To Be Argued By: Ronald L. Kuby
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

- v -

Ind. No. 2721/09
New York County

RAPHAEL GOLB,

Defendant-Appellant.

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REPLY BRIEF OF DEFENDANT-APPELLANT RAPHAEL GOLB

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes, Constitutional Provisions & Legislative Materials

Other Authorities

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----------x

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REPLY BRIEF OF DEFENDANT-APPELLANT RAPHAEL GOLB

I. THE COURT BELOW ERRONEOUSLY PERMITTED THE PROSECUTION TO CRIMINALIZE CONSTITUTIONALLY-PROTECTED SPEECH BY LABELING IT "FRAUD"

Appellant's opening brief repeats the fundamental error common to all of the criminal impersonation and forgery counts, as well as the convictions for identity theft in the second degree in counts one and two. The trial court violated the First Amendment by criminalizing the speech Golb engaged in under an assumed name on the grounds that he intended to obtain any type of benefit or cause any type of harm. In Respondent's view, communicating under an assumed name is lawful unless, in so doing, the speaker intends to create any type of benefit or create any type of injury. (Resp. Br. at 71). But if the benefit or injury can be anything, this "element" adds nothing. Communication or expression is 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 nihilistic or pointless. The trial court's definition of the terms "benefit," "harm," and "fraud" required the jury to find Golb guilty precisely because he intended to expose wrongdoing on the part of the Scrolls monopolists, generally, and Lawrence Schiffman in particular, thereby "benefitting" Golb's view of the truth and "harming" those whom he perceived to be mendacious and engaged in misconduct. These types of benefits and harms are fully protected by the First Amendment; they are not legally cognizable in the criminal justice system.[1]

The trial court held that as long as speech made under an assumed name is denominated as fraud (defined as intending any benefit or harm), there is no First Amendment protection for such speech. Respondent does not shrink from these assertions now; he embraces them. Respondent justifies the jury instructions, stating that they all "required proof that [Golb] attempted to dupe others into acting in reliance on his deception about who was writing them," (Resp. Br. at 62), and pointedly emphasizing that the "Penal Law succinctly defines 'benefit' as *any* gain

[1] This definition of intent required the jury to find Golb guilty even of count one, the only count predicated on a tangible financial benefit, as discussed *infra* at p. 22.

or advantage to the defendant…." (Resp. Br. at 64) (emphasis in original). Respondent again asserts that because the case law has held that benefit or harm is not always limited to financial gain or loss, the benefit or harm is anything; even the joy a writer feels in demolishing an opponent in an online controversy. Respondent asserts that the ordinary dictionary definition of "injury" suffices—a definition so broad that it would make not only the acute embarrassment caused by critical satire, but the mere wounding of another's feelings a legally cognizable harm for purposes of New York's criminal statutes, including those contained in the fraud chapter. [2]

This was unsupportable before United States v. Alvarez, ___ U.S. ___, 132 S. Ct. 2537 (2012). Afterward, it is risible. The Alvarez plurality left no doubt 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

[2] As noted in Appellant's opening brief, the statute is unconstitutionally vague because of the absence of notice of its sweep and lack of limiting principle. To the extent that the statute is read as Respondent reads it, its potential to criminalize vast areas of constitutionally-protected speech renders it overbroad. On the overbreadth of "harm" caused by satire, see Katharine Malone, Note, *Parody or Identity Theft: The High-Wire Act of Digital Doppelgangers in California*, 34 Hastings Comm. & Ent. L. J. 275, 292 (Winter 2012).

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 Respondent's view of the Golb case, an allegedly "pathetic attempt to gain respect" was a legally cognizable benefit. Plainly, under Alvarez, it is not.[3] 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, after a primer on the breadth of the First Amendment's scope, 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

[3] 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."

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). Tellingly, Respondent omitted the relevant sentence with the word "material" from its quotation of this paragraph. (See Resp. Br. at 65).

