Ronald L. Kuby
Oral argument
requested
30 minutes

STATE OF NEW YORK – COURT OF APPEALS

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PEOPLE OF THE STATE OF NEW YORK,)

-against-)

APL-2013-00064

RAPHAEL GOLB,)

Appellant.)

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BRIEF OF APPELLANT RAPHAEL GOLB

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PRELIMINARY STATEMENT

This is an appeal by Appellant Raphael Golb from a Decision and Order of the Appellate Division, First Department, entered January 29, 2013, which dismissed one felony count of identity theft in the second degree, but otherwise affirmed the judgment of the Supreme Court, New York County (Carol Berkman, J.), convicting Appellant of two counts of identity theft in the second degree, fourteen counts of criminal impersonation in the second degree, ten counts of forgery in the third degree, three counts of aggravated harassment in the second degree, and one count of computer trespass.

Appellant was sentenced on November 18, 2010 to six months in prison followed by a five-year term of probation on the identity theft counts, and three months in prison followed by three years probation on each of the misdemeanor counts, all sentences to run concurrent. On March 11, 2013, the Honorable Eugene F. Pigott granted leave to appeal to this Court, which has jurisdiction to review this matter pursuant to CPLR 5602.

QUESTIONS PRESENTED

1. Did the trial court's refusal to properly limit the definitions of "benefit," "harm," "injury" and "fraud" compel the jury to criminalize expressions of Appellant's opinion, statements of fact, and causing hurt feelings to various scholars, all of which are protected by the First Amendment, and do these convictions render the statutes void for vagueness, without a limiting construction from this Court?

The court below answered the question "no."

2. Are the communications that are the subject of Counts 3, 40, and 48 of the Indictment protected by the First Amendment, and would criminalizing such communications render Penal Law § 240.30(1) unconstitutionally vague and overbroad?

The court below answered the question "no."

3. Was the Appellant convicted of a crime based exclusively upon his violating a Terms of Service Agreement, which renders the applicable statute unconstitutionally vague?

The court below answered the question "no."

STATEMENT OF THE CASE

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, two were alleged felonies and the rest were alleged misdemeanors.

The two felony charges were Count 1, charging Identity Theft in the Second Degree (Penal Law § 190.79(3)), with the object crime of Scheme to Defraud; and Count 2, charging Identity Theft in the Second Degree with the object crime of Falsifying Business Records. The First Department later reversed the conviction on Count 1 on the grounds that it was based on "speculation," but left the conviction on Count 2 intact without commentary.

Of the misdemeanors, three 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. The writings criminalized in these counts were apparently letters of complaint sent to the departments of these three complainants, but were never specified.

The remaining counts are as follows: 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.

Last, Count 51 charged unauthorized use of a computer (§ 156.05), alleging that Raphael Golb violated NYU's computer policy and therefore was acting in excess of authorization.

THE DEAD SEA SCROLLS CONTROVERSY

A. The Two Basic Theories of the Origin of the Dead Sea Scrolls

This prosecution arose in the context of a dispute over the Dead Sea Scrolls, science museum exhibitions, and educational ethics. The Scrolls are the most popular archaeological and religious discovery of the 20th century, and have been an 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 these ancient texts was originally monopolized by a team of Bible scholars appointed by the Jordanian government, from which Jews were rigorously excluded. (Tr. 168,

A-371).[1] 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). Members of the monopoly team and their students quickly came to regard the "Qumran-sectarian" theory and its variants as a fact not subject to debate or fundamental challenge.

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). Meanwhile, beginning in 1970, University of Chicago historian Norman Golb, Raphael Golb's father, mounted a systematic challenge to the proto-Christian sectarian theory of Scroll origins defended by the monopolists. In a series of publications in leading international journals, Professor Golb argued that the theory was unsupported by any actual evidence, but was instead based on arbitrary speculation, in violation of basic historical norms. He himself put forward precise historical and textual evidence that the Scrolls were writings of various Jewish groups taken down from Jerusalem, a major urban center, for hiding at the time of the siege and sacking of the city by Roman troops in 70 A.D. Prominent European and Israeli archaeologists (including an official Israel Antiquities Authority excavation team)

[1] 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.

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, in pertinent part, the suppression of physical evidence by the monopolists, their hoarding of unpublished material, and their failure to appropriately signal the history of scholarship in the field in footnotes as required by academic protocol.

Apart from a few scattered efforts, the monopolists largely failed to answer Professor Golb's critique, and they also ignored the research of the various archaeologists rejecting the sectarian view. They did, however, benefit from the financial support of several major foundations. With that support, they, along with their students and associates, began using science museum exhibits to propagandize the Qumran-sectarian theory, systematically excluding the contrary findings of the opposing group of scholars. (Tr. 276, A-403). Thus, the ethical issue forming the backdrop of the Appellant's criminalized activities was the alleged abuse of academic "politics" in a number of important educational

institutions (including universities and museums), and the demand for an open public debate of a major historical and religious controversy.

Lawrence Schiffman, then chairman of the Jewish Studies department at NYU and currently a vice provost at Yeshiva University, is an academic figure who defends a version of the "Qumran-sectarian" theory of origin of the Dead Sea Scrolls. (Tr. 61, A-350). He has derived, 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 aforesaid academic monopoly. Schiffman testified that he is not a member of the monopoly, but admitted that he received, from members of the monopoly, the multiple manuscript fragments of the famous "MMT" or "Acts of Torah" text on which his version of the sectarian theory was purportedly based. (Tr. 174-75, A-373-74). At the time, while Schiffman was publishing his claims about that text, scholars at large were not allowed to see those fragments. After the monopoly was broken, others, including Professor Golb, disputed Schiffman's claims and his speculative methodologies.

Dr. Susan Braunstein, Curator of Archeology and Judaica and Chair of Curatorial Affairs at the Jewish Museum, a witness for the prosecution, testified at trial 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). She acknowledged that Professor Golb was the leading proponent of the Jerusalem Libraries theory, and Dr. Lawrence Schiffman one of the leading proponents of the sectarian theory. She testified that in her opinion, "neither side had proven their case." (Tr. 278, A-405). However, she was critical of prior exhibits on the Dead Sea Scrolls because they championed the sectarian view rather than presenting both sides of the story. (Tr. 276-78, A-402-04). Her aim at the Jewish Museum's 2008 Scrolls exhibit was, in part, to correct this biased and misleading approach.

