending an e-mail from that account on August 4, 2008 to Lawrence Schiffman's teaching assistants. Counts 10 (§190.25(1)) and 11 (§170.05) criminalized e-mails sent from that account on August 5, 2008 to various other NYU addresses. Counts 13 (§190.25(1)) and 14 (§170.05) criminalized an e-mail sent from that account on August 5, 2008 to an NYU dean. Counts 16 (§190.25(1)) and 17 (§170.05) criminalized an e-mail sent from that account on August 5, 2008 to an NYU provost. Counts 19 (§190.25(1)) and 20 (§170.05) criminalized an e-mail sent from that account on August 6, 2008 to NYUNews.com. Count 23 (§190.25(1)) criminalized Defendant's opening of a gmail account on November 22, 2008 entitled seidel.jonathan@gmail.com. Counts 25 (§190.25(1)) and 27 (§170.05) criminalized an e-mail sent from that account on November 22, 2008 to the Royal Ontario Museum. Counts 29 (§190.25(1)) and 31 (§170.05) criminalized an e-mail sent from that account on November 24, 2008 to the museum's guest curator. Counts 33 (§190.25(1)) and 35 (§170.05)

criminalized an e-mail sent from that account on November 24, 2008 "regarding Norman Golb." Counts 37 (§190.25(1)) and 39 (§170.05) criminalized an e-mail sent from that account on December 6, 2008 "regarding" an internet post made by one Stephen Goranson. Count 42 (§190.25(1)) criminalized Raphael Golb's creating a gmail account on August 7, 2008 entitled steve.goranson@gmail.com. Count 44 (§190.25(1)) criminalized Raphael Golb's creating a gmail account on July 20, 2008 entitled frank.cross2@gmail.com. Counts 46 (§190.25(1)) and 47 (§170.05) criminalized an e-mail sent from that address on July 20, 2008 "regarding Bart Ehrman and the Jewish Museum." Count 50 (§190.25(1)) criminalized Raphael Golb's opening of a gmail account on June 15, 2008 entitled gibson.jeffrey2@gmail.com. Counts 3, 40, and 48 charged Aggravated Harassment in the Second Degree (§240.30(1)(a)) as against Lawrence Schiffman, Stephen Goranson, and Robert Cargill, respectively. Last, Count 51 charged unauthorized use of a computer (§156.05), alleging that Raphael Golb violated NYU's computer policy.

B. THE DEAD SEA SCROLLS CONTROVERSY.

This prosecution arose in the context of a dispute over the Dead Sea Scrolls, science museum exhibitions, and educational ethics. The ancient Scrolls are the most popular archaeological discovery of the 20th century,

and have been the object of dispute ever since their discovery in 1948 in caves near the site known as Khirbet Qumran (then under Jordanian control). Physical access to them was originally monopolized by a team of experts appointed by the Jordanian government, from which Jews were rigorously excluded. (Tr. 168, A-371).[2] The monopoly group treated the Scrolls as the writings of a small radical sect (usually, but not always, identified as Essenes), imagined to have been living in the desert at Qumran. (Tr. 980, A-567). This "Qumran-sectarian" theory and its variants quickly became a dogma, to which anyone associated or allied with the group has always adhered.

Starting in the 1980s, some Jews were gradually admitted to the monopoly, and ultimately, in view of growing public outrage, the monopolists' physical control over the manuscripts collapsed. (Tr. 169, A-372). In recent years, however, the monopolists, along with their students and associates, have been using science museum exhibits to propagandize the Qumran-sectarian theory, systematically excluding the contrary findings of another group of scholars. (Tr. 276, A-403).

[2] All references to the trial transcript are denoted as "Tr." followed by the appropriate pagination. All references to the Sentencing Transcript are denoted as "Sent. Tr." followed by the appropriate pagination.

Beginning in 1970, University of Chicago historian Norman Golb, Defendant's father, mounted a strong challenge to the proto-Christian sectarian theory of Scroll origins defended by the monopolists. Professor Golb put forward evidence that the Scrolls were writings of many different Jewish groups and came from Jerusalem rather than from Qumran. Major European and Israeli archaeologists then found additional evidence that supported Professor Golb's theory. (Tr. 983, A-568; Tr. 998-99, A-569-70). In 1998, Professor Golb was invited to write one of the two essays on scroll origins presented to the public in the prestigious Cambridge History of Judaism, thereby giving his theory equal status in a primary reference source. In his 1995 book, Who Wrote the Dead Sea Scrolls, Professor Golb discussed not only the history of scrolls research, but the ethics of scholarship and education in the field. He criticized unethical research practices including the plagiarism and misrepresentation of his own work by one Lawrence Schiffman.

Lawrence Schiffman, formerly Chairman of the Skirball Department of Jewish Studies at NYU and currently a vice provost at Yeshiva University, is a scholar who defends a version of the "Qumran-sectarian" theory of origin of the Dead Sea Scrolls. (Tr. 61, A-350). He derives, by his own testimony, "notoriety" (Tr. 202, A-379) from playing a prominent

public role in the DSS controversy, appearing on television and giving many interviews and popular lectures at DSS museum exhibits and elsewhere. (Tr. 182, A-375; Tr. 223, A-387). Schiffman is an associate of the monopoly of scholars who, for many years, controlled physical access to the Scrolls, and who have continued to control their presentation in museum exhibits. Schiffman testified that he is not a member of the monopoly, but admitted that he received a "small group of texts," and multiple manuscript fragments comprising the famous "MMT" text, from members of the monopoly. (Tr. 174-75, A-373-74). At the time, scholars at large were not allowed to see those fragments. After the monopoly was broken, other scholars, including Professor Golb, disputed Schiffman's conclusions and his methodologies.

Schiffman's reputation was also based on various articles published towards 1990, and a book published in 1994, in which he presented ideas and arguments that were, in part, manifestly derived from works previously published by Norman Golb. Schiffman, who by his own testimony attended a conference where Professor Golb presented his theory in 1987 (Tr. 65, A-352), failed to give Professor Golb credit for having originally formulated the ideas in question. This created controversy in the academic world as well as among informed members of the lay public. For example, in 1993, in the pages of Haaretz (a major Israeli newspaper), the well-known

journalist and Hebrew University professor Avi Katzman wrote that Schiffman had "adopted portions of Golb's theory and presented them as [his] own without acknowledging as much, and without giving him appropriate credit." (Tr. 216, A-384). In response, Schiffman denigrated Norman Golb's scholarship, claiming that "Golb can say what he wants" and that there was "no innovation in Golb's theory." (Tr. 215, A-383). Two NYU deans testified that the terms used by Katzman constitute an accusation of plagiarism (Tr. 265, A-392), and that they are synonymous with NYU's definition of plagiarism. (Tr. 311, A-426).

In 1994, Schiffman claimed, in his own book on the Scrolls, that the book was a "revolutionary" work. The grounds he offered for this assertion were, again, manifestly derived from previously published articles by Professor Golb. In his 1995 book, Professor Golb quoted the Katzman article as well as Schiffman's response, and examined the plagiarism and misrepresentation of his work by Dr. Schiffman.

During his trial testimony, Dr. Schiffman initially acknowledged that charges of plagiarism are "very serious." (Tr. 147, A-367). Asked by the prosecutor if there was any "truth" to the allegations that he had plagiarized and misrepresented Norman Golb's ideas, Schiffman replied: "Yes." (Tr. 90, A-356). He denied having plagiarized Professor Golb (Tr. 91, A-357),

characterizing the allegations as "just an accusation of too few footnotes to a guy." (Tr. 217, A-384a). Schiffman also denied that he has taken liberties in describing Professor Golb's theory (Tr. 184, A-375a), but acknowledged that he made an "error" or a "mistake" in describing it (Tr. 185, A-375b; Tr. 217-218, A-384a-84b; Tr. 225, A-387b) — and that he has continued to make this error or mistake for twenty years (Tr. 185-86, A-375b-75c), despite being repeatedly corrected in Professor Golb's book and elsewhere. Thus, the trial record demonstrated, at a minimum, that Schiffman had been previously accused of plagiarizing Norman Golb and that he had repeatedly misrepresented Professor Golb's theory.

C. RAPHAEL GOLB'S BLOGGING CAMPAIGN.

Raphael Golb holds a Ph.D. from Harvard University, a J.D. from NYU, and a B.A. in Latin from Oberlin College. During a two-and-a-half-year period beginning in 2006, he published a series of Internet articles based largely on his own online research, denouncing the use of science museum exhibits to misinform the public as to the current state of research on the Dead Sea Scrolls. This activity was engaged in at New York University on the Bobst Library computers, to which Raphael Golb had legitimate access as an alumnus and a subscriber in good standing to the "Friends of Bobst Library" program. (Tr. 342-43, A-428-29).

Raphael Golb published his articles under a variety of shifting pseudonyms. He created his Internet avatars mostly at random, picking fairly common, nondescript names such as "Peter Kaufman," "Albert White," "Jesse Friedman" and the like. The name that he used most prolifically was "Charles Gadda." Raphael Golb's pseudonymous articles gathered evidence that members and associates of the Dead Sea Scrolls monopoly had been setting a religiously oriented, "proto-Christian" agenda for science museum exhibits on the scrolls, belittling and excluding prominent secular-minded historians and archaeologists who have rejected the theory defended in the exhibits. (*E.g.*, Exhibits 40A3, 40A5, 40A6, 40B4, 40B1, A-115-130, A-133-193). The articles exposed false and misleading statements made in the media campaigns surrounding the exhibits. These statements included, for example, false claims of expertise by a curator, Dr. Risa Levitt Kohn, who had never published a single word on the scrolls and later admitted that she was "far from an expert." They also included embarrassing explanations offered by the same curator in newspaper interviews, such as: "you don't want to confuse people with so many competing theories." (*E.g.*, Exhibit 40B1, A-141-193). The tone and content of the articles was frequently satirical. In two pieces, for example, he mockingly pretended that he *approved* of the choice to exclude one side

of the debate from the exhibits, and ironically praised the San Diego curator, Dr. Kohn, for working to prevent the "public confusion" that would take place should the public be properly informed.

Several additional articles of August, 2008 exposed the plagiarism and misrepresentation by Lawrence Schiffman of arguments initially published in 1980 by Norman Golb. These articles were published by Defendant on the NowPublic site under the pseudonym "Peter Kaufman," and on several different blogs that were opened with domain names using forms of Dr. Schiffman's name, *e.g.*, "Larry Schiffman" or "Schiffman Plagiarist." (Tr. 138, A-365; Tr. 143, A-366)(Exhibits 40C16, 40A8, 40A9, 40B3, A-87-114).[3] In addition to the small number of blogs featuring such domain names, Schiffman's conduct was criticized, along with that of other associates of the DSS monopoly, in around 25 other blogs posted by Raphael Golb. (Tr. 136, A-364).

Some of the individuals who were involved in creating the DSS museum exhibits, including complainant Robert Cargill of UCLA, were upset that a single person was apparently using different names to post blogs and critical

[3] The use of a criticized person's name in the domain names of critical websites is a common practice on the Internet, since it helps bring the site to the attention of people who do "Google" searches for the name of the criticized person. See, e.g., http://keitholbermann.com (criticism of political commentator Keith Olbermann); http://sirpeterscott.com (criticism of Sir Peter Scott, the former chancellor of Kingston University).

comments on "citizen news" sites like NowPublic and on the websites where the exhibits were being advertised through media campaigns emanating from museum publicity departments. They were upset because this technique was an effective way of drawing attention to the criticism. (Tr. 716, A-508; Tr. 729, A-517). They felt "accused," "criticized," and "attacked" by the criticism (Tr. 715, A-507; Tr. 718, A-510; Tr. 727, A-516; Tr. 740, A-519; Tr. 742-43, A-520-21; Tr. 747-49, A-523-24), which they saw as an "abuse of anonymity," as an unjustifiable effort to "promote and defend" Norman Golb and to "influence" the museum exhibits, or as a "widespread campaign to defame, to critique the Dead Sea Scrolls exhibitions and the scholars involved in them." (Tr. 721, A-513; Tr. 723, A. 515; Tr. 729, A-517). Feeling that they were being baited into responding, they implemented a policy of not mentioning Norman Golb's name. (Tr. 730, A-518; Tr. 798-99, A-537-38).

D. RAPHAEL GOLB'S E-MAIL CAMPAIGN.

To call attention to his campaign, Raphael Golb opened over 70 e-mail addresses in different names, mainly with Google and Yahoo. Google and Yahoo technology permits, and even encourages, users to open gmail and e-mail accounts under pseudonyms. (Tr. 577-582, A-451-56). Google and Yahoo do not require any identification to create an e-mail account, and their Terms of Service do not require that the name used on the

account actually be the originator's own name. (Tr. 583-584, A-457-58; Tr. 601, A-460; Tr. 489, A-448). The only limitation is that the account holder cannot use a name exactly identical to one that is already in use. Thus, if Sarah.Palin@gmail.com already exists, one can still open an account named Sarah.Palin2012@gmail.com and use it to make fun of Sarah Palin.