The plurality noted that the few First Amendment exemptions for false speech all involve cases "discussing defamation, fraud, or some other legally cognizable harm associated with a false statement." Id. at 2539. The plurality then illustrated the types of legally cognizable harm recognized in the law. First, 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." Id. at 2540. This rejected "broader proposition" is the basis of Appellant Golb's convictions. Second, and similarly, the plurality held that perjury statutes are permissible because perjury "threatens the integrity of judgments that are the basis of the legal system." Id. at 2546. As the plurality noted, "Sworn testimony is quite distinct from lies not spoken under oath and simply intended to puff up oneself." Id. Yet, under the trial court's instructions in Golb's case, such "puffery," creating an exaggerated aura of importance around his Internet campaign, was a benefit to Golb that made his actions criminal. Last, the Alvarez Court noted that statutes that prohibit falsely claiming one is speaking on behalf of the government protect the "good repute and dignity of government …." Id. Private citizens, on the other hand, have no *criminal* remedy for assaults on their "dignity" and "good repute." Defamation law protects such "good repute," provided the good repute existed in the first place. The prosecution cannot reanimate the corpse of criminal libel by labeling it "fraud," any more than civil plaintiffs can arbitrarily avoid the strictures of the First Amendment by presenting claims sounding in libel under the color of the torts of "fraud" or "intentional infliction of emotional harm." See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52-54 (1988); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522-24 (4th Cir. 1999). The professional and personal

embarrassment that Raphael Golb caused Schiffman are not legally cognizable harms.

Furthermore, any effort to extend the meaning of fraud into an intangible, non-material realm will run up against the various United States Supreme Court decisions that Respondent continues to disregard. See, e.g., Skilling v. United States, __ U.S. __, 130 S. Ct. 2896, 2907 (2010) ("In proscribing fraudulent deprivations of 'the intangible right of honest services' … Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal."); 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); McNally v. United States, 483 U.S. 350, 360 (1987) ("Rather than construe the [mail fraud] statute in a manner that leaves its outer boundaries ambiguous . . . we read [it] as limited in scope to the protection of property rights.").

Respondent admits that even if Golb truthfully stated that Schiffman is a rank plagiarist and a fraud, his presentation of those accusations in the form of crude Gmail confessions or "not-so-subtle admissions" issued under Schiffman's

name would still, under Respondent's view, be a criminal act. (Resp. Br. at 72). The extensive list of public source references to critical or satirical impressions provided in Appellant's Appendix, (A.697-A.704), were chosen because they fit squarely within the prosecution's model of what may be criminalized: falsely claiming one is someone else and using the technique of "admissions" under that borrowed identity to generate some harm or benefit. The examples show the remarkable range of public discussion of the compelling issues of our times that can be criminalized whenever a New York County ADA decides to do so.[4] 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 Golb's prosecution, no limiting principle suggests itself and Respondent has offered none.

Parsing the Breyer concurrence does not help Respondent. Applying intermediate scrutiny to the Stolen Valor Act, Justice Breyer noted that "[f]alse factual statements can serve useful human objectives . . . and can promote a form

[4] For additional examples of the "doppelgänger" and hoax phenomenon pervading political and social discourse in blogs, emails, and tweets, see Raphael Golb, The Raphael Golb Trial, *More Public-Source References to Impersonations*, http://raphaelgolbtrial.files.wordpress.com/2011/11/more_public-source_references_updated.pdf.

of thought that ultimately helps realize the truth. . . ." [5] Alvarez, 132 S. Ct. at 2553 (Breyer, J., concurring). Justice Breyer approvingly refers to the long list of constitutionally protected lies set forth in Judge Kozinski's concurring opinion below, (Id.),—a list that includes lying "to make a point." See United States v. Alvarez, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, J., concurring in denial of rehearing en banc). According to the Breyer concurrence, such statements deserve First Amendment protection. Indeed, after Alvarez made his false assertions, numerous people were moved to engage in online comment, rebuttal, and discussion. The Alvarez plurality, and the concurrence, viewed this commentary as a laudable reminder that under the First Amendment, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society." Alvarez, 132 S. Ct. at 2550.