B. Dr. Lawrence Schiffman and the Accusations that he Plagiarized and Misrepresented the Works of Professor Norman Golb

Dr. Schiffman's reputation was based in significant part on various articles published towards 1990, and a book published in 1994. In those publications, Schiffman attributed to Professor Golb the view that the Scrolls were a collection of writings of Temple priests—a theory explicitly rejected in Professor Golb's articles. Equally important, Schiffman, in the late 1980s, began to straddle both sides of the Scrolls "divide," defending the Qumran-sectarian theory while at the same time embellishing it with ideas and arguments manifestly derived from works published by Norman Golb during the 1980-86 period.

By his own testimony, Schiffman attended a conference where Professor Golb presented his theory in 1987. (Tr. 65, A-352). But there is no mention of a source for the ideas in question in any critical apparatus in Schiffman's work;

Schiffman failed to credit Professor Golb for having introduced and developed those ideas. In his 1994 book, Schiffman claimed that he had produced a "revolutionary" work which for the first time (so he claimed) treated the Scrolls as a product of Jewish society. The grounds he offered for this assertion were, again, manifestly derived from articles published by Professor Golb during the preceding decade.

All of this created controversy in the academic world as well as among informed members of the lay public. 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). In his 1995 book, Professor Golb quoted the Katzman article as well as Schiffman's response, and discussed the plagiarism and misrepresentation of his work by Dr. Schiffman in the broader context of the Scrolls controversy. At Raphael Golb's trial, two NYU deans testified that the terms used by Dr. 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). Moreover, Dr. Braunstein testified that she was

familiar with the prior accusations of plagiarism made against Dr. Schiffman with respect to Professor Golb's works. (Tr. 288, A-414). Another prosecution witness, Stephen Goranson, also testified that Professor Golb had accused Schiffman of plagiarism in his 1995 book.

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 then 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 denied that Dr. Katzman had accused him of any "impropriety," and asserted that "no one reads" the NYU faculty code of conduct. (Tr. 144, A-366a; Tr. 211, A-382a).[2] 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. 217-18, A-384a-84b; Tr. 225, A-387b)—and that he 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

[2] However, in Count 51, Raphael Golb's emails and blogging were criminalized because they violated the NYU library computer code of conduct.

minimum, that Schiffman had been previously accused of plagiarizing Norman Golb and that he had repeatedly misrepresented Professor Golb's theory.

RAPHAEL GOLB'S BLOGGING CAMPAIGN

Raphael Golb, the son of Professor 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).

Like thousands of Internet users before him, Raphael Golb published his comments and articles under a variety of shifting pseudonyms. The frequent use of pseudonyms through history is documented in many works, and using multiple pseudonyms or "sock-puppets" online to engage in debate under the cover of anonymity is a ubiquitous Internet practice engaged in by hundreds of thousands of bloggers.[3] Golb created his Internet avatars mostly at random, picking fairly

[3] See, e.g., A. Room, Dictionary of Pseudonyms: 13,000 Assumed Names and Their Origins (Jefferson, North Carolina: McFarland and Company, 2010); W. Cushing, Initials and Pseudonyms (New York, 1885); Sh. Chajes, Otzar Beduyey HaShem, Index of pen-names in

common, nondescript names such as "Peter Kaufman," "Albert White," "Jesse Friedman" and the like. The name that he used most prolifically was "Charles Gadda," a reference to an Italian author (Carlo Emilio Gadda, 1893-1973) whose concern was irrationality and digression .

Raphael Golb's pseudonymous online 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-115-30, A-133-93). 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." The tone and content of these blog articles were frequently satirical. In two pieces, for example, Raphael Golb mockingly pretended that he *approved* of the choice to

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Hebrew literature (Vienna, 1933); H. Love, *English Clandestine Satire*, 1660-1702 (Oxford University Press, 2004). For an estimate of 600 million "sock-puppets" worldwide, see: M. Gibbs, "Lots of 'People' You Interact with Online Are Sockpuppets," http://www.networkworld.com/columnists/2011/032411-backspin.html. Those who have used multiple pseudonyms online to engage in debate under the cover of anonymity include a well-known rabbi who is a professor of law at Emory University. See, Michael Broyde, "My Nom de Plume Exposed," at http://torahmusings.com/2013/04/my-nom-de-plume-exposed/; "Rabbi Michael Broyde Tight-Lipped About 'Sockpuppet' Scandal," at http://forward.com/articles/174919/rabbi-michael-broyde-tight-lipped-about-sockpuppet/.

exclude one side of the debate from the exhibits, and sarcastically praised the exhibitors for working to prevent the "public confusion" that would take place should the public be properly informed. (Exhibits 40C1, A-130a; 40C2, A-130b-c).

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 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). 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 comments on "citizen news" sites like NowPublic and on the websites where the exhibits were being heavily 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 to criticism of the exhibits, they implemented a policy of not mentioning Norman Golb's name. (Tr. 730, A-518; Tr. 798-99, A-537-38).

RAPHAEL GOLB'S E-MAIL CAMPAIGN

To call attention to his blogging 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. 577-82, 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. 583-84, 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 the email address 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 and send out communications under that name.

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 by creating a "spoofed" address, such as Lawrence.Schiffman@NYU.edu. (Tr. 369, A-436). Having created the "Larry.Schiffman" address, Raphael Golb proceeded to use it to call attention to, and to stimulate discussion about, his articles exposing the alleged plagiarism of Dr. Schiffman. He did this by sending provocative "gmail confessions" from the newly created 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-217-60). Each of the e-mails overtly featured a "link" to the NowPublic article discussing Avi Katzman's plagiarism allegations and NYU's failure to investigate it. The tone of the e-mails was deadpan, yet crudely pompous. The purported author accused himself of a "minor failing" (to wit, plagiarism), (Tr. 80, A-354), and explained that "every effort" was to be used to help cover up the allegations of

misconduct detailed in the prominently linked Internet article. (Tr. 64, A-351). He instructed faculty and students alike "not to mention the name" of the plagiarized scholar, implored for their "understanding," and referenced the quagmire of DSS "politics" by explaining that "if I had given credit to this man [Norman Golb], 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 link to the plagiarism article, the peremptory command "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. 305-06, A-424-25). 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-378; Tr. 223-24, A-387-87a).[4]

Raphael Golb testified that his purpose was to mock and distribute information: he never intended to "benefit" from sending the e-mails except to "produce a benefit for the academic community and the public…, the free and open discussion of this entire scandal of Dr. Schiffman's conduct, perhaps some explanation of it." (Tr. 1007, A-573). And in fact, the communications did

[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.

generate commentary, discussion, and criticism. Schiffman took it upon himself to author an eleven-page letter that he submitted to NYU officials, in which he denied that he had ever been accused of plagiarism before and put forward various claims about Professor Golb's allegedly unpopular research. After this document became public, Professor Golb in turn offered a detailed rebuttal and a renewed and precise discussion of Schiffman's alleged academic misconduct.[5]

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 the Harvard Divinity School. Professor Cross committed significant research fraud with respect to a text called the "Qumran ostracon."[6] Again, Raphael Golb did not engage in any kind of "hacking," nor did he make any use of private information, passwords, or identifiers. He 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 former student of his testified that Dr. Cross always uses the name "Frank *Moore*

[5] See, Norman Golb, The Confidential Letter Composed by Prof. Lawrence Schiffman of New York University, The Oriental Institute of the University of Chicago (Nov. 30, 2010), available at http://oi.uchicago.edu/pdf/schiffman_response_2010nov30.pdf (accessed Dec. 6, 2012).