One of the accounts opened by Raphael Golb was entitled Larry.Schiffman@gmail.com. It was easily created without using any private information about Schiffman. (Tr. 489-91, A-448-50; Tr. 583-85, A-457-59). The account did not purport to be Professor Lawrence Schiffman's institutional e-mail, which Raphael Golb could have done either by creating a "spoofed" address (Lawrence.Schiffman@NYU.edu) or by adding "NYU" to a gmail account (SchiffmanNYU@gmail.com). (Tr. 368-369, A-435a-436). Raphael Golb's most provocative communicative "act" of all was a truculently ironical parody, spoof, or send-up, taking the form of several e-mails sent from this account to members of the Jewish Studies Department (around 15 people), two deans, the provost, the Washington Square student newspaper, and Schiffman's four graduate student teaching assistants at NYU. (Tr. 75, A-353; Tr. 80, A-354; Tr. 89, A-355; Tr. 92, A-358); (Exhibit 16, generally, A-217-260).

The e-mails mockingly imitated Lawrence Schiffman in the first person, with a solemn tone. Written with a sharp academic edge, these short texts referred to the purported author's "minor failing" (to wit, plagiarism), and dramatically proclaimed: "my career is at stake." (Tr. 80, A-354). They absurdly asked recipients to use "every effort" to help cover up the allegations of misconduct, while at the same time doing exactly the opposite by providing links to an Internet article that exposed the known details of the plagiarism. (Tr. 64, A-351). The e-mails satirically instructed recipients "not to mention the name" of the plagiarized scholar, asked for their "understanding," and ridiculously explained that "if I had given credit to this man, I would have been banned from conferences around the world." (Tr. 90, A-356). The message to the student newspaper contained, in addition to the plagiarism article link, the transparently self-contradictory request "not to publish a word about this in the Washington Square News, should it be brought to your attention." (Tr. 93, A-359).

Raphael Golb also informed NYU officials of his articles about Dr. Schiffman's plagiarism in several e-mails (again containing links to the blog articles) in which he explicitly admitted to using a pseudonym, explaining that he wished to avoid retaliation. (Tr. 108, A-361).

The response of the NYU community to these allegations ranged from flaccid to non-existent. Former NYU Dean Catherine Stimpson, who was in a position of authority over Schiffman, testified that she did not believe Dr. Schiffman had written to them confessing to plagiarism. Stimpson testified that she immediately found the imitative e-mail she received "weird," that there was a "lack of credibility on the surface," that something was "wrong here," and that it didn't "make sense," because the contents did not seem to be plausibly written by Schiffman and because the "gmail" address the e-mail came from was not Schiffman's. (Tr. 238, A-388; Tr. 262-63, A-390-91).

After a brief inquiry, which consisted solely of Dean Stimpson and another dean, Richard Foley, having "conversations" and a "quick meeting" with Schiffman concerning the allegations of plagiarism (Tr. 301, A-420; Tr. 303, A-422; Tr. 306, A-425), the matter was dropped. (Tr. 301, A-420; Tr. 305-307, A-424-25a). Neither of the two deans bothered to even read the blog article linked in the e-mails. (Tr. 263, A-391; Tr. 303, A-422). Dr. Schiffman, by his own testimony (Tr. 195-96, A-376-77), suffered no harm from the e-mails except anger and hurt feelings. (Tr. 157-58, A-369-70). He testified that the issue was "whether they investigated it or not" at NYU, and that the harm lay in what "could" have happened to him if NYU

officials had found that he *did* commit plagiarism. (Tr. 197, A-3778; Tr. 223-224, A-387-87a).[4]

Raphael Golb testified that he never intended to "benefit" in any way from sending the e-mails; rather, he "sought to produce a benefit for the academic community and the public. . . ." The benefit he sought to produce was "the free and open discussion of this entire scandal of Dr. Schiffman's conduct, perhaps some explanation of it." (Tr. 1007, A-573).

Raphael Golb also sent an e-mail in the name "Frank Cross" (from the address frank.cross2@gmail.com), which is similar to the name of a member of the original Dead Sea Scrolls monopoly group, Professor Frank Moore Cross of Harvard University. Professor Cross committed significant research fraud with respect to a text called the "Qumran ostracon."[5] Again, Raphael Golb did not use the "harvard.edu" header in the e-mail. In fact, he did not represent that he was Frank Moore Cross of Harvard, or a professor, or even a scholar at all. Dr. Cross did not testify, but his daughter and a

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[4] At no point did the trial court permit the jury to draw any distinction between the psychic harm of being falsely accused and the less inchoate harm that would be caused by a truthful allegation. As the court instructed the jury, either form of intended harm would be criminal.

[5] See Norman Golb's discussions, "Qadmoniot and the Yahad Claim" (1998) and "The Qumran-Essene Theory and Recent Strategies Employed in its Defense" (2007), available on the University of Chicago's Oriental Institute website at http://oi.uchicago.edu/research/projects/scr/yahad.html and http://oi.uchicago.edu/research/projects/scr/Recent_Strategies_2007.pdf.

former student of his testified that Dr. Cross always uses the name "Frank *Moore* Cross" or "F. M. Cross" in correspondence and for his e-mail addresses. (Tr. 698, A-503; Tr. 816, A-548). His daughter testified that the e-mails "do not appear to be" in her father's style. (Tr. 699, A-504).

The Frank.Cross2 e-mail linked recipients to a blog item concerning Professor Bart Ehrman of the University of North Carolina. (Exhibit 19(4)-(7), A-307-310). The message commented that "Bart" had "gone and put his foot in his mouth again," and ironically asked: "Are we going to have to take on the Jewish Museum?" Raphael Golb testified that his intent, in creating the address frank.cross2@gmail.com, was to allude to Frank Moore Cross and that the message hinted Bart Ehrman was guilty of the same kind of research fraud as Cross. (Tr. 1038-39, A-594-95). The trial court refused to allow Raphael Golb to testify about Cross's research fraud, explaining: "The relevance of whether or not these people perpetrated an academic fraud . . . is off to the side, and not in the center." (Tr. 1030, A-590).

One of the names Raphael Golb chose at random was "Jonathan Seidel," opening an account named "Seidel.Jonathan2@gmail.com. Although this happens to be the name of at least 119 people (Tr. 615-16, A-463-64), one of them is a rabbi who teaches Judaism in Oregon, who is not a Dead Sea Scrolls scholar, has published no articles on the topic, and

apparently has no view on the various DSS controversies. (Tr. 613-14, A-461-62). Raphael Golb never claimed in his "Jonathan Seidel" e-mails to be a rabbi, a scholar, or to be writing from Oregon. (Tr. 616, A-464). Nonetheless, the People brought Rabbi Seidel across the country to testify that he felt "shocked" and "angry" when he found out "that there was a Seidel dot Jonathan." (Tr. 618, A-466). The People never specified in what manner Raphael "benefited" from using this name, or what "harm" was done to Rabbi Seidel.

The "Jonathan Seidel" e-mails were of two kinds: a first batch, addressed to participants on an Internet chatroom called "ANE-2," satirically *attacked* Norman Golb and lauded the "courage" of his adversaries; the others, addressed to museum curators, were comments and inquiries about whether an upcoming DSS exhibit would again conceal the existence of the two basic, and mutually opposed, theories from the public. (Exhibit 12, generally, A-208-216).

Raphael Golb also opened a gmail account using the name "Steve Goranson," which is similar to that of an employee at the Duke University library, Stephen Goranson, who has posted many offensive comments about Norman Golb over the years. (Tr. 631-35, A-473-77; Tr. 640-42, A-478-80). No messages were even sent from the steve.goranson@gmail.com

account. Raphael Golb used the account for storing drafts of various texts and e-mail lists, and for "automatic verification" purposes (utterly invisible to the public) when opening various blogs. (Tr. 623-24, A-467-68; Tr. 1023, A-583). The existence of this account, in fact, was known and visible only to Raphael Golb himself and to his brother. Raphael Golb testified that the name of the account was simply a private joke, since Goranson and Schiffman were two of those who had behaved in the most hostile manner towards Norman Golb. (Tr. 1023, A-583). No evidence was presented that Goranson has ever used the nickname "Steve," and in fact he has not. (Tr. 640, A-478). The People alleged that Raphael Golb was "trying to insert Goranson onto online disputes" (Tr. 27, A-343), but never explained what kind of fraudulent "benefit" Raphael Golb intended to obtain by using a name similar to Goranson's in manners that were not even visible to the public, or what kind of "harm" he thereby intended to do to Goranson, who found out only from the prosecution that a name similar to his own had been used to open an e-mail account.

Similarly, Raphael Golb opened a gmail account in the name gibson.jeffrey2@gmail.com. Jeffrey Gibson is an Internet blogger who had an online conflict with Raphael Golb during which he accused Raphael Golb's father of breaking the law. (Tr. 1026, A-586**)**. Just as with the

"Steve Goranson" account, no e-mails were sent from this account. (Tr. 1040, A-596).

E. CONVICTIONS AND SENTENCE.

After five hours of deliberation the jury found Raphael Golb guilty of 30 out of the 31 charges. The only charge they did not find him guilty of was the criminal impersonation of Jeffrey Gibson.

On November 18, 2010, the trial court sentenced Defendant to six months in prison followed by a five-year term of probation on Counts 1 and 2, and three months in prison followed by three years probation on each of the 29 misdemeanor counts, all sentences to run concurrent. The trial court ignored the Probation Department's recommendation of probation (Sent. Tr. 24, A-689), denied a defense request to allow the Defendant to self-surrender after Thanksgiving, falsely characterized the application for self-surrender as a motion for a stay of sentence, and, when counsel stated that he did intend to seek a stay from another court, sneeringly replied: "I gather from someone who knows less about it." (Sent. Tr. 26, A-691).[6]

[6] The trial court issued final orders of protection that included a provision forbidding Raphael Golb from using any pseudonym, "whether fictitious, invented, historical or the like," to blog about the Dead Sea Scrolls. (Sent. Tr. 25, A-690).

On November 18, 2010, the Hon. Rosalyn H. Richter, J.S.C., granted Defendant's motion to stay execution of judgment, and Defendant was released from Rikers Island the next day.

This appeal followed.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO PROPERLY DEFINE THE TERMS "BENEFIT," "HARM," "INJURY" AND "FRAUD" COMPELLED THE JURY TO CRIMINALIZE EXPRESSIONS OF DEFENDANT'S OPINION, STATEMENTS OF FACT, AND CAUSING HURT FEELINGS TO VARIOUS SCHOLARS. THE CONVICTIONS VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, §8 OF THE CONSTITUTION OF THE STATE OF NEW YORK.

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain . . . As a nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate.
>
> Snyder v. Phelps, ___ U.S.___, 2011 U.S. Lexis 1903 (March 2, 2011).

The People properly conceded that the mere act of opening an e-mail account under an assumed name, even the name of a real person, is not a crime. Moreover, sending an e-mail from such an account, or posting a blog or blog comment under an Internet alias, without more, is not a crime. The First Amendment protects an individual's right to communicate

anonymously or through use of pseudonyms. The right to engage in such deceit (as the People called it) is part of the fundamental "core of First Amendment liberties." See McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 357 (1995). There are many reasons pseudonymous speech and debate is a cherished, if perennially controversial, part of our tradition. It allows "a quick response time by knowledgeable people who otherwise would not — for personal or professional reasons — be inclined to enter a public debate . . . [I]n the context of an evolving debate . . . informed opinion is essential."[7] See Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) (there is a "legitimate and valuable right to participate in online forums anonymously or pseudonymously… This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate."); American Library Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (indicating that "many" people use pseudonyms, even multiple pseudonyms, online and that this helps to "preserve anonymity"); see also, Doe v. Cahill, 884 A.2d 451 (Del. Sup. Ct. 2005) ("The internet is a unique democratizing medium unlike anything that has come before . . .

[7] See this and other comments at http://opinionator.blogs.nytimes.com/2009/06/08/the-outing-of-publius/.

Internet speech is often anonymous. Many participants in cyberspace discussions employ pseudonymous identities. . . . This unique feature . . . promises to make public debate in cyberspace less hierarchical and discriminatory than in the real world."). Many of the world's most famous intellectuals have used multiple pseudonyms to influence debates without becoming the object of an inquisition. They include, for example: Benjamin Franklin, who used many aliases; novelists and philosophers like Romain Gary and Kierkegaard; and Fernando Pessoa, one of the most respected poets of the 20th century, who is known to have created at least 72 pseudonyms, staging debates between them, mourning their deaths, and fooling the public and the literary world (including university professors around the globe) into believing that they were real people.[8]

The imitative use of *another person*'s name for purposes of mimicry, criticism, mockery, or ridicule is also a recognized right. Various terms are commonly used to refer to this type of expressive speech, including

[8] It has often been pointed out that pseudonyms are themselves part of the protected content of speech. For example, the use of shifting pseudonyms (which is what Raphael Golb did in weaving his "web of deceit") has been variously interpreted as equivalent to calling oneself "anon," as a way of insisting that the speaker wishes his words to be evaluated by their merits rather than by his identity, or even as a statement that the speaker does not wish to be taken seriously. See, e.g., Paul Horowitz, *Anonymity, Signaling, and Silence as Speech*, in Sarat, ed., Speech and Silence in American Law (Cambridge University Press, 2010), at 172-89, available at http://ssrn.com/abstract=1361225; David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity,and Limited Liability in Cyberspace*, 1196 U. Chi. Legal F. 139 (1996).