The totality of Golb's criminalized communications likewise generated commentary, discussion, and criticism: inspiring Dr. Cargill to engage in an

[5] Much emphasis was placed upon the false identities assumed by Appellant, but the truth of what these personae were saying was deemed to be irrelevant by the prosecution, the trial court, and Respondent. If the accusations were true, then Raphael Golb exposed an actual pattern of egregiously unethical conduct taking place at several elite educational institutions and museums. The truth of his accusations bears directly upon his credibility: his complaints would be legitimate expressions of concern; any annoyance caused by them would be the healthy sort of trouble caused by robust criticism and debate. The prosecution, despite its casual assertions to the contrary, was keenly aware at trial of the actual relevance of truth or falsity. Thus, whereas Appellant, pursuant to the trial court's ruling that "neither good faith nor truth is a defense," was not allowed to introduce any evidence that his accusations were true, the prosecution was allowed to repeatedly elicit testimony and otherwise suggest and argue that Golb's accusations were false. Specific instances of the prosecution's efforts to highlight the alleged falsity of the accusations are referenced at page 47 of Appellant's opening brief; others abound.

exhaustive online cataloguing of Golb's writings; causing New York University to engage in a lamentably brief inquiry into Lawrence Schiffman's conduct; leading one of Dr. Schiffman's teaching assistants to contact his peers with the suggestion that the plagiarism accusations should be kept a secret; and providing Duke University with the opportunity to caution librarian Stephen Goranson against using his official "Duke.edu" email address for online diatribes and disputes unrelated to his work in the stacks maintenance department of the Duke library.

Golb's accusations also instigated Dr. Schiffman himself to author an eleven-page letter that he submitted to NYU officials, in which he put forward various claims about Professor Norman Golb's character and allegedly unpopular research, defended the one-sided Scroll exhibits, explained that he himself had been falsely "portrayed" as accusing himself of plagiarism, and justified his alleged plagiarism on the grounds that Golb's ideas and arguments, in his view, lacked originality. (Defense Exhibit C at trial).[6] After this document became public, Professor Golb offered a detailed rebuttal of Schiffman's claims and a renewed and precise discussion of Schiffman's alleged academic misconduct.[7] See

[6] Respondent continues to erroneously insist that Schiffman was forced to write this response due to Golb's false confession. He was not. No such document was required or requested by NYU. Schiffman chose to write it. (A.425a.). Since the "truth" is not a "defense," Golb was not allowed to testify about the contents of Schiffman's letter.

[7] Schiffman, in his letter, repeatedly denied that he had ever been accused of plagiarism by Dr. Avi Katzman or Professor Golb. Even the prosecution recognized this as a lie, noting in its motion papers of January 19, 2010 that the accusations of plagiarism were "supposedly based

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). Inverting the First Amendment principle reiterated by Alvarez, the prosecution and the court below viewed these responses and reactions as among the "harms" Raphael Golb inflicted and the "benefits" he received. (See Resp. Br. at 46, 73-74). "Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication." Alavarez, 132 S.Ct. at 2550-51 (plurality).

Respondent tortures a quotation from the Breyer concurrence, twisting it to assert as an "example" applicable to this case that "an impersonation statute might require proof that 'someone was deceived' into acting in reliance on the perpetrators' deception." (Resp. Br. at 66-67), quoting Alvarez, 132 S. Ct. at 2554 (Breyer, J., concurring). Respondent has lifted this partial quotation from Justice Breyer's reference to laws "forbidding impersonation of a public official," (Id.), not online impersonations of non-governmental actors. Yet more important, the Breyer concurrence focuses, to the extent it would permit restrictions on speech, on proof of "tangible harm" and "actual substantial harm." Id. While falsely claiming

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upon a prior accusation… by an Israeli journalist." (See People's Affirmation, dated January 19, 2010, at 17, n. 24).

to have won the Congressional Medal of Honor results in "diluting its value to those who have earned it, to their families and to the country," this harm is insufficient to justify the ban on false statements. Id. It is unlike the harm remedied by trademark law which focuses "upon commercial and promotional activities that are likely to dilute the value of a mark." Id. A lie that simply provokes a "behavioral difference" in the listener is not a legally cognizable harm or benefit. Id. at 2556; see also Falwell, 486 U.S. at 55 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.") (internal quotes omitted).