[6] 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.

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-307-10). 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 forming 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).

The prosecution acknowledged that the blog to which recipients of the "Frank.Cross2" emails were directed "ridiculed" Bart Ehrman. (Resp. Br. 3). This is the only instance in which the prosecution has associated the term "ridicule" with any of Raphael Golb's expressive efforts.

One of the names Raphael Golb testified he 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), unfortunately for the defendant, one of them is a rabbi who teaches Judaism in Oregon. Rabbi Seidel 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 prosecution brought Rabbi Seidel across the country to testify that he graduated from Oberlin College four years before Raphael Golb, that he had the opportunity to meet Norman Golb in Cambridge, England nearly thirty years ago and discussed the Jews of medieval France over a coffee with him, that he once considered studying with Dr. Schiffman but decided not to do so, and 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," that 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-208-16).

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 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). The prosecution 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 messages were sent* from this account. (Tr. 1040, A-596).

THE AGGRAVATED HARASSMENT ACCUSERS COMPLAIN RAPHAEL GOLB HURT THEIR FEELINGS.

Counts 3, 40, and 48 charged the misdemeanor of aggravated harassment as against Lawrence Schiffman, Stephen Goranson, and Robert Cargill, respectively. The communications that form the basis of these charges apparently comprised the totality of all of Raphael Golb's published and e-mail commentary on their scholarship, including e-mails to various officials, faculty members, and graduate student teaching assistants at New York University (where Schiffman taught),[7] UCLA (where Cargill taught), and Duke University (where Goranson works in the circulation department of the library). Raphael Golb's writings complained about various statements, practices and conduct engaged in by this trio. (Exhibit 16, generally, A-217-60, Schiffman), (Exhibit 17, generally, A-261-87, Cargill), (Exhibit 18, generally, A-301-13, Goranson).

None of the communications alleged to be harassing were sent to Messrs. Cargill or Goranson. The only communications sent directly to Schiffman were two e-mails politely suggesting that he openly respond to his critics (Tr. 116,

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

A-363), an invitation that Schiffman ignored. All of the communications were made using names other than Raphael Golb.

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.[8] (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).

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

[8] In actual fact, 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 members at Duke." (Exhibit 18-10, A-292).

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. 714-15, A-506-07). 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 the online aliases characterized him and his work as "mendacious,"[9] "spurious," asserted that he "doesn't know what he is talking about" or that he "failed to consider" the evidence, 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 critiques and inquired about them, making him regret that he had ever started this line of research. (Tr. 744, A-522).[10]

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

[10] Dr. Cargill's memory was flawed. In a series of articles, Raphael Golb presented specific evidence that Cargill's "Digital Qumran" film presented at the 2007 San Diego scrolls exhibit contained misleading statements and was in fact not the "first work of its kind," as touted by UCLA and the San Diego museum. (E.g., exhibits 40C3, A-130d-g; 40C4, A-130h-j). Golb then submitted several complaints to faculty members at UCLA concerning the film, linking the articles and suggesting that criticism of the film be answered.

For all of this, Raphael Golb's criticism inspired Cargill to engage in an exhaustive online cataloguing of Golb's writings; Cargill would eventually write nearly 30 blogs about the Golb family. Furthermore, 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. 807-08, A-545-46). Finally, Cargill also sent emails to the University of Chicago, demanding that Professor Golb's critique of his "Virtual Qumran" film be removed from the University's website.[11]

MOTIONS FOR TRIAL ORDERS OF DISMISSAL AND JURY CHARGES

According to the prosecution's formulation, embraced by the trial court, the writing under a pseudonym, or even using one to open an account, only became criminal when it was accompanied by fraudulent intent, or intent to derive a benefit to oneself or to another, or to inflict harm. Counts 1,2, 5, 7, 8, 10, 11, 13, 14, 16,

[11] See the response to Dr. Cargill from University of Chicago counsel, reproduced in the appendix to N. Golb, "Aspects of the Roles of Truth and Fiction in the Current Struggle over the Meaning of the Dead Sea Scrolls," at: http://oi.uchicago.edu/pdf/the_role_of_truth.pdf.

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. Thus, the definitions of "fraud," "harm," and "benefit" were crucial.

Pretrial, the defense repeatedly demanded that the prosecution 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 prosecution to provide such details. The trial 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).

(A-85).

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 prosecutor, in his 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 prosecutor claimed that the "defendant sent e-mails attempting to stir up controversy and also draw another victim into a dispute." (Tr. 27, A-343). The prosecutor also alleged that Raphael Golb sought "to prevent [Dr. Cargill] from getting his Ph.D." (Tr. 28, A-344).

At the close of the Prosecution'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 detailed requests that attempted to provide some limits on the terms "benefit," "harm," and "fraud," limited the jury's consideration of the content of Golb's speech to the five categories of speech that fall outside the protection of the First Amendment, and omitted the word "annoy" from the instructions on

aggravated harassment. (A. 50-54).[12] All of the defendant's requests were denied.

The instructions the trial court proposed to give, and over defense objection did give to the jury, [13] fully incorporated the prosecution's theory that any intended benefit or harm, no matter how ethereal, was criminal if the communication was sent under the name of another real person. As to the definition of the word "defraud," the trial court charged:

> 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).

As to the definition of "benefit," the trial court instructed the jury that anything could be a benefit: benefit "means *any* gain or advantage to the beneficiary or any advantage to a third person." (A-77) (emphasis added).

Finally, the trial court specifically instructed the jury that they were to not consider any issue related to the concept of freedom of speech. The trial court began by stating, as a general matter the importance of the First Amendment and

[12] 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. (A. 50-54).