"personal satire," irony, parody, lampoon, send-up, or hoax; "act of literary impersonation" is the precise term used by this Court in Rall v. Hellman, 284 A.D.2d 113 (1st Dept. 2001) to refer to e-mails of exactly this sort. Such speech is almost always intended to embarrass, or to expose perceived wrongdoing or human faults, and is thus frequently experienced as injurious by the imitated person. Utilized by social critics over the centuries, in recent years it has inevitably made its way to the Internet. Although it may evoke outrage or even the deepest popular resentment (along with occasional laughter), satirical speech, without more, cannot be a crime, consistent with the First Amendment.

The "more" that transforms pseudonymous activity into a criminal act is supplied when the use of a name is undertaken with an intent to "defraud," obtain a "benefit," or "injure." People v. Briggins, 50 N.Y.2d 302, 307 (Ct. App. 1980) (adopting an alias or "nom de plume" is not illegal *per se*; it only becomes so when it is accompanied by fraudulent design). Counts 1,2, 5, 7, 8, 10, 11, 13, 14, 16, 17, 19, 20, 23, 25, 27, 29, 31, 33, 35, 37, 39, 42, 44, 46 and 47 all required proof, *inter alia,* that Defendant acted with one of these intents, although they are worded somewhat differently. Criminal Impersonation (Counts 5, 7, 10, 13, 16, 19, 23, 25, 29, 33, 37, 42, 44 and 46) requires proof that Defendant acted "with intent to obtain a benefit or to

injure or defraud another." Penal Law §190.25(1). Identity Theft in the Second Degree (Counts 1 and 2) requires proof that Defendant acted "with intent to defraud." Penal Law §§190.78, 190.79. Forgery (Counts 8, 11, 14, 17, 20, 27, 31, 35, 39, and 46) requires acting with "intent to defraud, deceive or injure another." Penal Law §170.05.

It is axiomatic that if the impersonator intended to achieve an object that is not legally cognizable as a "fraud," "benefit," or "injury," there can be no prosecution under any of the enumerated statutes. It cannot be the law that the psychic joy one feels in demolishing an Internet opponent is a "benefit" that can be criminalized simply because one does it with a pseudonym or in satirical form.[9] Similarly, anger and hurt feelings experienced by parties who have been criticized cannot be recognized as an "injury" subject to redress by the criminal courts. If pseudonymous speech is to be criminalized under these statutes, the terms "fraud," "benefit," and "injury" must be carefully defined to exclude the emotional and intellectual

[9] Thus, in preparing California's "online impersonation" statute, the members of the California Senate Committee on Public Safety concluded that the term "benefit" would render the proposed statute void for vagueness, and hence decided not to include it. The committee chair's bill analysis specifically stated: "Arguably, an impersonation that caused no harm but that created some sort of benefit or sense of satisfaction to the impersonator does not involve criminal conduct." *Impersonation: Internet And Electronic Mail*, http://info.sen.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1411_cfa_20100412_141750_sen_comm.html (CA St Comm on Public Safety, Bill Analysis, March 25, 2010, accessed March 11, 2011); the statute has since been enacted as Calif. Penal Code §528.5.

results of expressive conduct that is protected by the First Amendment. In this case, the opposite was done.

The defense repeatedly demanded that the People define the object of the alleged crimes: What were the benefits the Defendant intended to obtain? What were the injuries he intended to inflict? What did he intend to gain through the "fraud"? Pretrial, Defendant moved the court below to direct the People to provide such details. The court ruled, unhelpfully:

> As the People assert, "a reasonable view of the evidence indicates that defendant did not pick these names by mere 'coincidence.'" (People's response, ¶52). From the evidence, various "benefits" suggest themselves, but there is no requirement that the benefit be financial or that the People specify further. *People v. Mackey*, 49 N.Y.2d 274 (burglary).

Thus, the trial court's view was that "benefit" was equivalent to "crime" in the burglary statute; the People, in Mackey, did not have to specify what crime was to be committed. This, of course, is a false analogy, because a "crime" is always illegal, but many "benefits" are *protected* by the law. Moreover, the court's "analysis" completely ignored the First Amendment rights at issue. That would become the theme throughout the trial.

On the day of trial, the defense reiterated its request and the trial court again ruled "I am not aware of any requirement that the People specify what the gain is, just like they don't have to specify what the object crime is in a burglary crime case." (Tr. 6, A-334).

The prosecution, in the People's opening statement, suggested a broad range of potential benefits and injuries intended by Raphael Golb: "to destroy [the] reputations and careers" of various academics, "cause them alarm, fear, provoke them." (Tr. 22, A-338). Defendant, through his Internet activities, intended to "smear and attack Dr. Schiffman." (Tr. 24, A-340). The People alleged that the "defendant sent e-mails attempting to stir up controversy and also draw another victim into a dispute." (Tr. 27, A-343). The People also alleged that Raphael Golb sought "to prevent [Dr. Cargill] from getting his Ph.D." (Tr. 28, A-344). The only specific objects asserted by the People were with respect to the two felony counts. Count 1, alleging the object crime as a scheme to defraud the Jewish Museum by obtaining an invitation to Professor Golb to speak there, is dealt with *infra* at p. 50. As to Count 2, the prosecutor claimed the object was to make "false accusations [that] were designed to falsify the records of New York University to generate an inquiry and a reaction based upon false premises." (Tr. 26, A-342).

At the close of the People's case, Defendant timely filed, in writing, a Motion for a Trial Order of Dismissal, setting forth, in detail, all of the arguments set forth herein. (A-31). Said motion was denied except as to Count 1, on which decision was reserved but subsequently denied after the

verdict.

The trial court solicited requests to charge from the defense. The defense submitted the following requests:

> DEFENDANT'S REQUEST TO CHARGE #1: INJURY. (A-50)
>
> A. The intended injury that the People must prove is not limited to financial injury. However, not all injuries are the subject of the criminal law.
>
> 1. Intending to harm another's reputation by disseminating falsehoods is not the type of harm that the criminal law recognizes. That type of injury may be redressed in the civil courts.
>
> 2. Similarly, the injury intended must go beyond intending to have another spend time responding to accusations or criticisms. A defamation does not become criminal simply because the alleged injured party spends time responding to, or countering, what he or she believes to be falsehoods.
>
> 3. Similarly, intending to abuse, deride, provoke, with the use of words, even vulgar words, is not the type of harm that the criminal law recognizes.
>
> (citations omitted). [10]
>
> DEFENDANT'S REQUEST TO CHARGE #2: BENEFIT. (A-51)
>
> A. The intended benefit that the People must prove is likewise not limited to financial gain. Similarly, not all benefits are the subject of the criminal law. The fact that a defendant may gain emotional pleasure from harming another's reputation, from informing the public or the academic community of perceived wrongdoing**,** from

[10] The trial court initially refused to accept Defendant's requests to charge, because they cited no authority. (Tr. 664, A-481). Counsel then re-wrote the requests to charge, properly annotated. They were submitted as Court Exhibit II. The text quoted above omits these annotations, in order to remove redundancy.

provoking debate, from getting another to respond to criticisms, and/or from irritating another is not the type of benefit that the criminal law recognizes.

(citations omitted).

DEFENDANT'S REQUEST TO CHARGE #3: DEFRAUD. (A-52)

A. Intent to defraud means an intention to deceive another person, and induce such person, in reliance on the deception, to assume, create, transfer, alter or terminate a right, obligation, or power.

1. As with the terms "benefit" and "injury," the intended deception need not be financial. And, as with the terms "benefit" and "injury," not all deceptions are the subject of the criminal law. Satire, parody, and/or pranks, for example, generally contain elements of deception, but these are not criminal.

2. Moreover, the People must prove that the intent to deceive was an actual, or genuine intent. For example, if the People fail to prove that the defendant was actually intending to convince others that Professor Lawrence Schiffman was the author of the e-mails, and/or fail to prove that the defendant was actually intending to convince others to assume, create, transfer, alter or terminate a right, obligation, or power based upon this deception, then you must acquit the defendant on these counts. In other words, to find that the defendant intended to defraud, you must find, beyond a reasonable doubt, that the defendant actually intended for others to believe that the Schiffman e-mails were authored by Professor Lawrence Schiffman, and intending to convince others to initiate an investigation of Professor Schiffman based upon an induced belief in the false self-confession rather than upon the content of the linked article.

(citations omitted).

DEFENDANT'S REQUEST TO CHARGE #4: INTENT TO DEFRAUD, GAIN A BENEFIT, OR CAUSE HARM. (A-53)

A. In order to find, beyond a reasonable doubt, that the defendant intended to defraud, or cause legally recognized harm, or to achieve a legally recognized benefit, the People must prove, beyond a reasonable doubt, that the defendant knew that the accusations he was making under assumed identities were false. That is, it is not enough to prove that the defendant knew he was impersonating or taking the identity of another; you must find that he did so to make accusations that he knew were false. For this purpose, you need not decide whether such accusations were true or false; you need only decide whether the People have proved that the defendant knew them to be false.

B. In considering the defendant's intent, you may consider whether the accusations made by defendant were, in fact, true.

(citations omitted).

DEFENDANT'S REQUEST TO CHARGE #5: FREEDOM OF SPEECH. (A-54)

The right to speak and to write freely is protected by both the Constitution of the United States and the State of New York. You cannot find the defendant guilty of any of the charged offenses unless you find that his speech and/or writings created a clear and present danger of some serious, substantive evil.

(citations omitted).

All of these requests were denied.

As to the definition of the word "defraud," the trial court's charge was a masterpiece of error and confusion. The court stated that it means:

to practice fraud, to cheat or trick, to deprive a person of property or interest or right by fraud, deceit, or artifice. So the meaning of fraud both in its legal usage and its common usage is the same, a deliberately planned purpose and intent to cheat, or deceive, or unlawfully deprive someone of some advantage, benefit, or property.

(Tr. 1279, A-630). Thus, if the jury believed that Raphael Golb's creation of Internet personae to engage in an ideological battle was trickery or cheating, he was guilty. If the jury believed that Raphael Golb's parody of Schiffman was a "trick," he was guilty. If the jury believed that Cargill had an "interest" in not having his film criticized by a pseudonymous author, Defendant was guilty. And so on.

The trial court actually did worse with defining the term "benefit," instructing that it "means any gain or advantage to the beneficiary or any advantage to a third person." (Tr. 1287, A-638). While faithfully tracking the statutory language of Penal Law §10.00(17), the trial court made it clear that a benefit could be anything.[11]

These definitions may be adequate in a larceny case, where the fraud, benefit, or injury generally is undisputed and relates to property. But where, as here, the benefits or harms are ideological, spiritual, or emotional, these definitions mandated wholesale criminalization of constitutionally-protected forms of speech.

With respect to Count 2, the second of the two felony charge**s**, the court made a subtle but important change in the People's theory, telling the

[11] The defense timely objected, in writing, to these instructions, on all of the grounds presented in the instant appeal. (Court Exhibit IV, A-56).

jury that "[b]roadly speaking, the People's theory here is that the Defendant sought to falsify the business records of NYU . . . ," thereby omitting the object that the People had stated in their opening statement: "to generate an inquiry and a reaction based upon false premises." (Tr. 1284, A-635; Tr. 25-26, A-341-42). The defense objected. (Tr. 1151-52, A-600-01; Tr. 1291-92, A-642-43). At no point was it ever made clear if the People were alleging that Raphael Golb's communications were themselves false NYU records or whether Raphael Golb was intending to "falsify" other, unspecified NYU records to reflect that Schiffman was a plagiarist. Neither assertion is supported by any view of the evidence. What certainly is true is that Raphael Golb intended to provoke NYU into investigating Schiffman's plagiarism and believed that Schiffman should be found culpable. It is hard to imagine how that could be a criminal act. But the discussions around Count 2 illustrate the constantly changing and evolving attempts of both the trial court and the People, to find *some* way to characterize Raphael Golb's conduct as a crime.

A. THE CONTENT OF RAPHAEL GOLB'S E-MAILS AND BLOGS WERE PROTECTED BY THE FIRST AMENDMENT; THE FACT THAT HE SENT THEM UNDER NAMES OTHER THAN HIS OWN DOES NOT CONVERT THEM INTO LEGALLY COGNIZABLE BENEFITS, INJURIES, OR FRAUDS.

The core rights protected under the federal and state free speech guarantees are the rights to engage in free, open, vigorous and even vitriolic debate on political, social, cultural and intellectual issues.

> No danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for full discussion. . . . Only an emergency can justify repression. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J.)(concurring), overruled, in part, on other grounds, Brandenburg v. Ohio, 345 U.S. 444 (1969). Accordingly, statutes that criminalize speech violate the First Amendment unless the speech "reasonably places the recipient in fear of immediate danger of severe harm." People v. P.S., 189 Misc.2d 71 (N.Y. Just. Ct., Westchester County 2001).