Respondent misleads this Court by asserting that the court below "exhorted the jury" to protect Appellant's First Amendment rights. In fact, the trial court specifically instructed the jury to ignore the First Amendment, telling them "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 proven beyond a reasonable doubt." (A.631-A.632). Indeed, throughout the course of the case, Judge Berkman insisted that Raphael Golb's conduct was outside any First Amendment protection. See, e.g., A.85 (Summary Order declining to set forth rationale with respect to the First Amendment because the "gravamen of the … charges… is the intentional assumption of specific identities … with the requisite intent to obtain a 'benefit,' as

the statute broadly defines that term"); A.558 ("Notwithstanding your diligent effort to turn this into a First Amendment case, I think I've discussed that as much as I need to."); A.632 ("Now as I said, we have freedom of speech but words can be the tools by which crimes are committed, as, for very obvious example, when a robber says, Your money or your life, the First Amendment doesn't protect that."); A.695-A.696 (stating at sentencing, "[T]he criminal intent… brought you a parody over the line… you seem to believe you were carrying a banner for the First Amendment and what you were doing is a form of yelling fire in that crowded theater.").

For the trial court, then, as for Respondent, as long as Raphael Golb communicated under an assumed name and intended any benefit or harm, he was guilty. 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 pending, but not passed, 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 Golb's claimed offenses was to "dupe" people into believing that the assumed writer was

the actual writer, such a requirement would provide 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).

Last, there is a widely-recognized "Wild West" phenomenon to Internet speech, in which all communications, except those over secure sites, are subject to *caveat lector*. The prevalence of impersonation, satire, and anonymity of virtually every imaginable sort on the Internet—illustrated recently by a wave of fake Twitter declarations attributed to university presidents[8]—illustrates how far Respondent has fallen afoul of this Court's warning that, in evaluating the import of Internet communications, the unusual variety and nature of Internet expression must be taken into account. See Sandals Resorts Intl. Ltd. v Google, Inc., 86 A.D.3d 32 (1st Dept. 2011) (in adjudicating libel claim, the context of pseudonymous emails critical of a company had to be taken into account; that context included "freewheeling" Internet behavior). The importance of authenticating Internet-derived information before acting on it is the subject of commentary ranging from cartoons to college courses. Atlantic Wire writer Rebecca Greenfield has observed "thousands of fake accounts in other people's

[8] To read about the Twitter impersonations, see Steve Kolowich, *College Presidents Around USA Impersonated On Twitter*, USA Today, May 3, 2011, available at http://www.usatoday.com/news/education/2011-04-18-college-presidents-impersonated-twitter.htm (accessed on Dec. 6, 2012); Jeffrey R. Young, *When A Twittering College President Is Not Who He Seems*, The Chronicle of Higher Education, May 21, 2009, available at http://chronicle.com/article/When-a-Twittering-College-P/47269/ (accessed on Dec. 6, 2012).

names …. If an account is not verified, assume it's a fake …. When using the Internet we … accept that misrepresentations are the norm." Rebecca Greenfield, *The Ethics of Fake Twitter Accounts*, The Atlantic Wire, Feb. 1, 2012, available at http://www.theatlanticwire.com/technology/2012/02/learning-cormac-mccarthy-twitter-hoax/48147/.

As noted by the Sandals court, the fact that

> readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts … is … valid for anonymous … blogs, and it applies as well to the type of widely distributed e-mail commentary under consideration here.

Sandals Resorts Intl. Ltd., 86 A.D.3d at 44.