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

how wonderful it is, (A. 631-32), assuring the jurors that "Tina Fey is free to keep doing her famous Sarah Palin imitation…." (Id.) She then instructed the jury:

> So the questions for you *are not* the legal issues of freedom of speech under the First Amendment to the United States Constitution, but rather whether the elements of a charged crime have been proved beyond a reasonable doubt.

(Id., emphasis added).

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.

CONVICTIONS, SENTENCE, AND APPEAL BELOW

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 of 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).

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.

By Opinion dated January 29, 2013, the Appellate Division, First Department, overturned Raphael Golb's conviction on Count 1, finding "there was no evidence that defendant intended to defraud one or more persons of property in excess of $1,000…[and the prosecution's] assertions in this regard rest on speculation." People v. Golb, 102 A.D.3d 601, 603 (1st Dept. 2013). (A-705-10). The First Department otherwise affirmed.

On February 13, 2013, the Hon. Eugene F. Pigott stayed defendant's surrender pending determination of the Motion for Leave to Appeal. On March 11, 2013, Judge Pigott granted said application. (A-711).

This appeal followed.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO PROPERLY LIMIT THE DEFINITIONS OF "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, ALL OF WHICH ARE PROTECTED BY THE FIRST AMENDMENT. THESE CONVICTIONS RENDER THE STATUTES VOID FOR VAGUENESS, WITHOUT A LIMITING CONSTRUCTION FROM THIS COURT.

A. INTRODUCTION

The prosecution conceded that the act of writing or sending an email under the name of another real person, without more, is not a crime. (Resp. Br. 71). The right to engage in such deceit (as the prosecution called it) is part of the fundamental "core of First Amendment liberties." See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).[14] According to the prosecution and the courts below, the "more" that transforms the impersonation into a criminal act is supplied when another's name is used with an intent to "defraud," obtain a "benefit," or "injure." People v. Briggins, 50 N.Y.2d 302, 307 (Ct. App. 1980) (adopting an

[14] 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, including "Richard Saunders," the name of many real people; 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.

alias or "nom de plume" is not illegal *per se*; it only becomes so when it is accompanied by fraudulent design).

The trial court repeatedly refused to require the prosecution to specify the intended benefits, harms, injuries, and "tricks" required to transform the content of the deceptively-entitled emails into "fraud." At trial, the prosecution suggested a broad range of potential benefits to and injuries intended by Raphael Golb: "to destroy [the] reputations and careers" of various academics, to "cause them alarm, fear, provoke them," (Tr. 22, A-338), to "smear and attack Dr. Schiffman," (Tr. 24, A-340), "attempting to stir up controversy and also draw another victim into a dispute," (Tr. 27, A-343), and "to prevent [Dr. Cargill] from getting his Ph.D." (Tr. 28, A-344). 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).

The trial court, over defense objections and overruling defendant's extensive written requests to charge, (A-50-59), instructed the jury that the benefits or harms can be, literally *anything*. Making intensive use of the disjunctive word "or," the trial court instructed the jury:

> [T]o 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) (emphases added). Thus, if the jury believed that Raphael Golb's creation of Internet personae to engage in an ideological battle was trickery, cheating, or "deceit," he was guilty. If the jury believed that Raphael Golb's accusatory mimicry 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 did even 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). This repetition of the word "any" made it clear that the scope of possible benefits was without any limitation.

The breadth and nature of the phenomenon of online literary impersonation that plays a significant role in public discourse and that could be criminalized under the principle of "impersonation plus any harm or benefit" is astonishing. To choose one of the many examples that were offered below, but never answered by the prosecution, conservative pundit Tucker Carlson opened an e-mail account in the name of liberal pundit Keith Olbermann, and sent numerous crazy-sounding rants under Olbermann's name. The recipient of the rants actually thought they came from Olbermann, thereby harming Olbermann's reputation and benefiting Carlson's standing as a witty skewer of liberal pretensions. Carlson thus adopted

the identity of another real person, and clearly intended to benefit his own reputation at the expense of Olbermann's. (See, http://www.observer.com/2010/media/tucker-carlson-has-some-fun-keitholbermanns-expense.) The prosecution below asserted that this conduct could not be criminalized, (Resp. Br. 87-88) but never explained why. The truth is that Carlson's conduct, and the conduct of thousands of other people using the internet, falls squarely within the prosecution's "pseudonym + intended harm or benefit = felony" equation.

The First Department, like the trial court and the prosecution, simply ignored this threat to the freedoms protected by Article I, Section 8 and the Due Process Clause by reiterating that pseudonymous speech requires the element of "fraudulent intent" to be criminal. But if fraudulent intent is established by intending to gain any benefit or inflict any harm, this "element" adds nothing. Communication or expression is almost always intended to generate benefits or harms, at least in the broadest sense. It comforts the afflicted or afflicts the comfortable. It praises an idea or a policy, or denounces it. It exposes wrongdoing or it vindicates truth. It creates satisfaction or sorrow. By definition, communication is not pointless. The trial court's definition of the terms "benefit," "harm," and "fraud" required the jury to find Raphael Golb guilty precisely because his online impersonations called attention to, condemned, and mocked

alleged wrongdoing on the part of the Scroll monopolists and exhibitors, generally, and Lawrence Schiffman in particular, thereby "benefitting" Raphael Golb's view that these people were perpetrating a fraud on the American public and the academic community, and "harming" those whom he perceived to be mendacious and engaged in unethical conduct. These types of benefits and harms are fully protected by the First Amendment; they are not legally cognizable in the criminal justice system.[15] The First Department's ruling authorizes the prosecution of all who engage in literary impersonation, provided the communications they send have any meaningful content.

B. THE SUPREME COURT HAS REPEATEDLY RULED THAT EXTENDING THE TERM 'FRAUD' INTO THE INTANGIBLE REALM RENDERS SUCH STATUTES VOID FOR VAGUENESS.

The First Department's effort to extend the meaning of fraud into an intangible, non-material realm is new in New York, but has been thoroughly condemned by the United States Supreme Court in the course of overturning federal "fraud" prosecutions. In a series of cases, the Supreme Court limited the scope of federal fraud laws on the ground that allowing prosecutions based upon intangibles would render the statutes impermissibly vague and threaten core First

[15] Construed in this expansive fashion, the statute is unconstitutionally vague because of the absence of notice of its sweep and lack of limiting principle. To the extent one reads the statute as the First Department has, its potential to criminalize vast areas of constitutionally-protected speech renders it overbroad.