New York courts, like others throughout the United States, have systematically implemented this doctrine, generally in the context of prosecutions for aggravated harassment, one of the few crimes that can be committed by speech alone and only by speech. See People v. Mangano,

100 N.Y.2d 569, 570 (Ct. App. 2003) (information dismissed where defendant left five messages on Parking Violations Bureau answering machine, in which she "rained invective on two village employees, wished them and their families ill health, and complained of their job performance, as well as tickets that she had received"); People v. Dietze, 75 N.Y.2d 47, 51 (Ct. App. 1989) ("unless speech presents a clear and present danger of some serious substantive evil, it may neither be forbidden nor penalized"); People v. Ruggiero, 4 Misc.3d 133(A), 2004 NY Slip Op 50747(U) (App. Term, 2d Dept. 2004) ("While genuine threats of physical harm fall within the scope of the [aggravated harassment] statute, an outburst, without more, does not violate the statute."); Dupont, 107 A.D.2d at 251 ("The fact that certain modes of expression may be 'annoying to others' does not require an individual to forfeit his right to make such assertions . . . The preferred position of the First Amendment, the right to freedom of speech, is beyond dispute.") (quoting, Papish v. Board of Curators, 410 U.S. 667 (1973)).

The State of New York properly criminalizes as identity theft, criminal impersonation, and forgery the use of the identity of another person to make money, damage someone financially, frustrate the legitimate ends of the criminal justice system, or to commit another crime that is presumably

independent of the assumption of the false identity. There is not even a hint that happened here.

The First Amendment allows any American citizen to influence a debate, criticize and poke fun at another in writing, question whether another should be awarded a Doctorate if he has not answered published criticism of his work, truthfully accuse another of plagiarism, "stir up dispute," and the like. The only "benefit" Raphael Golb received was the emotional and intellectual satisfaction he derived from defending his father and other scholars who had been blackballed and excluded, and from denouncing those who were doing the blackballing and the excluding. The only "injury" suffered by the complainants was the sting of criticism, mockery, and embarrassment. The appropriate response to an accusatory e-mail and blogging campaign is either to ignore it or to rebut it, not to file criminal charges based on the idea that the alleged author of the campaign sought to influence a debate or a public exhibition.

For example, the "Jonathan Seidel" e-mails sent to Risa Levitt Kohn of San Diego in her capacity as guest curator at the Royal Ontario Museum (Counts 28 and 31), and to the Board of Trustees of that museum (Counts 25 and 27), contain links to articles describing the DSS controversy, a request on behalf of the public for a more balanced presentation, an inquiry as to

whether the curator thought the "two basic theories" formulation was wrong, and an additional inquiry as to whether the curator plans to answer a published critique of her previous exhibit (in San Diego) by Norman Golb. (Exhibits 12N and others, A-212). There are no threats, no extortionate demands; there is no obscenity. The closest thing to invective is the author's comment that a particular statement made by the curator strikes him as "shockingly obscurantist." These are not "fighting words," even in academia.

The Senate Memorandum in support of the enactment of the 1976 bill that created the "scheme to defraud" felony specifically stated that "to establish guilt under the new law, it would be necessary to prove the identity of at least one person from whom property was obtained." (Senate Mem in Support, L 1976, ch 384). The People never alleged at all that Raphael Golb obtained property or deprived another of property through his alleged scheme to "influence a debate." With the exception of Count 1 the People never even alleged that Raphael Golb intended to deprive another of property.

Some courts, observing that the term "intent to defraud" is undefined in the statute, have explicated it as involving a "purpose of leading another into error or to disadvantage." See People v. Taylor, 55 A.D.3d 640, 642 (2d

Dept. 2008), quoting Briggins, 50 N.Y.2d at 309 (concurring opinion) (Jones, J.). This language, too, was inserted into the jury charge by the trial court. But when the Taylor opinion indicates that "while an intent to defraud is often for the purpose of gaining property or a pecuniary benefit, it need not be," the example supplied is People v. Kase, 53 N.Y.2d 989 (Ct. App. 1981). See Taylor, 55 A.D.3d at 642. In Kase, the intent to defraud was found where a person "intentionally filed a false statement with a public office for the purpose of frustrating the State's power to fulfill its responsibility to carry out faithfully its own law." Id. Taylor also points to Black's Law Dictionary 423 (6th ed. 1990): "*intent to defraud* means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power." Id. In none of this, however, is there even a remote hint that the intent to influence a debate, criticize the conduct of a group of scholars, ridicule a charismatic public lecturer, or expose someone as a plagiarist can constitute an intent to defraud, obtain a benefit, or cause an injury. The mere fact that pecuniary gain is not *always* the purpose of fraud, criminal impersonation, forgery, and identity theft, does not open the door to an assault on human conscience and intellectual life. Neither prosecutors nor courts have the right to enact an intent that the legislature

totally failed to express; a statute directed against known and stated evils is not to be stretched to cover situations lacking any reasonable relation to those evils. See People v. Bell, 306 N.Y. 110 (Ct. App. 1953) overruled on other grounds, People v. Bright, 71 N.Y.2d 376, 381 (Ct. App. 1988); see also Bridgewater v. Robbins, 22 Barb. 662 (NY Sup. Ct. 1856) (word "fraudulently" in statute to be construed to import actual, not constructive, fraud).

Until the instant case, New York's application of the "defraud" component of identity theft, criminal impersonation, and forgery, and the "benefit" and "injury" components of criminal impersonation, have been remarkably narrow. The vast majority of such prosecutions rest on the plethora of means used to commit acts for financial gain or to cause financial loss.[12]

[12] The legislative history of New York's identity theft, criminal impersonation, and forgery statutes makes it abundantly clear that the type of "fraud" the lawmakers intended to remedy was financial. See, *e.g.*, the 2008 Memorandum in Support of Bill S8376A submitted to the New York State Senate to justify the enactment of amendments to the Identity Theft statutes: "Despite the magnitude of the problem, victims of identity theft and *financial fraud* in New York State face barriers in receiving important assistance, information, and resources. Victims of identity theft have an arduous task in repairing their *financial record, credit rating, and well being*." (emphases added). See also the 1996 Memorandum in Support of the enactment of Senate Bill S587A, criminalizing, *inter alia*, the obtaining of any telecommunications service with fraudulent intent by use of an unauthorized, false, or fictitious name: "Telecommunications fraud is widely used by criminal enterprises . . . The telecommunications industry estimates that . . . criminal and fraudulent activity involving telecommunications annually *costs all telecommunications consumers an amount in excess of $3.3 billion nationwide*. Telecommunications fraud continues to be *a very expensive crime* . . . Sophisticated

A handful of cases have gone further, finding a legally cognizable benefit or fraud when one adopts a false identity to frustrate the criminal justice system and thereby obtain freedom from incarceration to which he would not otherwise be entitled. See, e.g., In re Travis S., 96 N.Y.2d 818 (Ct. App. 2001) (one purpose of the criminal impersonation statute is to avoid wasted time and effort searching for the real identity of the person who gives pedigree information to the police); People v. Pergolizzi, 92 Misc.2d 528 (Sup. Ct., Queens County 1977) (forgery prosecution upheld where defendant's signing of the Desk Appearance Ticket under a false name allowed him to be released from custody and misled police).

There is, in fact, no indication in any New York case that a "scheme" to influence a debate has ever been considered a form of fraud, nor is there any indication in any fraud statute that the lawmakers intended to include such a "scheme" as a form of fraud. An interpretation of the sort would necessarily violate the principle that content-based restrictions on speech violate the First Amendment unless they serve a compelling state interest and no way can be found of serving the interest that is less speech-restrictive. There is no compelling interest in protecting scholars and their

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frauds, particularly those aimed at senior citizens and individuals with a limited fluency in English, continue to abound. The theft of personal identification numbers from business travelers and tourists in air, train, ship, and bus terminals causes significant problems to those who find that they have become victims." (emphasis added).

work from criticism. Indeed, robust and public controversy serves essential American values — values that occupy a "'preferred position' in the constellation of constitutional rights" because they are "basic to a free and dynamic society." Buckley v. Meng, 35 Misc.2d 467, 470 (Sup. Ct., New York County 1962), quoting Kovacs v. Cooper, 336 U.S. 77, 88 (1949). See also Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) (a statute that affects First Amendment rights is unconstitutional if it prohibits constitutionally protected speech or activity along with activity that the government must limit to achieve a compelling state interest). Clearly, the appropriate response to a pseudonymous scheme to influence a debate, a "smear," a written "attack," and the like, is the simple publication of a rebuttal, silence, or a civil case for defamation (if the accusations are false), and not a criminal prosecution for fraud.

The trial court's instructions also contradicted long-standing notions of the ordinary meaning of the term "fraud." See, e.g., Carpenter v. United States, 484 U.S. 19, 27 (1987) ("common understanding" of fraud involves "wronging one in his property rights by dishonest methods or schemes" and "the deprivation of something of value by trick, deceit, chicane or overreaching.") (internal quotes omitted); see also McKinney's, N. Y. Stat. §271 ("if there is reasonable doubt whether a penal statute applies to a

particular case, the party of whom the penalty is claimed should have the benefit of it").

B. INJURY TO REPUTATION, HURT FEELINGS, AND BEING SUBJECTED TO RIDICULE ARE NOT LEGALLY COGNIZABLE 'INJURIES' UNDER THE STATUTES THAT PROSCRIBE CRIMINAL IMPERSONATION AND FORGERY; TO HOLD OTHERWISE IS TO JUDICIALLY RESURRECT CRIMINAL LIBEL.

The trial court's refusal to provide any definition for the term "injury" mandated a conviction if the jury believed that Raphael Golb intended to hurt the complainants' feelings, disparage their scholarship, or damage their professional reputation. Indeed, the People's theory of the case was that Raphael Golb intended to do exactly that. But the e-mails sent to some thirty NYU faculty members and students containing a bogus confession by Schiffman to plagiarism and urging the recipients to continue to hide his misdeeds do not create the type of "injury," nor do they evince an intent to commit the type of injury, that the law may criminalize. At best, the Defendant used an unorthodox and bitingly satirical means to publicize Schiffman's plagiarism. At worst, the Defendant engaged in defamatory conduct for which Schiffman has a remedy in civil court, not criminal court.[13] Similarly, the blog sites and e-mails that critiqued, ridiculed, and

[13] The civil nature of this entire dispute is amply revealed in Norman Golb's article published on the University of Chicago website on November 30, 2010. Norman Golb,

condemned the activities of Cargill, Cross, Goranson and others constituted, at worst, an attempt to damage their professional reputations.

Whether any of this conduct can be criminalized depends, in the first instance, on whether the allegedly intended injury is legally cognizable. Criminalizing the use of speech and expressive means such as parody, irony, satire or mockery to hurt another's reputation or feelings is barred by the First Amendment. Libel itself was decriminalized in New York in 1965, following the United States Supreme Court's decision in Ashton v. Kentucky, 384 U.S. 195 (1966), holding a criminal libel statute to be unconstitutionally vague because it left "wide open the standard of responsibility," necessitating "calculations as to the reaction of the audience to which the publication was addressed" (or, as the Court's opinion also put it, "as to the boiling point of a particular person or a particular group"). Id. at 200. The law and logic of that case applies here and must result in a dismissal of these charges.

Criminal defamation law was historically predicated on the need to maintain social order by preventing breaches of the peace. In Garrison v.

The Confidential Letter Composed by Prof. Lawrence Schiffman of New York University, available at http://oi.uchicago.edu/pdf/schiffman_response_2010nov30.pdf (accessed March 11, 2011). This is Professor Golb's analysis of the claims made in the crucial text submitted, in the fall of 2008, by Dr. Schiffman to NYU officials and to the prosecution—claims on which the People's treatment of the DSS controversy in this case was based.

Louisiana, 379 U.S. 64 (1964), however, the United States Supreme Court concluded that the common law "breach of the peace" justification for criminalizing libel had become irrelevant in the twentieth century, and quoted the drafters of the Model Penal Code for the proposition that no other compelling considerations justify prosecutions for criminal defamation. Id. at 69. See also, Ashton, 384 U.S. at 199-200 (basing a crime on the premise that conduct is likely to create a breach of the peace "'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence'") (quoting Zechariah Chafee, Free Speech in the United States, at p. 151 (Harvard Univ. Press, 5th pr., 1954)). The New York Penal Code *used* to criminalize libel (in former article 126), but the Legislature, responding to a growing realization that libel must be treated as a purely civil matter, abrogated this provision in 1965, and by 1969 it was recognized that criminal libel was "no longer a crime in this State." Figari v. New York Telephone Co., 32 A.D.2d 434, 446 (2d Dept. 1969).[14]

In the forgery and criminal impersonation statutes, the type of "injury" contemplated by the legislature was clearly bodily and financial,

[14] Today, the only New York criminal statute that includes an element involving harm to reputation is the provision criminalizing extortion, Penal Law §155.05(2)(e), which renders it illegal to compel someone to deliver property under duress of a threat to "expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule." The elements of threat or duress and property are absent from this case.

and not harm to reputation. With respect to forgery, many cases have indicated that fraud is an essential element of the crime. See, e.g., People v. Cunningham, 2 N.Y.3d 593, 597 (Ct. App. 2004) ("Forgery is a crime because of the need to protect signatures and make negotiable instruments commercially feasible").