Commentators have defended the wild side of the Internet. They have pointed out, for example, that this type of environment fosters a "thicker skin," (New York Times, *In Defense Of Trolls (And Other Online Meanies)*, http://cityroom.blogs.nytimes.com/2010/02/08/in-defense-of-trolls-and-other-online-meanies/ [Feb. 8, 2010]), that it helps people "build a … moral backbone," (James Rhodes, The Telegraph, *In Defence Of Trolls: The Fearless Internet Sages Who Bring Us The Truth At The Expense Of Personal Hygiene*, http://blogs.telegraph.co.uk/culture/jamesrhodes/100066855/in-defence-of-trolls-the-fearless-internet-sages-who-bring-us-the-truth-at-the-expense-of-personal-hygiene/ [updated Oct. 15, 2012]), and that "all vigorous debates shade into trolling at the perimeter; it is next to impossible to excise the trolling without snuffing out

the debate." Mattathias Schwartz, New York Times, *The Trolls Among Us*, http://www.nytimes.com/2008/08/03/magazine/03trolls-t.html (Aug. 3, 2008). Others oppose radical online freedom, and advocate greater control over the Internet. But New York's criminal fraud statute is too broad an instrument for such control, even if one makes the unwarranted assumption that the New York Legislature has deemed it desirable.

II. APPELLANT'S CONVICTION ON COUNT ONE, BASED UPON THE PROSECUTION'S SHIFTING AND EVANSCENT CLAIMS THAT APPELLANT BOTH INTENDED AND CAME DANGEROUSLY CLOSE TO DEFRAUDING VARIOUS PEOPLE OUT OF PROPERTY WORTH MORE THAN $1,000, CANNOT BE SUSTAINED UNDER ANY VIEW OF THE EVIDENCE

Golb's conviction on count one illustrates the danger of attempting to elevate pseudonymous internet communications into felonies by alleging an intent to gain some ultimate financial benefit or to cause financial loss to someone; vigorous and acrimonious speech becomes punishable by State prison time as long as a prosecutor can cobble together some potential financial benefit or loss to someone, no matter how remote or speculative. At the core of its untenably attenuated chain of inferences, Respondent reveals the actual nature of these charges—*i.e.*, they sound in libel, not fraud—arguing that Golb tried to get his father invited to present his research conclusions in public, through a "smear on Schiffman's reputation." (Resp. Br. at 47). Respondent then argues that "the jury

had ample evidence from which to infer that defendant intended by his fraud to divert the benefits of Schiffman's speaking engagements to his father, and came dangerously close to succeeding . . . ." (Resp. Br. at 49). But only one speaking engagement—Schiffman's presentation to the Jewish Museum—was at issue at trial, and Respondent points to no such evidence, as no such evidence exists. All of the evidence in the record conclusively refutes this theory of conviction. While the evidence is to be viewed in the light most favorable to the prosecution, this standard cannot be used as a substitute for actual evidence.

Dr. Susan Braunstein, the curator of the Jewish Museum exhibit and the person responsible for making all decisions with respect to the program, testified clearly and unequivocally that no person ever requested or suggested that Schiffman's speech be cancelled or that he be replaced as a speaker. (A.407). Dr. Braunstein was well aware of the original plagiarism allegations against Schiffman made by Dr. Avi Katzman in 1995, and deemed these to be irrelevant to Schiffman's limited role in the Jewish Museum exhibit. (A.414-A.415). The schedule had been set, the programs printed, and no one was going to be added or subtracted. (A.410-A.411). The Jewish Museum exhibit did not focus on debating the intensely disputed origin of the Scrolls, and hence the angry combat over this matter was irrelevant to Dr. Braunstein. (A.411). No one requested that Schiffman

be cancelled, and Schiffman would not have been cancelled. Period.[9] Even if the jury wished to speculate that the complete absence of any evidence that Golb intended to have Schiffman's speech cancelled is in fact the clearest possible proof this is precisely what he intended, such intent never came close, let alone dangerously close, to succeeding.

The prosecution exclusively relies on People v. Nardazy, 11 N.Y.3d 460 (Ct. App. 2008), to support the assertion that Golb's "efforts came 'dangerously close' to success." (Resp. Br. at 49-50). Respondent wisely omits any mention of the facts of Nardazy. Jason Nardazy made a "to do" list in which he memorialized his plan to murder his girlfriend while her children watched. The list contained the precise times in which he would take each step, culminating in the murder. Id. at 463. He then purchased a shotgun, borrowed an automobile, drove to the town where his girlfriend lived, loaded the shotgun, proceeded to about 20 feet of the