Amendment values. In McNally v. United States, 483 U.S. 350 (1987), the Court addressed the federal fraud statute which made criminal "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. Because the law was phrased in the disjunctive, the Courts of Appeals uniformly held that Congress intended "scheme or artifice to defraud" to include deprivations not only of money or property, "but also of intangible rights," such as the public's right to "honest services," invasion of privacy rights, and election fraud. McNally, 483 U.S. at 358. The McNally Court ended this judicial expansion, holding that there were vagueness problems that could be contained only through a limiting construction. "Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," we are to read the statute "as limited in scope to the protection of property rights." Id. at 360. "If Congress desires to go further," the Court stated, "it must speak more clearly." Id.

Congress did so the following year, passing 18 U.S.C. § 1346, which provided that fraud included "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. In Skilling v. United States, 561 U.S. __, 130 S.Ct. 2896 (2010), defendant Skilling mounted the same vagueness challenge to Section 1346 as Appellant Golb mounted below:

> First, the phrase "the intangible right of honest services," he contends, does not adequately define what behavior it bars…Second, he alleges, § 1346's "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections," thereby "facilitat[ing] opportunistic and arbitrary prosecutions."

Id. at 2928. The Skilling Court acknowledged that Congress had not cured the vagueness problem by the "honest services" provision, and hence concluded that the reach of the statute needed to be limited:

> [T]o preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-McNally cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

Id. Thus, the Skilling Court held that "[r]eading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes only the bribe-and-kickback core…." Id. at 2931. See also, Carpenter v. United States, 484 U.S. 19, 27 (1987) (words "to defraud" in mail fraud statute construed to have "common understanding of wronging one in his property rights by dishonest methods or schemes" and "the deprivation of something of value by trick, deceit, chicane or overreaching") (internal quotes omitted; emphasis added); Kolender v. Lawson, 461 U.S. 352, 358 (1983); Smith v. Goguen, 415 U.S. 566, 573 (1974) (when a statute is capable of reaching First Amendment freedoms, the doctrine of

vagueness "demands a greater degree of specificity than in other contexts"); Ashton 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.").

Recently, in United States v. Alvarez, 567 U.S. __, 132 S.Ct. 2537 (2012), the Court reiterated that the government has the power to punish fraud, but that fraud must be defined in a manner that does not intrude upon protected speech. The fraud must be intended to provide a defendant with something more tangible than vindication, or to cause an injury greater than embarrassment. See, Id. at 2547-48.

In Alvarez, the defendant, a board member of the Three Valley Water District Board, introduced himself publicly by falsely asserting that he had been awarded the Congressional Medal of Honor for military exploits that were entirely fictional. Id. at 2542. The plurality described the defendant's intent in making this false statement as "a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment of financial benefits or admission to privileges reserved to those who had earned the Medal." Id. This distinction between a pathetic attempt to gain respect, on one hand, and legally cognizable "benefits," on the other, was central to the Court's analysis.

Under the First Department's view of the Golb case, an allegedly "pathetic attempt to gain respect"—in this instance, attention for his accusations and for the information he was disseminating—was a legally cognizable benefit. Plainly, under Alvarez, it is not. See, Id. at 2549.

Alvarez was indicted under the Stolen Valor Act, 18 U.S.C. § 704(b), which made it a crime to falsely claim that one had "been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." Id. at 2543. The Alvarez plurality specifically rejected the government's position that "false statements, as a general rule, are beyond constitutional protection." Id. at 2544-45. To the contrary, the plurality held that the existence of a few limited restrictions on false speech "do not establish a principle that all proscriptions on false statements are exempt from exacting First Amendment scrutiny." Id. at 2545; see also, Id. at 2546-47 ("reject[ing] the notion that false speech should be in a general category that is presumptively unprotected"). The plurality specifically condemned the criminalization of false speech that was not designed to obtain some *material* benefit, noting that if the Stolen Valor Act was sustained:

> [T]here could be an endless list of subjects [the government] could single out. Where false claims are made to secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. But the Stolen valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban

> on speech, absent any evidence that the speech was used to gain a *material* advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition.

Id. at 2547-48 (citation omitted; emphasis added). Explaining that the legislature cannot create new categories of unprotected speech**,** the plurality noted that the few First Amendment exemptions for false speech all involve civil cases, rather than criminal remedies for benefits or damages to reputation or career. Id. at 2546-47. Defamation law protects such "good repute," provided the good repute existed in the first place. The First Department cannot reanimate the corpse of criminal libel by labeling it "fraud." The professional and personal embarrassment that Raphael Golb caused Schiffman are not legally cognizable harms, nor is any legally cognizable benefit discernible in the attention he provocatively brought to the suppression of opposing voices in the Dead Sea Scrolls museum exhibits created by Schiffman and his associates.

In words frighteningly applicable here, the Alvarez concurrence cautioned that "the pervasiveness of false statements… made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more." Id. at 2553. Warned the plurality: "That governmental power has no clear limiting principle." Id. at 2547. In Raphael Golb's prosecution, no limiting principle suggests itself and Respondent has offered none.

Of utmost importance to this Court's resolution of Raphael Golb's case, the

analysis in Alvarez also makes it clear that the result would have been the same if defendant Xavier Alvarez, instead of falsely claiming that he won the Congressional Medal of Honor, falsely claimed that he was Rodolfo Hernandez (an actual Congressional Medal of Honor winner) as a "pathetic attempt to gain respect."

The phenomenon of Internet impersonation has become a dominant theme in contemporary critical discourse. University presidents are today regularly impersonated in "tweets" that are often difficult or impossible, without further verification, to differentiate from the "real thing," and which are highly embarrassing. See, e.g., http://usatoday30.usatoday.com/news/education/2011-04-18-college-presidents-impersonated-twitter.htm. Examples of controversial websites opened in names of individuals who are being criticized include: http://sirpeterscott.com (criticism of Sir Peter Scott, former chancellor of Kingston University); http://robert-lloyd-goldstein.com/ (criticism of Robert Lloyd Goldstein, a professor of clinical psychiatry at Columbia University); and scores of others, including not only academics but many a politician. Groups like the Yes Men open deadpan satirical websites that claim to be, and look exactly like, the sites of the companies and organizations they are criticizing. See, e.g., http://en.wikipedia.org/wiki/The_Yes_Men. Precisely this type of accusatory online activity has been held to be protected by the First Amendment. See, e.g.,

Koch Indus., Inc. v. Doe, 2011 U.S. Dist. LEXIS 49529 (D. Utah May 9, 2011) (fake Koch Industries press release attributing false statements to Koch brothers protected speech); Layshock v. Hermitage Sch. Dist., 650 F. 3d 205 (3d Cir. 2011) (fake Myspace "profiles" in name of school principals protected expression); Draker v. Schreiber, 271 S.W. 3d 318 (Tex. Ct. App. 2008) (same). 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 opened on a myriad of social networking sites including, e.g., Friendster, Myspace, and Facebook are estimated to number in the tens of thousands. See, e.g., http://www.shearsocialmedia.com/2011/11/njfake-facebook-page-case-may-open-up.html; Danah Boyd, *None of This is Real*, at http://www.danah.org/papers/NoneOfThisIsReal.pdf.