There is no evidence that it even occurred to the New York legislature that the requisite intent for criminal impersonation or forgery could include the intent to cause an intangible, reputational injury to someone. There is still less evidence that the legislature intended to revive the wholly-discredited crime of criminal libel by *sub silentio* including it as forgery or criminal impersonation when the alleged defamation takes a satirical form in mock e-mails. Courts should not stretch the meaning of words to include something that the legislature could easily have expressed but did not. See People v. Shafer, 30 A.D.2d 213 (4th Dept. 1968). If the New York lawmakers had intended to include harm to reputation among the type of intended "injuries" contemplated by the statute, they could have done so. Furthermore, the "words employed in a statute are construed in connection with, and their meaning is ascertained by reference to, the words and phrases with which they are associated." McKinney's, N.Y. Stat. §239; People v. Darryl M., 123 Misc.2d 723, 726 (Crim. Ct., New York County 1984).

Here, the intent clauses, taken as a whole, clearly indicate that the type of injurious intent contemplated was connected with fraud, the deceitful gaining of a financial benefit, the causing of financial harm, or the commission of another crime made possible by the false identity.

The basic policy of treating defamatory (as opposed to fraudulent) impersonation as a civil rather than criminal matter, is supported by long-established legal principle. For example, in Ben-Oliel v. Press Pub. Co., 251 N.Y. 250 (Ct. App. 1929), an article appeared in a newspaper purporting to have been written by the plaintiff, a well-known and widely-regarded scholar in the field of Judaic studies specializing in the "the Symbolism of the Tabernacle." The article, which was in fact not written by the plaintiff, made a number of false statements regarding Jewish custom that the plaintiff claimed made her out to be "ridiculous," a "charlatan," "ignorant as well as stupid," and subjected her to "ridicule and derision." Id. at 254-255. The Court of Appeals found that to "publish in the name of a well-known author any literary work, the authorship of which would tend to injure an author holding his position in the world of letters, has been held to be a libel." Id. at 256. Observing that we "reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security," the drafters of the Model Penal Code concluded that "personal calumny . . . is

. . . inappropriate for penal control" and that "penal law need not address itself to . . . irritating or malicious gossip, or to the ordinary case of defamation compensable in a civil suit."

C. TRUTH MUST BE PERMITTED AS A DEFENSE TO ANY COUNT THAT CRIMINALIZES SPEECH BASED UPON ITS ALLEGED FALSITY.

Even if this Court were to permit the People to recreate the crime of criminal libel under the guise of criminal impersonation, identity theft, and forgery, the trial court committed reversible error in ruling Raphael Golb could not assert truth as a defense. In its pre-trial ruling, the trial court specifically held that "neither good faith nor truth is a defense to any of the crimes charged here." (Op. at 2, f.1, A-84). Despite this ruling, the prosecutor was repeatedly allowed to argue or suggest that the Defendant made false accusations. (Tr. 25-26, A-341-42; Tr. 30, A-346; Tr. 149, A-368; Tr. 157-58, A-369-70; Tr. 250, A-389; Tr. 295, A-418; Tr. 300-302, A-419-21; Tr. 322, A-427; Tr. 1218-19, A-609-10; Tr. 1222-23, A-611-12; Tr. 1249, A-613; Tr. 1255, A-614; Tr. 1260, A-615; Tr. 1265, A-616). The defense, on the other hand, was repeatedly prevented from proving that the accusations were true, in accordance with the court's pretrial ruling. E.g., Tr. 179, A-374a (court doesn't see "relevance" of questions about Schiffman's role in the monopoly); Tr. 187, A-375d (court doesn't see

relevance of "inquiry" into Schiffman's continued misrepresentations of Professor Golb's theory); Tr. 205, A-381 (court does not "care" whether or not People investigated truth of allegation of plagiarism); Tr. 216, A-384 (court objects to relevancy of Katzman's article accusing Schiffman of plagiarism); Tr. 220, A-386 (Schiffman "is not on trial for plagiarism," etc.); Tr. 1210, A-608 (three pages from Norman Golb's book admitted "on your client's state of mind and not for its truth"); Tr. 965, A-560; Tr. 968, A561; Tr. 973, A-562; Tr. 975, A-565; Tr. 1000-1001, A-571-72; Tr. 1007-09, A-573-75; Tr. 1014, A-576; Tr. 1017-18, A-577-78; Tr. 1021, A-581; Tr. 1024, A-584; Tr. 1030, A-590 (interrupting, needling, and blocking witness Raphael Golb from testifying about multiple matters relevant to the truth of his accusations). And, as indicated, the trial court rejected Defendant's proposed jury instruction which would have allowed the jury to "consider whether the accusations made by defendant were, in fact, true," when considering the question of Defendant's intent.

Most dramatically, Count 2 alleged that Raphael Golb had attempted to falsify business records of NYU. But the NYU records (whether "business" or otherwise) could only be "falsified," if an investigation falsely found that Schiffman had committed plagiarism. If an investigation truthfully found that Schiffman had committed plagiarism, then of course

there would be no falsification. Furthermore, since all Schiffman had to do to refute the "confession" was deny having made it (which he did not need to do, as it was not credited in the first place), the notion that an investigation of this matter, *per se*, is a form of "falsification," borders upon the absurd and cannot rationally form the basis for a conviction under this count. Thus, to deny that truth is a defense in the face of this count is entirely illogical and can only result, as it did, in a denial of due process.

All of this violated the plain mandate of Article I, §8 of the New York State Constitution which provides:

> In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.Y. Const. Art. I, §8 (Amended by vote of the people November 6, 2001). Under the People's theory of the case, as enshrined in the jury instructions by the trial court, Raphael Golb was certainly charged in a "criminal prosecution" for "libels" —that is, for making "false accusations" about Dr. Schiffman and other complainants. The fact that the crimes charged were given names that did not contain the word "libel" does not change the essential nature of the allegations. As Blackstone observed, "if the fact be true, it is *damnum absque injuria* [harm but not an injury], and where there

is no injury, the law gives no remedy." Blackstone, Commentaries, at 118-119.[15] In plain English, it simply cannot be a crime to truthfully call someone a liar, no matter what name or satirically biting form the speaker adopts to hurl the allegation.

II. THE VERDICT IN COUNT 1 IS AGAINST THE WEIGHT OF THE EVIDENCE AND INSUFFICIENT AS A MATTER OF LAW.

Count 1 in the indictment was the only charge that made any reference to financial gain or loss, although this component was never articulated until late in the trial. In the fall of 2008, the Jewish Museum of New York was scheduled to hold an exhibition on the Dead Sea Scrolls, and Dr. Schiffman was invited to speak there (on October 30**)**, and Norman Golb was not. In his opening statement, the prosecutor asserted that Defendant had a scheme "to influence the Jewish Museum. . . . defendant's plan was to get the museum to drop Dr. Schiffman as a speaker and add his father . . . ." (Tr. 25, A-341). Thus, the People clearly stated that the object of Defendant's "fraud" was to persuade a museum to change its cast of speakers.

[15] Various authors have pointed out that on-line defamation is not criminalized, and have argued that it *ought* to be criminalized through the enactment of new laws. See, e.g., Susan Brenner, *Should Online Defamation be Criminalized?*, 76 Miss. L.J. 705-787 (2007). Brenner observes that if the legislature decided to criminalize online defamation, the only possible justification for doing so would be the premise underlying the law of civil defamation: that the publication of "untrue" information that "defames" someone inflicts an injury that the law must address.

Dr. Susan Braunstein, Curator of Archeology and Judaica and Chair of Curatorial Affairs at the Jewish Museum, testified that the exhibit scheduled two speakers —Lawrence Schiffman and Eileen Schuler (another associate of the monopoly who was recommended by Schiffman). Dr. Braunstein forthrightly acknowledged that there were "two basic theories as to the origin of the Dead Sea Scrolls," and that there were prominent scholars on both sides. (Tr. 277-78, A-404-05). Her critique of prior exhibits on the DSS was — just like Raphael Golb's — that they had tended to champion the sectarian view. She was determined that the Jewish Museum exhibit would present both sides to the public but advocate neither; "I felt that neither side had proven their case." (Tr. 278, A-405).

Indeed, the exhibit itself focused on other matters related to the DSS, rather than the controversy over their origin. She testified that receiving demands that a view be represented is a normal part of museum life (Tr. 281, A-408), and that the Museum was never contacted with any suggestion that Schiffman's lecture be canceled. (Tr. 280, A-407; Tr. 283-84, A-410-11). She testified that a curator emeritus of the museum, Daniel Friedenberg, did contact her with a request that a lecture by Professor Golb be added to the exhibit, and offered to pay for it himself. (Tr. 274-75, A-401-02). However, Dr. Braunstein declined this offer, as there was not sufficient time to redo

the program. (Tr. 284, Tr. 411). As to Raphael Golb, she met him only after the exhibit, and he chatted with her politely and pleasantly. (Tr. 285, A-412). The Larry.Schiffman e-mail "confessions" were never addressed to anyone at the Jewish Museum. No one in any way ever suggested, nor did anyone in any way consider, that Schiffman be dropped as a speaker.

The only references to a financial benefit were elicited from Dr. Schiffman, who acknowledged that he had received a $500.00 fee for consulting on the exhibits, a fee which he did not know he would receive, and a $650.00 honorarium for his lecture. (Tr. 99, A-360).

At the first charge conference, the prosecution began articulating a very different theory for Count 1: by adding the $500.00 consulting fee (which Schiffman did not know about and Raphael Golb did not either) to the $650.00 honorarium (about which Raphael Golb was also ignorant) and further adding the fact that Dr. Schiffman mentioned that sometimes he got travel and hotel expenses paid when he spoke (although not in this case), the prosecution argued the sum was over one thousand dollars and, hence, the jury could find that Raphael Golb's object scheme was an intent to defraud the Jewish Museum of $1,000.00. (Tr. 665-66, A-482-83). The trial court commented that this was "something of a stretch." (Tr. 668, A-485). The prosecution then attempted to stitch together an even more elaborate theory,

to which the trial court commented "perhaps you want to think about whether or not you want to confuse the jurors as totally as you've confused the Judge." (Tr. 676, A-493).[16] [17]

Over defense objection, (Court Exhibit IV, A-56), the trial court charged the jury on yet a new, hybrid theory: they could convict if they found Raphael Golb "was intending to defraud and obtain property worth more than $1,000 from one or more persons, and comes dangerously close to doing so." (Tr. 1284, A-635). Gone was the reference to Raphael Golb's non-existent attempt to have Schiffman's lecture cancelled; it was enough that Raphael Golb fraudulently attempted to have his father speak at the Museum; that his father would have received recompense in excess of $1,000.00; and that Raphael Golb had come "dangerously close" to realizing this goal. But there was no evidence to support any of these three propositions.

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[16] The fact that the grand jurors must have been utterly befuddled was raised by counsel when he asked to have the People's grand jury instructions disclosed. The trial court told counsel that he was "so funny" and dismissed the grand jury function as "blah, blah, blah" (Tr. 675-76, A-492-93).

[17] In his motion for a trial order of dismissal, defense counsel raised all of the grounds raised herein. (A-31). The motion on this count was deferred; the trial court noting "I have some issues with it but I think it should be presented to the jury . . . ." (Tr. 950, A-558). The motion was re-raised at the close of all of the evidence, and the trial court literally ignored it. (Tr. 1151, A-600). At sentencing, defense counsel again asked for a ruling. The trial court stated: "I will deny those motions." (Sent. Tr. 3, A-668).

First, the only attempt made to have Professor Golb speak at the exhibit was made by Daniel Friedenberg, the former curator of the Museum. Even if one believed that Raphael Golb originated this idea, there was nothing fraudulent or dishonest in the manner in which the request was made. Dr. Freidenberg asked and Dr. Braunstein said no; the schedule was already set. There was no acrimony and the former curator remained a good friend of the museum after the exhibit closed. More important, the former curator offered to pay for Professor Golb's expenses. Thus, the Jewish Museum would have lost nothing, even if an invitation had been extended. While Professor Golb would have gained something in the way of an honorarium and expenses, this gain would have been achieved through means entirely open, honest, and totally independent of Raphael Golb's e-mail and blogging campaigns.

Second, finding that Professor Golb would have received in excess of $1,000.00 was totally speculative. Even assuming that he would receive the $650.00 honorarium, the remaining $351.00 had to be invented. Would Professor Golb have stayed in a hotel overnight, or with his son for free? Would he have had a black car on reserve, or taken the train? Would he have flown in from Chicago, or would he have been here anyway, visiting

his son? This is not an exercise in fact-finding; it is an exercise in metaphysics.

Third, the non-existent fraudulent scheme never came close, let alone "dangerously close," to succeeding. Dr. Braunstein never entertained, for a nanosecond, changing the program.