[9] Preventing fundamentally opposing views of Scrolls origins from being heard was in fact repeatedly condemned by Raphael Golb in his blogs and emails, and has been the exclusive province of the Monopolists, seeking to defend their increasingly disputed and untenable sectarian theory through the time-honored, albeit repugnant, technique of censorship. See, e.g., Defense Exhibit C at trial, at 5, n13 (Schiffman's letter informing NYU officials that he was a member of a conference committee that decided not to invite Prof. Golb to participate in the 60th anniversary celebration of the Scrolls' discovery); A.537-A.538 (Robert Cargill's admission that he and another monopolist agreed to not mention Prof. Golb's name). See also 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), at 10-12 ("Schiffman … suggests that there is nothing inappropriate about keeping lectures and debates on the Scrolls under the control *of a particular group of scholars who oppose the ideas of certain other scholars*….").

home, where he stopped to ponder whether he should go through with the murder. Id. at 464-466. During this reverie, he was spotted by a neighbor, who called the police and Nardazy was arrested. Id. at 466. Nardazy argued that since his intent "wavered" he never came "dangerously near" to committing the murder. Id. at 467. The Nardazy court concluded that the plan had proceeded to the point where Nardzay had "the power to commit the offense unless interrupted," and hence, the jury was justified in convicting him of attempted murder. Id. at 467-468. Because reciting the facts of Nardazy is to distinguish them, perhaps the only commentary still warranted is the admonition in People v. Mahboubian, 74 N.Y.2d 174, 190 (Ct. App. 1989), that a determination of whether conduct comes dangerously close to achieving the object crime "depends greatly on the facts of the particular case."

A good example of conduct that *fails* to come dangerously close to achieving its object is People v. Mike, 92 N.Y.2d 996 (Ct. App. 1998), where the defendant approached two off-duty police officers and inquired whether they wished to buy drugs. After some haggling about the quantity, the defendant got into the officers' vehicle and directed them to drive to a particular location. Id. at 998. He then asked for money with which to purchase the drugs. Id. The officers refused to "front" the money and refused to accompany the defendant to make the purchase. Id. They arrested him for attempted sale of narcotics. The Court of Appeals reversed the defendant's conviction, noting that the prosecution had

adduced no evidence "that defendant had both the intent and the ability to proceed with the sale. . . . Here, the evidence was insufficient to establish that defendant had the ability to carry out the sale." Id. at 998-999.

Similarly, Respondent brushes past the absence of evidence supporting the statutory requirement that the defendant must have specifically intended to fraudulently obtain or deprive at least one named person of more than one thousand dollars (and come dangerously close to succeeding) by guessing what funds would have accrued to Professor Golb, "thus bringing defendant's potential take from this scheme to defraud against multiple victims, including Schiffman, Braunstein, and the Jewish Museum, to well over $1000." (Resp. Br. at 47).

But this calculation is as fanciful as the non-existent scheme's "dangerous" proximity to succeeding. Golb could not have intended to deprive Schiffman of a $500 consulting fee that neither he, nor Schiffman, knew about, and that was earned before Golb adopted the "I Schiffman, Plagiarist" persona. (Resp. Br. at 17). Assuming that Schiffman would have lost a $650 speaking fee that would have been given to Golb, the prosecution can only count this once. There is no evidence as to an approximate dollar value of any airfare and/or other benefits that may or may not have been offered to Golb had Schiffman been cancelled. There is only speculation.

Respondent's view of the scope of what gets included as potential fraudulent gain or loss is chillingly expansive. The evidence at trial showed that the late Daniel Friedenberg, a wealthy donor to the Jewish Museum and champion of the rationalist, non-sectarian theory (and a friend of the Golb family), requested that the Jewish Museum add Professor Golb as a speaker, and offered to pay any expenses. Dr. Braunstein declined because the schedule had been set. (A.401-A.402). Sneering at this evidence, Respondent asserts that "this argument would merely add Friedenberg to the list of victims of the fraud. . . ." (Resp. Br. at 48). In Respondent's view then, once Golb made the confession of plagiarism in the name of Schiffman, everything Golb did, however polite and respectful, to include Professor Golb in the lecture was part of his fraud. It is hard to imagine a broader and vaguer threat to the free exchange of ideas.