Deadpan e-mail satires have become a fashion among political activists. See, e.g., http://techpresident.com/blog-entry/hill-republicans-fake-email-pelosi (fundraising e-mail "designed to look as if Nancy Pelosi is the sender… And your gullible blogger … totally believed it to be an email from the Speaker"); http://tpmmuckraker.talkingpointsmemo.com/2010/02/nancy_pelosi_sends_out_fundraising_email_for_gop.php.[16]

[16] A list of scores of examples, all culled from public record sources of the existence of which

It is precisely the resulting potential to criminalize vast swaths of internet discourse—undreamt by the framers of the fraud, forgery, and criminal impersonation statues—that requires this Court either to place a Skilling-type restriction on them, or to find them void-for-vagueness and overbroad.

C. NEW YORK LAW HAS ALWAYS APPLIED STATUTES BARRING FRAUD TO CLEAR, WELL-DEFINED, TANGIBLE BENEFITS AND HARMS.

The First Department ignored the above-detailed body of well-established federal law, and held that the trial court:

> …was under no obligation to limit the definitions of 'injury' or 'defraud' – terms used in the forgery and criminal impersonation statutes—to tangible harm such as financial harm (see *People v. Kase*, 76 AD2d 532, 537-538 [1st Dept 1980], *affd* 53 NY2d 989 [1981]).

People v. Golb, 102 A.D.3d at 602.

For several reasons, however, Kase is too slender a branch on which to hang such a heavy burden. First, Kase relied entirely on the federal courts' construction of federal law to broaden "fraud" beyond "pecuniary loss." Kase, 76 A.D.2d at 537. That body of federal law has been substantially overturned, both by subsequent statutory enactment and by the McNally-Skilling line of cases.

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this Court can take judicial notice, is found at A-697 and supplemented at The Raphael Golb Trial, *More Public-Source References to Impersonations*, http://raphaelgolbtrial.files.wordpress.com/2011/11/more_public-source_references_updated.pdf.

Second, Kase involved a false statement to a public office, designed to frustrate law enforcement. But, as the Alvarez plurality noted, false statements made to government officials in official matters may be criminalized to protect important government interests; a fact, the Court emphasized, that "does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context." Alvarez, 567 U.S., 132 S. Ct. at 2540. This rejected "broader proposition" is clearly the basis of Raphael Golb's convictions.

Third, Kase involved a document fraudulently stating the purchase price of a tavern was $15,000, when in fact, an additional $60,000.00 was paid under the table. The false document was part of a fraudulent scheme to avoid payment of taxes, even if the false document itself did not cause a pecuniary loss under Penal Law § 170.35.

Last, and most important, a holding that fraud did not have to be limited to specific "pecuniary harm" cannot serve as precedent establishing there are no limits on that term when the expression of sentiments—albeit provocative, offensive, or inappropriately embarrassing—is at stake. See, Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.") (internal quotes omitted).

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.") 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.") 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).

At no point, however, has the New York State Legislature asserted any need, let alone a compelling or substantial one, to require online communicants to properly identify themselves before communicating anything that could create any type of benefit or create any type of injury. There is a bill introduced before the New York State Assembly and the Senate, (2012 NY Senate-Assembly Bill S6779, A8688), that would require all website service providers to require commentators to supply their authentic names and verifiable contact information, upon pain of civil penalties. Since Respondent asserts that the gravamen of Raphael Golb's claimed offenses was to "dupe" people into believing that the assumed writer was the actual writer, such a requirement would pose far less danger to the First Amendment than the "censorious selectivity by prosecutors" that lies at the heart of the Golb case. Alvarez, 132 S. Ct. at 2555 (Breyer, J., concurring); Reno v. ACLU, 521 U.S. 844, 872 (1997) (criminal penalties "pose[] greater First Amendment concerns" than civil regulations because "[i]n addition to the opprobrium and stigma of a criminal conviction…[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate").

That Bill, however, has never passed.

D. THE FIRST DEPARTMENT ERRED IN RELYING ON TRADEMARK LAW TO SUPPORT ITS HOLDING THAT GOLB'S CONVICTION WAS NOT BASED UPON THE CONTENT OF HIS SPEECH.

Unable to find any precedent for the trial court's extraordinary expansion of "fraud" into the realm of the intangible, the First Department relied upon trademark law to conclude:

> Defendant was not prosecuted for the content of any of the emails, but only for giving the false impression that his victims were the actual authors of the emails. The First Amendment protects the right to criticize another person, but it does not permit anyone to give an intentionally false impression that the source of the message *is* that other person.
>
> Golb, 102 A.D.3d at 603, citing, SMJ Group, Inc. v. 417 Lafayette Restaurant LLC, 439 F. Supp. 2d 281 (S.D.N.Y. 2006) (emphasis in original).

This is demonstrably untrue. If Raphael Golb had sent an email from the Larry.Schiffman@gmail account containing only the word "test," or proclaiming "I ate an orange," he would not be guilty under the First Department's analysis because the *content* of his speech could not have been intended to inflict any harm or cause any benefit. Because such content is utterly pointless or innocuous, under the First Department's view, it is constitutionally protected despite any "false impression" as to its origin. Indeed, the prosecution has consistently conceded this point, arguing that the writing only becomes criminal when its content seeks a benefit or harm.

The focus of the entire trial was, as it had to be, on the content of Raphael Golb's messages and what he hoped to gain and whom he hoped to hurt by that content. The prosecution introduced scores of emails and published them to the jury not to prove they originated with Raphael Golb (which was not in dispute) but rather, to prove the harm Raphael Golb intended and the benefits he sought. The First Department cannot reconcile its holding that the content of the emails (which sought a benefit or harm) transformed them into a crime, with its holding that the prohibition is not content based. See, e.g., Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) (a statute affecting 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).