There are other, less obvious infirmities with sustaining this conviction. It is clear from the evolving, evanescent, and confusing attempts to define just what Raphael Golb was charged with that the grand jury could not have been properly instructed by the prosecutor. Indeed, the issue of the grand jury's historic function as a check on the prosecution's power was worth far more than the trial court's "blah, blah, blah." See, *supra*, at p. 53n, 16. The constant shifting in the prosecution's definitions of the crime violated basic notions of due process. Furthermore**,** the idea that otherwise protected speech can be criminalized as "fraud" if it has any financial impact to anyone, no matter how attenuated or speculative, is abhorrent in a free society, and would render the statutes both void for vagueness and overbroad.

III. APPLICATION OF THE FORGERY, CRIMINAL IMPERSONATION AND IDENTITY THEFT STATUTES TO DEFENDANT'S CONDUCT RENDERS THEM VAGUE AND OVERBROAD.

If this Court accepts the People's unique, innovative, and literally unprecedented interpretation of the statutes criminalizing identity theft, criminal impersonation, and forgery to encompass the use of fake identities to influence an academic debate as "fraud" and "benefit," and damage to reputation as "injury," then Penal Law §§170.05, 190.25, 190.78 and 190.79 are void for vagueness under the Fourteenth Amendment of the Constitution of the United States. The unconstitutionally-void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient precision that ordinary people — including law enforcement agents — can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[18] "[T]he requirement that a legislature establish minimal guidelines to govern law enforcement," is crucial. Where the legislature fails to provide such guidelines, a criminal statute may end up permitting "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

[18] In the context of First Amendment challenges, vagueness is often argued in tandem with overbreadth; so much constitutionally-protected conduct is criminalized that the law sweeps too broadly, chilling speech. For purposes of this brief, as in the court below, the vagueness argument encompasses First Amendment overbreadth as well.

Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citations omitted). This concern is precisely why the United States Supreme Court recently limited the legally cognizable object of "honest services" fraud to bribes and kickbacks. See Skilling v. United States, __ U.S. __, 130 S.Ct. 2896, 2907 (2010) ("In proscribing fraudulent deprivations of 'the intangible right of honest services,' §1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal."). See also, Ashton v. Kentucky, 384 U.S. 195 (1966) (overturning a criminal libel conviction because the statute swept in "a great variety of conduct under a general and indefinite characterization, and [left] to the executive and judicial branches too wide a discretion in its application"). Due process requires that all "be informed as to what the State commands or forbids," Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), and that "men of common intelligence' not be forced to guess at the meaning of the criminal law." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). If people of common experience and intellect must guess at a statute's meaning and may well differ as to its application, its application would violate an essential of due process. See, e.g., People v. Coleman, 120 Misc.2d 691 (Nassau Dist. Ct. 1983); People v. Howell, 90

Misc.2d 722 (Buffalo City Ct. 1977). Offenses cannot be established by implication; there must be a clear and positive expression of legislative intent to make them criminal. People v. Gillette, 172 Misc. 847 (Rochester City Ct. 1939).

In the First Amendment area, "[t]he very existence of . . . [a] censorial power, regardless of how or whether it is exercised, is unacceptable." Int'l. Soc'y For Krishna Consciousness v. Eaves, 601 F.2d 809, 822-23 (5th Cir.1979). When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness "demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974). See also, Ashton, 384 U.S. at 200 ("Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."); Buckley, 35 Misc.2d at 470 ("The reason for the requirement of clarity may be stated simply: we value speech so highly, that we will only enforce a restriction on speech which is not subject to expansion at the discretionary whim of one who applies it. We will not tolerate 'dubious intrusions.'").[19]

[19] See also Hynes v. Mayor & Council of Borough of Oradell, 425 U.S. 610, 622 (1976); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); NAACP v. Button, 371 U.S. 415, 432-433 (1963).

The notice/definition requirement, as explicated in United States v. Lanier, 520 U.S. 259, 266 (1997) has three overlapping elements:

> First, the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning or differ as to its application.' [citation omitted]. Second, … the canon of strict construction or rule of lenity, ensures fair warning by resolving ambiguity in a criminal statute as to apply only to conduct clearly covered . . . .Third . . . due process bars courts from applying a novel construction . . . to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.

As Justice Holmes noted in McBoyle v. United States, 283 U.S. 25, 27 (1931):

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language the common world will understand, of what the law intends to do if a certain line is passed. To make that warning fair, so far as possible the line should be clear.

If Defendant Golb, a "common man" with a law degree, were to have carefully parsed the statutes at issue here before embarking upon his alleged vigorous campaign to influence debate and criticize unethical conduct, what would he have found? First, a study of the meaning of the words "fraud," "benefit," and "injure," as used by the relevant statutes, and the information supplied by studying their legislative histories, would have yielded the correct conclusion that these terms did not and could not encompass the act of influencing an academic debate or injuring someone's

reputation. Discovering that the Supreme Court and the New York Legislature had abolished criminal libel over 40 years ago, Raphael Golb would have no way of ascertaining that even the most hurtful accusations of misconduct could still be criminalized, under the different and highly fraud-oriented laws of forgery and criminal impersonation. Ordinary people have no way of knowing whether the Legislature intended the term "injure" to include harm to reputation. Careful lawyers would conclude that it had not.

Second, if Raphael Golb somehow concluded that such a construction was possible, then he would have noted that the rule of lenity dictated that any possible ambiguity be resolved in his favor. In construing an ambiguous criminal statute, the court must resolve the ambiguity in favor of the Defendant. See McNally v. United States, 483 U.S. 350 (1987); Rewis v. United States, 401 U.S. 808, 811-812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). In such cases, the court should look to the legislative purpose of the statute to determine its meaning. See, e.g., Daimler Chrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660 (Ct. App. 2006) ("[i]n matters of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the Legislature") (internal quotation marks and citation omitted). See also North Carolina v. Crawford, No. COA04-286 (N.C. Ct. App. 2005) ("serious

injury" rather than "serious bodily injury" ambiguous, hence court looked to "manifest legislative purpose"); United States v. Burke, 504 U.S. 229 (1992) (since neither the text nor the legislative history of Internal Revenue Code § 104(a)(2) offers any explanation of the term "personal injuries," court looked to Internal Revenue Service regulations to determine statute's purpose and meaning).

Even if the People could construe (as they have) the relevant laws to criminalize an alleged attempt to influence an academic debate and to cause harm to another's reputation by online impersonation, no fair-minded person could assert that such conduct is "clearly covered."

Last, the curious Raphael Golb would discover that no judicial gloss or prior judicial decision has ever hinted that the term "defraud" or "benefit" could be expanded so broadly, or that the term "injure" was meant to resurrect the wholly discredited doctrine of criminal libel. Indeed, he would discover that every case that presented conduct that was akin to his was handled in the civil courts, not the criminal courts.

The definitional/notice defects are more than sufficient to result in the dismissal of the charges against Raphael Golb. But the lurking evil, that of unbridled, standardless prosecutorial discretion, looms even larger. The trial court's charge that that injury can be reputational or psychic, and that

anything that leads anyone "into error" can be fraud, provides the People with the power to engage in standardless prosecutions of a vast array of on-line activities. Plagiarism becomes forgery. Indeed, should the People choose to prosecute Lawrence Schiffman for appropriating Norman Golb's work, their interpretation of the forgery statute would permit them to do so. Hundreds of thousands of blogs contain posts or comments by persons who use fake identities, often the names of real people, to lampoon, criticize, or set forth positions. Left to the unfettered discretion of the New York County District Attorney, any one of these will become criminal impersonation and identity theft. See, United States v. Drew, 2009 WL 2872855 (C.D. Cal. 2009).

The breadth and nature of the online phenomenon of mimicry and satire that plays a significant role in public discourse and that could easily be criminalized under the principles of this case is astonishing: Examples of websites opened in names of individuals who are being criticized include: http://sirpeterscott.com (criticism of Sir Peter Scott, chancellor of Kingston University); http://robert-lloyd-goldstein.com/ (criticism of Robert Lloyd Goldstein, a professor of clinical psychiatry at Columbia University). Groups like the Yes Men open satirical websites that claim to be, and look exactly like, the sites of the companies and organizations they are criticizing.

See, e.g.,

http://www.museumofhoaxes.com/hoax/archive/permalink/the_yes_mens_bhopal_hoax/ and http://tedfellows.posterous.com/chevron-spoofed-in-a-fantastic-hoax-by-the-br (copycat versions of official websites of Dow Chemical and Chevron; reporter who called the fake Dow Chemical phone number listed on one of these sites believed he was having a conversation with a Dow representative). See also http://long18th.wordpress.com/2007/12/11/satire-and-the-fake-first-person-voice/ (Professor David Mazella describes "an entire constellation of fake blogs" that impersonate Steve Jobs, John McCain and other figures). Fake accounts have been opened on a myriad of social networking sites including, e.g., Friendster, Myspace, and Facebook. See, e.g., Danah Boyd, *None of This is Real*, at http://www.danah.org/papers/NoneOfThisIsReal.pdf.

Satirical e-mails are part of the same phenomenon, e.g., http://www.observer.com/2010/media/tucker-carlson-has-some-fun-keith-olbermanns-expense ("insane emails that purportedly came from Keith Olbermann were actually the work of Tucker Carlson's conservative news site…."; the journalist who received the messages "believed the emails to be coming from Olbermann"; the e-mails came from the address keith@keitholbermann.com). E-mail parodies have become a fashion

among Republican Party activists. See http://tpmmuckraker.talkingpointsmemo.com/2010/02/nancy_pelosi_sends_out_fundraising_e-mail_for_gop.php (fundraising e-mail appeared under the name Nancy Pelosi, and was addressed to "Dear Naive Republican"; article calls the e-mail "a crude stab at satire by the NRCC… The 'satirical' communication, written in the voice of one's adversary, appears to be a hot new tactic, at least among Republicans").[20]

Now that a citizen has been criminalized for employing satirical mimicry to expose and denounce the conduct of a popular professor, and for writing, under an assumed name, a polite e-mail to a museum curator inquiring about whether both of the two salient theories of Dead Sea Scroll origins will be presented at an upcoming exhibit, we are no longer imagining a slippery slope. We are hurtling down that slope without anything to stop our accelerating descent.

[20] A lengthier list, all culled from public record sources of the existence of which this Court can take judicial notice, is found at A-697.

IV. THE COMMUNICATIONS THAT ARE THE SUBJECT OF COUNTS 3, 40, AND 48 ARE PROTECTED BY THE FIRST AMENDMENT AND CANNOT BE CRIMINALIZED, DOING SO WOULD RENDER N.Y. PENAL LAW §240.30(1) UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. STATEMENT OF FACTS RELEVANT TO COUNTS 3, 40, AND 48.

Counts 3, 40, and 48 charge the misdemeanor of aggravated harassment as against Lawrence Schiffman, Stephen Goranson, and Robert Cargill, respectively. The communications that form the basis of these charges include e-mails to various officials, faculty members, and graduate student teaching assistants at New York University (where Schiffman teaches),[21] UCLA (where Cargill teaches), and Duke University (where Goranson works in the circulation department of the library), complaining about various statements, practices and conduct engaged in by this trio. (Exhibit 16, generally, A-217-260, Schiffman), (Exhibit 17, generally, A-261-287 Cargill) (Exhibit 18, generally, A-301-313, Goranson).

None of the communications alleged to be harassing were sent to Messrs. Cargill or Goranson. The only communications sent directly to Dr. Schiffman were two e-mails politely suggesting that he respond to his critics (Tr. 116, A-363), an invitation that Schiffman ignored. All of the

[21] The documents that constituted the People's evidence of aggravated harassment as to Schiffman were never identified by the People with specificity. Presumably, they include every document in which Golb criticizes Schiffman or even mentions his name.

communications were made using names other than Raphael Golb; sometimes real people, sometimes not.

Professor Schiffman testified that he was unhappy with the mock confessions of plagiarism sent to the deans and to his departmental colleagues and teaching assistants from the Larry.Schiffman@gmail.com address; with the blog articles that alleged he committed plagiarism and misrepresented Professor Golb's work (Tr. 90, A-356); with specific communications authored by "Peter Kaufman"; and with the raising of the question why Schiffman had not been investigated for the academic misconduct that was detailed in the blog articles. (Tr. 108, A-361). Dr. Schiffman did not assert that any of the e-mails or articles contained any threats.

Dr. Goranson testified that he had a "disagreement online" with someone using the name "Charles Gadda" over the origin of the Dead Sea Scrolls (Tr. 627, A-469), and then came a series of "attacks online on people who didn't support the views of Norman Golb. . . ." (Tr. 628, A-470). Goranson also testified that his supervisors received unspecified "complaints" about him via e-mail, and that some of these complaints suggested that he be fired. The supervisors, according to Goranson, quickly

dismissed the complaints, did not investigate their validity, and did not even notify Goranson that they had been made.[22] (Tr. 629, A-471).

Goranson never stated that he was annoyed, alarmed, or that he felt threatened or harassed. Indeed, in the vigorous online clash of ideas, Goranson certainly gave as good as he got. He admitted that he had numerous online fights, was permanently removed from one website for making personal attacks (Tr. 631, A-473), and had been suspended from a number of others. (Tr. 633, A-475). Goranson acknowledged that he has regularly attacked Professor Golb's scholarship, probably close to a hundred times (Tr. 635, A-477), and that he has his computer set to inform him every time Norman Golb's name is mentioned online. He admitted his attacks are "vehement disagreements" and that, "many years ago," they degenerated into name-calling. (Tr. 641, A-479).