Rather than point to specific evidence, Respondent devolves into generalities—asserting, most notably, that "defendant's efforts were directed at jeopardizing Schiffman's career, and at buttressing his father's career at the same time. Success would have had significant financial implications." (Resp. Br. at 47). But such general "jeopardy" cannot be used as a substitute for actual dollar value, any more than it can be used as a basis to criminalize speech merely because someone may gain or lose a financial benefit somewhere down the line. Certainly Alvarez's fakery as to his valor and awards could have attendant financial benefits.

That is why both the majority and the concurrence focused on "material" or "tangible" gains and harms.

Last, despite the fact that count one's gravamen was a specific dollar amount, the instruction the trial court actually delivered suffered from the same infirmity as the other instructions regarding "fraud," *viz.*, the direction that "fraud" could be any benefit or any harm. The trial court erroneously stated:

> A felony Scheme to Defraud is committed when a person engages in a scheme constituting a systematic ongoing course of conduct with the intent to defraud more than one person *or* to obtain property from more than one person by false and fraudulent representations . . . .

(A.634) (emphasis added). And "fraud," over defense objection, was repeatedly defined as intending any benefit or any injury.

III. RESPONDENT'S NEW THEORY TO JUSTIFY APPELLANT'S CONVICTION UNDER COUNT TWO HAS NO EVIDENTIARY SUPPORT

Respondent finally specifies the "business records" that Appellant purportedly attempted to falsify and came "dangerously close" to entering at NYU—"the entry of false records at NYU reflecting the bogus confession" and "that Schiffman had confessed to plagiarism." (Resp. Br. at 47, 72). This new theory is advanced for the first time in Respondent's Brief,[10] and the trial record

[10] The prosecution's reaching to find some way to tie "fraud" to its usual financial basis was mirrored by its constantly changing the victims, beneficiaries, losses and benefits alleged as the gravamen of count one. (See Appellant's Br. at 32-33, 50, 52-54).

shows the utter absence of evidence to support it. First, no one can plausibly assert Golb could have believed the hyperbolic Gmail "I confess" missive (featuring the crude declaration, "If I had given credit to this man I would have been banned from conferences around the world") would have resulted in NYU concluding, without reasonable inquiry, that it originated from Schiffman and that thus, NYU's records would show Schiffman had confessed to plagiarism. That is why the prosecutor deemed the object to "generate an inquiry and a reaction based upon false premises. . . ." in his opening statement, (A.341-A.342), now disavowed by Respondent. (Resp. Br. at 74). Second, the evidence showed that none of the NYU authorities who received the bogus email entertained the idea that Schiffman was the author. (Appellant's Br. at 16-17). The *plagiarism accusation* indeed generated an inquiry, but not based upon the idea that Schiffman himself had confessed. Even under the assumption that the academically-sophisticated Golb ridiculously believed that the Schiffman confession would be credited as irrefutably establishing the truth of its provenance, there was no likelihood this could have happened. Nor did the New York State Legislature consider the possibility that they were criminalizing such non-material, intangible falsifications. The Alvarez case would not have been decided differently had Alvarez been criminalized under the theory that he wanted the business records of the Three

Valley District Water Board to falsely reflect that he was a Medal of Honor recipient.

IV. THE THREE AGGRAVATED HARASSMENT COUNTS MUST BE REVERSED

Wedged within a discussion of the sufficiency of the evidence, Respondent repeatedly seeks to defend the aggravated harassment convictions by asserting that Golb's "criminal intent" somehow removes the content of his extensive critiques of the works of Messrs. Schiffman, Cargill, and Goranson from First Amendment protection. (See Resp. Br. at 52-57). The "criminal intent" referenced is Golb's intent to "annoy" the subjects of his criticism. (Resp. Br. at 88).