The prosecution's trial focus on the content of Raphael Golb's communications is also demonstrated by the fact that in the course of publishing the emails to the jury—and despite the trial court's ruling that "neither good faith nor truth is a defense" to any of the charges, (A-84)—the prosecution repeatedly elicited testimony, argued, and otherwise suggested that Raphael Golb's accusations of plagiarism and other misconduct were false. The trial court freely allowed this, while systematically blocking Raphael Golb—pursuant to that ruling—from introducing any evidence that his accusations were true. Indeed, Count 2, the surviving felony conviction for identity theft, was specifically

predicated on the claim that the alleged crime's 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). The prosecution coupled its assault on the content of Raphael Golb's communications with claims that the defendant "knows how to twist language, stir up controversy. As a result, what he can do is…devious and disturbing…." (Tr. 1246, A-612a).[17]

Ironically, in SMJ, plaintiffs failed because, while their mark was used by defendants in violation of the Lanham Act with ensuing confusion as to the source of the communication, their real complaint was with the content of the message:

> Confusion may lead a potential customer to pick up a leaflet, but it is not that confusion that drives the customer away from plaintiffs' restaurant. Rather, it is the *message inside the leaflet* that might cause the reader to choose to dine elsewhere. That harm, however, results from defendants' criticism, not defendants' use of plaintiffs' marks, and therefore it cannot provide the irreparable harm necessary to support an injunction under the Lanham Act.

SMJ Group, 439 F. Supp. 2d at 294. The Lanham Act offers no guidance here; it regulates only using another's trademark in connection with offering goods and services. Names are not trademarks and denunciation of plagiarism is not

[17] Specific instances of the prosecution's efforts to highlight the alleged falsity of the accusations are referenced at page 47 of Appellant's Brief in the First Department. The defense, both at trial and before the First Department, argued that such allegations are appropriate only in a prosecution for criminal libel, where the right to present the truth is guaranteed by Article I, § 8 of the New York State Constitution.

commercial activity. And without parsing the SMJ court's application of Lanham Act prohibitions to activities of not-for-profit *corporations*, Lanham Act prohibitions apply only to commercial speech. See e.g., IMS Health Inc. v. Sorrell, 630 F.3d 263 (2d Cir. 2010) (State of Vermont cannot regulate non-commercial speech under guise of consumer protection regulations), aff'd __ U.S. __, 131 S.Ct. 2653 (2011).

Last, the First Department made an additional foray into trademark law to conclude defendant "never intended any kind of parody." Golb, 102 A.D.3d at 602, citing Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490, 494 (2d Cir. 1989). But Raphael Golb's claim at trial—namely, that he "used the methods of satire, irony, parody, and any other form of verbal rhetoric" to "confront…a form of obscurantism" and mock his adversaries (Tr. 1002)—has no bearing on the legal issue before the First Department or before this Court. This Court must decide whether the relevant statutes, as applied to Raphael Golb's speech, are so overbroad and so vague as to impermissibly intrude into the areas of protected speech without any limiting principles. Furthermore, while this court has no authority to revisit the First Department's specific finding that Golb's "gmail confessions" were not "parody" under a test *adopted from trademark law*, the legal elements of that test are hardly a guide to what constitutes protected expression under Article I, Section 8. See, e.g., O'Neill v. Oakgrove

Const., Inc., 71 N.Y.2d 521, 528 n. 3 (Ct. App. 1988) (reach of Art. 8 broader than First Amendment).

II. 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.

The First Department did not address Raphael Golb's convictions on Counts 3, 40, and 48, each charging aggravated harassment in the second degree, as to Messrs. Schiffman, Goranson, and Cargill, respectively. New York 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 uniformly have limited the range of § 240.30(1) to five categories of speech which enjoy no constitutional protection, none of which are even remotely applicable to Raphael Golb. In People v. Smith, 89 Misc.2d 789 (App. Term, 2d Dep't 1977), the Appellate Term held

carefully and correctly construed Penal Law § 240.30(1), to avoid finding it void-for-vagueness, holding that it:

> was intended to include communications which are obscene…threats which are unequivocal and specific…communications which are directed to an unwilling recipient under circumstances wherein substantial privacy interests are being invaded in an essentially intolerable manner…communications which by their very utterance tend to incite an immediate breach of the peace…and written communications intended to stimulate court process of any kind…As so construed, subdivision 1 does not, in our opinion, suffer from any constitutional infirmity.

Id. at 791-92. (internal quotes and citations omitted). Applying that holding here, while undoubtedly the thin-skinned Schiffman-Goranson-Cargill triumvirate found Raphael Golb's comments about their work "intolerable," their "privacy interests" were not invaded at all. No one has a "privacy right" to avoid criticism of their scholarship or actions relating to an academic controversy, whether made pseudonymously over the Internet or in a pamphlet. Raphael Golb uttered no threats, used no obscenity, made no reference to court processes, and threatened no immediate breach of the peace by use of "fighting words." As the prosecution candidly acknowledged in the brief below, Raphael Golb's intent was to "annoy" the subjects of his criticism. (Resp. Br. 88).

In People v. Dupont, 107 A.D.2d 247 (1st Dept. 1985), for example, the defendant self-published a magazine exclusively containing articles and cartoons accusing his former attorney of engaging in various forms of dishonesty. He distributed the magazine in public places the attorney was known to frequent. The

DuPont Court held that the aggravated harassment law "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. at 252. (emphasis added). The DuPont Court went on to elaborate on the civil-criminal distinction:

> 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 252-53 (emphases added) (internal citations omitted). The First Department 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, citing Papish v. Board of Curators, 410 U.S. 667 (1973).

The prosecution 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. The DuPont 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. See also, Vives v. City of New York, 305 F.Supp.2d 289, 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'"), rev'd on other grounds, 405 F.3d 115 (2d Cir. 2004).

Finally, in People v. Dietze, 75 N.Y.2d 47 (1989), this Court ratified the Smith analysis, reinforcing the point that speech is often "annoying" or "alarming" but without more, it cannot be criminalized:

> Speech is often… vulgar, derisive and provocative — yet it is still protected under the State and Federal Constitutional guarantees unless it is also much more than that…. Casual conversations may be 'abusive' and intended to 'annoy'; so too may light-hearted banter or the earnest expression of personal opinion or emotion. But unless speech presents a clear and present danger of some serious substantive evil, it may neither be forbidden nor penalized….

Id. at 51-52. Despite the fact that Raphael Golb may have been really mean in his emails and blogs, the First Amendment does not permit the government to

imprison a man because he explains that Robert Cargill should be held to a higher standard of truth and scholarship before being awarded a doctoral degree, or that Stephen Goranson's use of computers at his place of employment to wage an obsessive Internet campaign against Norman Golb is inappropriate, or that Lawrence Schiffman both plagiarized Norman Golb and systematically worked with the exhibitors to suppress any mention of his research.