[22] The "complaint" at issue concerned Goranson's use of Duke library computers, and of a "@duke.edu" e-mail address, to repeatedly attack Norman Golb. Raphael Golb (under the alias "Peter Kaufman") contacted the Provost and wrote: "From what I understand, Dr. Goranson, who received a degree from the Duke University Department of Religion but does not hold a teaching position, has already been blocked from several Internet forums on account of his personal attacks against various scholars. Although I am loathe to recommend any course of action to you, perhaps you might wish to consider whether it is appropriate for a Duke employee to engage in such conduct. I am particularly worried it will now be suggested that Dr. Goranson is acting at the behest of faculty member at Duke." (Exhibit 18-10, A-292).

Dr. Cargill also had a litany of hurt feelings. He felt very unhappy with Dr. Norman Golb's scholarly criticism of his digital film about Qumran (Tr. 713, A-505), with the criticism of his work in blogs and Internet comments although he publishes much of it on-line to invite commentary, and with the fact that administrators in his department received "negative" e-mails that contained "complaints" whose contents he could not recall. (Tr. 714-715, A-506-507; Tr. 768). Dr. Cargill was also upset that the pseudonymous writings criticized the exclusion of Professor Golb from academic conferences and museum lecture series controlled by defenders of the Qumran-sectarian theory (Tr. 719, A-511), and that they criticized scholars who physically controlled access to the DSS during the period when Jewish scholars were excluded. (Tr. 740, A-519). Last, Cargill testified that Raphael Golb's online aliases characterized him and his work as "mendacious,"[23] "spurious," asserted that he "doesn't know what he is talking about" or that he "failed to consider this," and asked whether he was "going to be allowed to get his Ph.D. for shoddy work like this." (Tr. 744, A-522). He particularly despaired when other scholars at UCLA read these

[23]The worst thing that was said about Cargill, to his recollection, was that he was "mendacious." (Tr. 751, A-526).

critiques and inquired about them, making him regret that he had ever started this line of research. (Tr. 744, A-522).[24]

For all of this, Cargill himself could "get down" in the online trenches when it suited his purposes. He admitted that he himself created online identities referring to Raphael Golb and his brother Joel (although it took a lot of cross-examination to get there). (Tr. 799-805, A-538-44). Cargill attacked "Charles Gadda" under (at least) the names "Raphael Joel" and "Charles Gadda's Watcher." And when Cargill grew irate, he contacted one of the blog sites, told them that a criminal investigation was pending against the probable author, and persuaded them to take down Raphael Golb's articles criticizing the museum exhibits and digital film. (Tr. 807-808, A-545-46). And Cargill concluded a lecture at the Society of Biblical

[24] Dr. Cargill's memory was flawed. As the exhibits showed, on January 18, 2008, Golb, under an alias, wrote to faculty members in the Department of Near Eastern Languages at UCLA, stating that Dr. Cargill's film "distorts the current state of scholarship in this field of studies, treating various disputed interpretations as facts and defending the old Qumran-Essene theory without informing the public of the reasons why an entire series of major researchers, including the officially appointed Israel Antiquities Authority team led by Drs. Magen and Peleg, have now rejected that theory." The writer then opined that the "transparently erroneous and mendacious statements made throughout the film, documented in Dr. Golb's article[,] and clearly designed to mislead the public, can hardly be called an example of ethical conduct on the part of a doctoral candidate." And the writer inquired: "What is the department of Near Eastern Language and Cultures at UCLA going to do to ensure that Mr. Cargill provides a candid explanation of his behavior in making the film? Will steps be taken to ensure that he responds to Dr. Golb, corrects his false statements and issues a public apology for having misled 450,000 people? Will Mr. Cargill be allowed to receive a Ph.D. for work of this quality, in the face of unanswered criticisms?" (Exhibit 17-44, A-267).

Literature by suggesting that "the world will be rid of Norman Golb when he dies."

Defendant timely moved for a trial order of dismissal, raising all of the grounds raised on appeal herein. (A-31). The motion was denied without comment.

Defendant also objected to the court including the word "annoy" in its jury charge defining aggravated harassment, noting that it would be unconstitutional to criminalize someone for intending to annoy and for communicating in a manner likely to annoy. (Court Exhibit IV, A-58). The court overruled the objection and charged the statutory language.

B. THE COMMUNICATIONS THAT ARE THE SUBJECT OF COUNTS 3, 40, AND 48 ARE PROTECTED BY THE FIRST AMENDMENT AND CANNOT BE CRIMINALIZED, DOING SO WOULD RENDER N.Y. PENAL LAW §240.30(1) UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

N.Y. Penal Law §240.30(1), Aggravated Harassment in the Second Degree, is both breathtakingly broad and vague. In pertinent part, the statute provides:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten, or alarm another person, he or she:
>
> [] communicates with a person, anonymously or otherwise . . . by transmitting or delivering any … form of written communication, in a manner likely to cause annoyance or alarm . . . .

Penal Law §240.30(1)(a). On its face, this language criminalizes anyone who intends to annoy someone and does so by distributing a written communication that is likely to annoy. The reason that every editorial writer in New York is not in prison, however, is due to the fact that the courts have consistently limited the range of §240.30(1) to those communications that convey actual threats, obscenity, or fighting words, which have never been protected by the First Amendment.

Harassment statutes are designed to prevent violence by criminalizing certain narrow areas of speech that are likely to result in violence. When stretched to cover situations where a complainant merely feels annoyed by abusive, mocking, satirical, or critical speech, or by challenges to debate, New York's laws against harassment must yield to the First Amendment. "Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest"; only "fighting words" that, "by their very utterance, inflict injury or tend to incite an immediate breach of the peace" are punishable. City of Houston v. Hill, 482 U.S. 451, 461-62

(1987), quoting Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (internal quotes omitted).[25]

In People v. Smith, 89 Misc.2d 789 (App. Term, 2d Dept. 1977), the Appellate Term held that the criminalized speech must be obscene, unequivocally threatening, invasive of substantial privacy interests in an "essentially intolerable manner," or tending to "incite an immediate breach of the peace." Id. at 791-792. Because the defendant's conduct fell within the "hard core" of the statute's reach, the Smith court deferred for another day the issue of whether the statute was void for vagueness. Id. at 791.

[25] Generally, attempts to criminalize obnoxious missives, angry venting, and other puerile behavior have been dismissed, on First Amendment grounds, on motion. See, e.g., People v. Mangano, 100 N.Y.2d 569 (N.Y. Ct. App. 2003) (information dismissed where defendant left five messages on Parking Violations Bureau answering machine, in which she "rained invective on two village employees, wished them and their families ill health, and complained of their job performance, as well as tickets that she had received"); People v. Ruggerio, 4 Misc.3d 133(A), 2004 N.Y. Slip Op. 50747(U), *1 (App. Term, 2d Dept. 2004) ("While genuine threats of physical harm fall within the scope of the [aggravated harassment] statute, an outburst, without more, does not violate the statute"); People v. Rodriguez, 19 Misc.3d 830 (Crim. Ct., Kings County 2008) (Defendant, using an alias, repeatedly proclaimed his love for the victim on her own MySpace page. The court observed that the declarations of love were not threats, and that the complaint contained "no allegations that Defendant attempted to quell Defendant's love by blocking Defendant's messages or by asking him to cease writing her." Accordingly, the court dismissed the complaint.); People v. T.V., 2003 N.Y. Slip Op. 51050(U), *2 (Crim. Ct., New York County 2003) (court noted that the criminal court "is often asked to decide whether puerile and obnoxious conduct constitutes harassment," and observed that "in a free society, such as ours, citizens are subjected to a degree of annoying behavior that, most likely, in a police State would not be tolerated. But merely because a person behaves in an immature, immoderate, rude or patronizing manner which annoys another is not enough to cause the actor to suffer criminal sanctions.") (internal quotes and citations omitted).

That day came in 1985, when this Court, in People v. Dupont, 107 A.D.2d 247 (1st Dept. 1985), faced a case remarkably similar to the one here. In Dupont, the defendant had hand-published a magazine which was devoted to criticizing his former attorney. The defendant's magazine, through the use of cartoons and articles, accused the attorney of dishonest real estate dealings with the defendant, used pejorative terms to describe the attorney and some of his clients, purported to "out" the attorney as a homosexual using particularly ugly language, and accused the attorney of dishonesty. Id. at 249. The defendant distributed the magazine outside the attorney's office, in restaurants frequented by the attorney, outside the homes of the attorney's friends and clients, at a bar mitzvah that the attorney attended, and at a charity event where he was being honored. Id. at 249-250. The defendant was charged with a violation of Penal Law §240.30(1)(a), tried, and convicted. This Court reversed.

This Court first pointed to the historical origins of the harassment statute in the 1881 Penal Code which made it a misdemeanor when any "person who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received any letter or other writing, *threatening to do any unlawful injury to the person or property of another*." Id. at 251 (emphasis added). This Court distinguished harassment from defamation,

and held that the harassment statute was applicable only to "communications transmitted directly to the complainant." Id. at 252. "It was not designed to prevent dissemination, let alone the publication of vexatious material about an individual. *There may be civil remedies for such conduct.* Offensive as defendant's activities may have been, they did not violate the statute." Id. (emphasis added); see also, People v. Martinez, 19 Misc.3d 1104(A) (Crim. Ct., New York County 2008) ("the allegations must establish that the defendant communicated with the complainant"). This Court noted that the conduct complained of involved "merely the distribution of literature, offensive though it may be." Dupont, 107 A.D.2d at 252. Concluding that "[s]uch conduct is plainly not within the 'hard core' of the statute's proscriptions," this Court addressed defendant's void-for-vagueness challenge and held:

> The vagueness is apparent. It is not clear what is meant by communication "in a manner likely to cause annoyance or alarm" to another person. Is it the form of distribution which is being condemned, or the content of the communication? How does one measure "annoyance"?
>
> * * * *
>
> Plainly, not every scurrilous or unsavory communication concerning an individual, no matter how repulsive or in what degree of poor taste, necessarily constitutes criminally harassing conduct. Where the interests of an individual are harmed *there may be a civil remedy* by action for damages or injunctive relief. The criminal law may not be

applied for this purpose. *The harassment statute was not meant as a substitute for the laws of defamation.*

Id. at 252-253 (emphases added) (internal citations omitted).

This Court presciently observed "the distinct possibility that the statute might again be similarly applied in the future, thereby forcing others to refrain from engaging in constitutionally protected speech or expression," and found the statute to be not only vague, but overbroad. "The fact that certain modes of expression may be 'annoying to others' does not require an individual to forfeit his right to make such assertions." Id. at 253, quoting Papish v. Board of Curators, 410 US 667 (1973). The People had neither shown a compelling State interest nor used a means "narrowly tailored" to achieve that end. In this respect, the court found that the State had no compelling interest in "protecting individuals against criticism of their sexual habits or their financial dealings." Id. at 254. This Court found that "[e]ven if the material in the magazine was provocative, that would not render its distribution the equivalent of 'fighting words' so as to except such activity from the protection of the 1st Amendment." Id. at 256. The defendant's distribution of his magazine, like Raphael Golb's communication of controversial e-mails to various members of the academic community at their professional, publicly posted, e-mail addresses, "was neither a violent nor a potentially violent act." Id.

The Dupont court's ruling has withstood the test of time. When presented with a situation where a defendant had stated that she would "beat the crap out of [complainant] some day or night in the street," the New York Court of Appeals declared the former harassment statute — which did not include the term "threaten" — to be unconstitutionally overbroad. People v. Dietze, 75 N.Y.2d 47 (1989). The court explained: "Speech is often 'abusive' — even vulgar, derisive, and provocative — and yet it is still protected under the State and Federal constitutional guarantees of free expression unless it is much more than that. [U]nless speech presents a *clear and present danger* of some serious substantive evil, it may neither be forbidden nor penalized." Id. at 51 (emphasis added) (internal citations omitted). Thus, even though the defendant's speech was clearly annoying and alarming, it could not be criminalized under those overly-broad terms.[26] Indeed, because of the necessity of a "clear and present danger," the U.S. District Court for the Southern District of New York has found the statute unconstitutionally overbroad on its face when based on alleged "annoying" or "alarming" speech. See Vives v. City of New York, 305 F.Supp.2d 289,

[26] In 2001, the legislature responded to Dietze by adding the term "threaten" to the statute. While the words "annoy" and "alarm" are still present in the statute, virtually all harassment cases since Dietze have involved speech or conduct that was unequivocally threatening.

302 nn 8, 9 (S.D.N.Y. 2003) (finding Penal Law §240.30(1) unconstitutionally overbroad on its face "to the extent it prohibits and punishes speech that is intended to 'annoy' and/or 'alarm'"), revd on other grounds, 405 F.3d 115 (2d Cir. 2004).