This argument merely restates the constitutionally-odious notion that an author can be prosecuted (and, in accordance with Justice Berkman's sentence, imprisoned) for publishing critical commentary as long as he intended to annoy someone by that commentary, and knew it was likely such person would be annoyed. No matter how often Respondent repeats that Appellant was really mean in his emails and blogs when talking about the scholarship of the Schiffman-Cargill-Goranson triumvirate, the First Amendment does not permit the government to imprison a man because he explains the reasons why Robert Cargill should not be awarded a doctoral degree, or that Stephen Goranson should not be permitted to inflate his modest academic credentials by using a "Duke.edu" email

address, or that Lawrence Schiffman both plagiarized Norman Golb and systematically worked with the monopolists to silence him. These arguments have been made at length in Appellant's Brief at pages 70-78, and will not be repeated here.

Surprisingly, Respondent places heavy reliance on People v. Smith, 89 Misc.2d 789 (App. Term, 2d Dept. 1977), where the defendant called the police to inquire about a complaint he had made. After he was told the police could not help, as the complaint was civil in nature, he called back 27 times over the next 3 hours and 20 minutes, despite repeated instructions not do to so. Id. Under those circumstances, the Appellate Term properly found that this "practice of driving a person to distraction by repeatedly dialing his number" was properly criminalized. Id. Respondent argues that Appellant committed similar misconduct when he "blanketed dozens of Cargill's, Goranson's and Schiffman's colleagues and superiors with unsolicited emails that interfered intolerably with Cargill's, Goranson's and Schiffman's lives." (Resp. Br. at 90, 93 n. 25).

But the Smith court carefully and correctly concluded that Penal Law § 240.30(1):

> 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 trio found 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 over the Internet or in a pamphlet.

The disgruntled client in People v. DuPont, 107 A.D.2d 247 (1st Dept. 1985), with his self-published magazine exclusively devoted to articles and cartoons which smeared his erstwhile attorney, engaged in behavior that was both "maddening" to the attorney as well as clearly designed to "ruin his life." The DuPont court found such speech and conduct merely "annoying." Id. at 253.

Golb's audience also were not "unwilling recipients"—some members of the audience made inquiries about the substance of Golb's accusations, and in the case of Dr. Goranson, found them to be valid. Appellant has no quarrel with the Smith court limiting the reach of Penal Law § 240.30(1) to the five areas of speech that are outside First Amendment protection; this is why Appellant specifically objected to the trial court's inclusion of the word "annoy" in the court's jury charge—it did not fall within this narrow construction. (A.43-A.45, A.58). And Smith provides a good example of the extreme type of "harassment"—far beyond vexatious criticism, however maddening—that may properly be criminalized.

Respondent argues separately that the aggravated harassment conviction against Schiffman should stand on the basis of People's Exhibit 16-U, (A.238), a pseudonymous email sent from Appellant to Schiffman. The prosecution characterizes this email as "warning Schiffman of disaster if he did not address the plagiarism allegations." (Resp. Br. at 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 of error. (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 odd assertion that this is some type of unequivocal and specific threat 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.

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

Respondent fails to either distinguish United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009), or to explain why its meticulous reasoning should not be applied to the facts here. Instead, Respondent asserts that since there was "no way that a reasonable defendant would be confused as to whether" committing a crime with

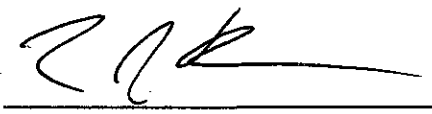
NYU computers was prohibited by NYU's Policy, Penal Law § 156.05 was not unconstitutionally vague as applied to him. (Resp. Br. at 95).

Respondent either fails to understand Drew or intentionally misses its point. Obviously 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 know, and could not know, was that violating the TOS was a crime. Identically, even assuming that Appellant knew his controversial speech could be criminalized, Appellant did not know, and could not know, that using an NYU computer to commit a crime was itself an independent and distinct crime. As indicated in Appellant's Brief, 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. (Appellant's Br. at 82-83). Golb, like Drew, was on notice as to the Policy/TOS's prohibition of "uncivil" conduct—not that such prohibition carried independent criminal penalties.

CONCLUSION

For the foregoing reasons, Appellant's convictions should be reversed.

Respectfully submitted,



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