The remarkable lack of specificity involved in the aggravated harassment charges enabled the prosecution to criminalize entire swathes of Raphael Golb's speech on the basis of the allegedly "annoying" nature of the content of his complaints and criticism. The jury, for example, could easily conclude that the content of Raphael Golb's *entire blog and email campaign* concerning Robert Cargill's misconduct was criminalized, as well as every blog and email he wrote concerning Lawrence Schiffman between August and December of 2008.

The impermissible overbreadth of criminalizing all "annoying" communications is even clearer in the context of the Internet. All of the thousands of email complaints from amateurs, ricocheting among university departments and lauded by NYU dean Ron Robin in his well-known book on academic controversies, Scandals and Scoundrels, could be criminalized. Academic culture thrives precisely on this type of "annoying" discourse and venting. This is why the American Association of University Professors (AAUP) has urged against

censoring this form of expression, suggesting "that electronic messages are protected to an even greater degree than their print-era counterparts." The AAUP's report goes on to explain:

> The doctrine of "fighting words" offers an illustration. While the Supreme Court held many years ago that a speaker could be punished for highly provocative face-to-face utterances likely to trigger a violent response… there does not seem to be any basis for treating even the most intemperate digital "flaming" in the same way, since the proximate, "in-your-face" risks simply do not exist when the combatants are seated at keyboards an unknown distance apart.

http://www.aaup.org/AAUP/pubsres/policydocs/contents/electcomm-stmt.htm.

Although Raphael Golb'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, the First Department held that the harassment statute was applicable only to "communications transmitted directly to the complainant." Dupont, 107 A.D.2d at 252. In denying Raphael Golb's pre-trial motion to dismiss, the trial court ruled that this statement was *dictum*. (A-85). However "the general rule" is 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).

These "oddball" cases share the common characteristic of involving speech that would not be constitutionally protected had it been communicated directly to the intended target of the speaker's ire. Thus, in People v. Singh, 187 Misc.2d 465, 722 N.Y.S.2d 368 (Crim. Ct., Kings County 2001), the defendant was properly criminalized when he called the Child Abuse Hot Line worker and threatened to kill judges and lawyers. The fact that the defendant communicated his specific threat of violence to a third party did not give it any protected status. And in People v. Kochanowski, 186 Misc.2d 441, 719 N.Y.S.2d 461 (App. Term, 2d Dept.), lv. den. 95 N.Y.2d 965 (2000), this Court properly criminalized a defendant who posted an Internet message that prompted others to call a woman with whom he had had a relationship for purposes of sex. Had the defendant himself placed such phone calls, he would have been invading the victim's privacy in an "essentially intolerable manner." Id. at 444. That he used others to do the same thing did not change his criminal liability.

Perhaps recognizing these principles, Respondent argued below that the aggravated harassment conviction against Schiffman, at least, should stand on the basis of the prosecution's Exhibit 16-U (A-238), a pseudonymous email sent from Raphael Golb to Schiffman. The prosecution characterizes this email as "warning Schiffman of disaster if he did not address the plagiarism allegations." (Resp. Br. 53). The email does nothing of the sort. It professes sympathy for Schiffman and

suggests that Schiffman respond to his critics with a gracious, if opaque, admission that all people say things in the heat of great polemics. (A-238). The admonitory clause states merely "I have seen these things start with a few hundred readers and boomerang all over the internet until they are picked up by mainstream news sources." (A-238). Respondent's peculiar assertion that this is some type of unequivocal and specific threat is directly at odds with this Court's holding in Dietze, and is precisely why the First Amendment removes most discourse from the power of prosecutors and places it within the purview of the marketplace of ideas.

III. GOLB WAS CONVICTED OF A CRIME BASED EXCLUSIVELY UPON HIS VIOLATING A TERMS OF SERVICE AGREEMENT WITH NYU. APPLYING § 156.05 TO CRIMINALIZE SUCH VIOLATIONS RENDERS THE STATUTE UNCONSTITUTIONALLY VAGUE.

Just as it ignored the unconstitutional harassment counts that helped poison the trial atmosphere, the First Department similarly ignored the unique and unconstitutional application of New York's computer trespass statute, Penal Law § 156.05 to the facts of this case. 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).

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, A-316-31). 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 prosecution'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 prosecution'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 prosecution, 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 independently criminalized under Penal Law § 156.05.

Unlike the vigorous development of federal law under the comparable Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000), New York law is a *tabula rasa* when defining the circumstances under which acting "in excess of authorization" is either criminal or void for vagueness. 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 answered in the negative by the U.S. District Court for the Central District of California in United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009), which remains the leading and definitive case on this issue. 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.[18] Id. at 452-53. The MySpace TOS, like the NYU Policy, prohibited a

[18] 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

broad range of conduct, including providing false information to MySpace in order to set up an account under a false identity.[19] 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.

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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 . . . 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. Mar. 17, 2010).

[19] 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.

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, 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. Drew, 259 F.R.D. at 464-65. 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 again 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. Drew, 259 F.R.D. 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. 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 F.R.D. at 467, quoting City of Chicago v. Morales, 527 U.S. 41, 64 (1999).[20]

Below, Respondent failed to either distinguish United States v. Drew, or to explain why its meticulous reasoning should not be applied to the facts here. Instead, Respondent asserted that since there was "no way that a reasonable defendant would be confused as to whether" committing a crime with NYU computers was prohibited by NYU's Policy, § 156.05 was not unconstitutionally vague as applied to him. (Resp. Br. 95).

Respondent either failed to understand Drew or intentionally missed its point. Obviously Raphael Golb knew NYU's computer policy prohibited the use of its computers to commit crimes, just as Lori Drew knew that the MySpace TOS prohibited her setting up an account under a fictitious name. What she did not

[20] Appellant 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 Appellant's argument in a single, un-illuminating sentence: "The charge of unauthorized use of a computer is proper." Appellant then raised the issue again as part of his Motion for A Trial Order of Acquittal (A-31), which was denied without comment.

know, and could not know, was that violating the TOS was a crime. Identically, Raphael Golb, even assuming that he knew he was committing "crimes" on the library computers, did not know, and could not know, that using an NYU computer to commit a crime was itself a crime separate and distinct from the crime he was allegedly committing. The only reference the Policy made to possible criminal sanctions for violating the Policy was made exclusively to Section C—allowing unauthorized third persons to gain access to NYU's computers. Raphael Golb, like Lori Drew, was on notice as to what conduct the Policy/TOS prohibited—not that such policy prohibitions carried independent criminal penalties.

CONCLUSION

For the reasons set forth above, Appellant Raphael Golb's convictions must be reversed and the charges dismissed.

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Respectfully submitted,

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