Here, none of the e-mails Raphael Golb is alleged to have sent contained any threatening language whatsoever. Provocatively calling attention to ethical issues involving education, research, and museum exhibits — clearly matters of public concern — is not a "serious expression of an intent to commit an act of violence to a particular individual or group of individuals," or an unjustifiable and inexcusable "true threat" to cause "substantial harm to individual or public interests." Sending an e-mail to various persons alleging that the chairman of a department is a plagiarist, or imitatively poking fun at him for his alleged misconduct, is no more the criminal offense of aggravated harassment than handing out a self-published magazine claiming your former attorney is a crook. The e-mails expressively informed various scholars of the unethical conduct (including plagiarism, misrepresentation, and a fraudulent campaign of public disinformation) engaged in by certain colleagues of theirs, and were manifestly aimed at stimulating discussion of that conduct.

The People's case rested on the claim that the complainants were annoyed or somehow "alarmed"[27] when they found out that members of their institutions had received e-mails in which they were criticized, accused of unethical conduct, and mocked. Such criticism, accusations, and mockery cannot, and should not, form the basis of a conviction for aggravated harassment, in view of the "clear and present danger" doctrine laid forth in Dupont, Smith, Dietze, and Vives. In fact, it is not even clear that they can legitimately form the basis for a libel action. See Burton v. Crowell Pub. Co., 82 F.2d 154, 155 (2d Cir. 1936) (Learned Hand, J.) ("It is indeed not true that all ridicule, or all disagreeable comment is actionable; a man must be not too thin-skinned or a self-important prig") (internal citations omitted). The First Amendment does not vanish into thin air simply because an expressive spoof or send-up makes someone appear contemptible. See Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986).

Although the Defendant's conviction on all three of the aggravated harassment counts must be reversed for the reasons stated above, in the alternative, the convictions must be reversed because none of the allegedly harassing communications were sent to the complainants. In Dupont, this

[27]It is hard to imagine any instance of alleged defamation where the victim could not say he was "alarmed" by the defamatory speech or its impact on others**.** Thus, "alarm," in the absence of threatening comments or behavior, is far too vague to serve as the basis for criminal charges in this case.

Court held that the harassment statute was applicable only to "communications transmitted directly to the complainant." Id. at 252. In denying Defendant's pre-trial motion to dismiss, the court below ruled that this statement was *dictum*. (Op. at 3, A-85). However this Court interprets its prior statement, lower courts have consistently cited Dupont for "the general rule" that "it is simply not a crime merely to speak or write bad things about another person," notwithstanding the existence of a "handful" of "oddball cases" that have found to the contrary. People v. Bethea, 1 Misc.3d 909A, 781 N.Y.S.2d 626 (Bronx Crim. Ct. 2004).

V. THE PEOPLE'S APPLICATION OF §156.05 TO DEFENDANT'S VIOLATION OF A NEW YORK UNIVERSITY REGULATION RENDERS THE STATUTE VOID FOR VAGUENESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Count 51 alleges a single violation of N.Y. Penal Law § 156.05 which provides that "A person is guilty of unauthorized use of a computer when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization." N.Y. Penal Law §156.05. As an NYU alumnus who joined the "Friends of Bobst Library Program," Raphael Golb was "authorized" to "use" or "access" dozens of computers at Bobst Library. (Tr. 343, A-429). The People's theory of

criminalization was that "Defendant's use of the New York University (NYU) computers and computer network was unauthorized in that he violated NYU computer policy by, among other things, committing crimes through the NYU computers." (Bill of Particulars, A-28). According to the People, by using NYU computers to violate the law, Raphael Golb in turn violated NYU's policy against using computers to violate the law, and hence, acted in excess of his authorization and hence, can be criminalized under Penal Law §156.05.

New York University's Bobst Library computer use policy (hereinafter "Policy"), was introduced into evidence as Exhibit 1B. (Tr. 347, A-431, Exhibit 1-B at A-316-331). It does not specifically prohibit committing crimes from the library computers. Section A(1) provides that all users must "behave in accordance with NYU's educational, research, and service purposes and in a manner compliant with this and other applicable NYU policies and procedures and all applicable laws and regulations[.]" (A-317) Section A(2) requires users to behave with "civil regard" toward others. (A-317) The People's witness, Jane Delfavero, NYU's director of Technology Security Services, acknowledged that these admonitions were just "a fancy way of just saying be nice." (Tr. 361, A-433). According to her, since no one was authorized by NYU to behave "uncivilly," one loses

one's "authorization" to use the computers in a philosophical sense (Tr. 361, A-433), but one still has authorized access until the privilege is taken away. (Tr. 362, A-434).

The question of whether knowingly violating an Internet Service Provider's terms of service (TOS) constitutes "accessing a computer without authorization or in excess of authorization" and is therefore a crime was recently answered in the negative by the U.S. District Court for the Central District of California in United States v. Drew, 259 FRD 449, 2009 WL 2872855 (C.D. Cal. 2009). Since there is no palpable difference between the "TOS" violation at issue in Drew and the "Policy" violation alleged to have occurred here, the Drew analysis is highly pertinent to this case.

In Drew, the defendant was convicted of a single count of unauthorized access to a computer based upon her violation of MySpace Terms of Service and Policy.[28] 259 FRD at 452-453. The MySpace TOS, like the NYU Policy, prohibited a broad range of conduct, including providing false information to MySpace in order to set up an account under a

[28] The federal counterpart to N.Y. Penal Law §156.05 is found at 18 U.S.C. §1030(a)(2)(C) and (c)(2)(A). While there are differences between the two statutes, both criminalize the knowing violation of an ISP's TOS and the void-for-vagueness analysis undertaken by the Drew court applies equally to N.Y. Penal Law §156.05. Even the narrowest reading of Drew engaged in by any court stands for the proposition advanced here, *i.e.*, that "a violation of a website's terms of service alone cannot constitute intentionally accessing a computer without authorization. . . ." United States v. Kernell, 2010 U.S. DIST. Lexis 36477 (E.D. Tenn. 2010).

false identity.[29] Drew, by creating the account under a name other than her own, and posting therein, was acting "in excess of authorization" and violated the statute. Id. at 461.

The Drew court held that the statute, thus construed, violated both prongs of the void-for-vagueness doctrine. First, the statute failed to provide actual notice as to what was prohibited. Second, the statute did not contain minimal guidelines to govern law enforcement. Id. at 464.

With respect to the notice requirement, the question was whether "individuals of 'common intelligence' are on notice that a breach of a terms of service contract can become a crime …." Id. at 464. In answering the question in the negative, the Drew court noted that ordinary people would consider the breach of a TOS to be a contractual violation resulting in civil, but not criminal, penalties. Id.

This defect is also present in the NYU Policy. Indeed, the NYU Policy is far worse than MySpace's TOS as to providing notice. Sections A through G of the Policy Requirements (A-317-18) set forth requirements and prohibitions. Section C prohibits the user from allowing any third person,

[29] The defendant in the Drew case created a fake MySpace profile pretending to be a teenage boy. Under this fictitious guise, the defendant engaged in an Internet romance with a teenage girl named Megan (a classmate of the defendant's daughter) and then dumped her. In her grief at losing her imagined on-line boyfriend, Megan committed suicide.

without NYU's permission, to gain access to any computer or data resources. Section C warns that such conduct is "prohibited by state and federal laws and may subject the violator to criminal and civil penalties. . . ." None of the other prohibitions or requirements contains a warning of similar criminal penalties. Indeed, the Policy explains that the penalties for violating Section H are university-imposed disciplinary sanctions. (A-318-19**)**. Thus, if a person of common intelligence were to read the NYU Policy to determine whether his or her conduct was a crime, the inescapable conclusion is that violating Section C is a crime and violating the other sections will subject the violator only to NYU discipline.

The Drew court also found that, given the wide range of conduct prohibited by the MySpace TOS, it was unclear which violations would result in acting in "excess of authorization" and which would not. 259 FRD at 464-465. To the extent that the answer was "all of them," the Drew court noted that the law would be "incredibly overbroad and contravene the second prong of the void-for-vagueness doctrine as to setting guidelines to govern law enforcement." Id. at 465.

A similar defect exists with respect to the NYU Policy, which requires, *e.g.*, an undefined and impossibly vague "civil regard for other members of the NYU community and of the wider community on the

Internet." (Exhibit 1B, A-317). Indeed, this section of the policy, allegedly violated by Raphael Golb, simply meant that Bobst Library computer users should be "nice."

The Drew court also found that allowing the owner of the service to define what would constitute criminal conduct would create fundamental definitional problems and hence further increase vagueness. 259 FRD at 465. The Drew court cited the MySpace TOS prohibition of "unfair content" as one such example; NYU's policy requiring "civil regard" jumps out as another.

Even more troubling to the Drew court was the absence of minimal guidelines to govern law enforcement. Treating a TOS violation as an act without authorization or in excess of authorization would transform the statute into "an overwhelmingly overbroad enactment that would convert a multitude of otherwise innocent Internet users into misdemeanant criminals." Id. at 466. Because the MySpace TOS, like NYU's Policy, has such an "expansive and elaborate scope," the court looked to whether there were any legislated guidelines — either "clear guidelines" or "objective criteria" — to govern law enforcement. Id. at 466. Sections 1030(a)(2)(C) and 1030(c)(2)(A) of Title 18, like §156.05 of New York's Penal Law, had no such restrictions; there was no requirement that there be any actual loss,

any actual damage, or any invasion of privacy interests. Id. The court concluded:

> In sum, if any conscious breach of a website's terms of service is held to be sufficient by itself to constitute intentionally accessing a computer without authorization or in excess of authorization, the result will be that [the statute] becomes a law "that affords too much discretion to the police and too little notice to citizens who wish to use the [Internet]."

Drew, 259 FRD at 467, quoting City of Chicago v. Morales, 527 U.S. 41, 64 (1999). [30]

CONCLUSION

Freedom of expression is not a whim, to be respected or avoided depending on whether prosecutors decide the verbal method used to express an accusation is too annoying, provocatively offensive or politically incorrect. Satirical accusations, too, are a form of speech, even when they present themselves as bogus confessions in the voice of a ridiculed department chairman, who in that way is being accused of serious academic misconduct. Prosecutors have no right to pick and choose between accusations that they regard as reprehensible and the protected content of lies that they regard as innocuous. The use of mockery, ridicule,

[30] Defendant first raised this issue in a motion to dismiss, dated December 2, 2009, that was denied in a summary order of February 11, 2010. (A-83). The order rejected Defendant's argument in a single, un-illuminating sentence: "The charge of unauthorized use of a computer is proper." Defendant then raised the issue again as part of his Motion for A Trial Order of Acquittal (A-31), which was denied without comment.

pseudonyms, and other controversial forms of speech to criticize unethical conduct is an old tradition in every society and, quite simply, not a form of legally cognizable fraud that can be criminalized by stretching laws beyond the limited purpose for which they were written. As evident in the prosecution's repeated, direct insistence that the accusation purveyed by the "Larry.Schiffman" e-mails was false, the specific, hurtful contents of that accusatory message, perceived as damaging to a scholar's reputation, formed the basis for the criminal charges. Those charges would clearly not have been leveled at Raphael Golb if he had simply sent out a "tweet" in the name of Lawrence Schiffman declaring: "I ate a good orange this morning!" This case is, at bottom, a thinly disguised defamation suit that was wrongly directed towards the criminal justice system.

For the forgoing reasons, the convictions must be reversed and the charges dismissed.

Dated: New York, New York
March 16, 2011

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

In compliance with §600.10(d)(1)(v), this is to certify that this brief was prepared on a computer utilizing Microsoft Word processing system and is printed in Times New Roman 14 point font. The word count, as determined by Microsoft Word, is 18,027. Permission to file an oversized brief was granted by this Court.

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STATEMENT PURSUANT TO C.P.L.R. § 5531

1. The indictment number was 2721/09.

2. The names of the original parties were the People of the State of New York and Raphael Golb.

3. The action was commenced in the Supreme Court of the State of New York, New York County.

4. Trial commenced on September 13, 2010 and concluded on September 30, 2010. Sentence and judgment was entered on November 18, 2010.

5. This was a criminal matter charging identity theft in the second degree, criminal impersonation in the second degree, forgery in the third degree, identity theft in the third degree, aggravated harassment in the second degree, and unauthorized use of a computer.

6. This appeal is from the judgment of the Supreme Court, duly entered on November 18, 2010, and from each and every part thereof.

7. This appeal is being prosecuted on the original record with the Appendix method.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

- v –

Ind. No. 2721/09
New York County
Hon. Carol Berkman

RAPHAEL GOLB,

Defendant-Appellant.

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AFFIRMATION OF SERVICE

RONALD L. KUBY, an attorney duly admitted to practice before the courts of the State of New York, and a member of the bar of this Court, hereby affirms under the pains and penalties of perjury that on March 16, 2011, he caused to be served by hand two true copies of the Brief and Appendix of Defendant-Appellant Raphael Golb, one true copy of the transcript, Note of Issue, CPLR §5531 Statement, and oral argument request upon the Office of the District Attorney, Appeals Bureau, New York County, 1 Hogan Place, New York, New York; and further caused and one true copy of the Brief and Appendix to be served upon Defendant-Appellant Raphael Golb by hand.

Dated: New York, New York
March 16, 2011

RONALD L. KUBY