

Gatekeeping the Net:
An Academic-Political Quarrel and its Aftermath

Power concedes nothing without a demand. – Frederick Douglass

I

Approximately eight years ago, I began what ultimately became a full-fledged Internet campaign drawing attention to what I continue to regard as a social and intellectual injustice: namely, the cooperation of science museums with various members of the academic community in systematically attempting to marginalize one of the two salient theories regarding the origins of the Dead Sea Scrolls. According to the traditional and largely faith-based theory followed in many museum exhibits, the scrolls were written, at a particular site in the desert, by a group of radical, proto-Christian sectarians, usually identified with the ancient Essenes of Palestine. A longstanding academic and quasi-academic group (often called the Dead Sea Scrolls “monopoly”) has defended that theory for more than half a century, but the basic claims made by that group have been thrown into doubt by concerned scholars who do their work independently, without the backing of powerful foundations and institutions supporting the efforts of the older, traditional school. According to the newer theory, the scrolls are not the writings of a particular religious sect, but the remains of libraries from Jerusalem hidden away by escaping inhabitants of the capital shortly before or during the Roman siege and sacking of the city in 70 A.D, and which contain works of several Jewish groups (*including* some sectarian texts). In this view, Khirbet Qumran, the ancient fortified site lying near the caves where the scrolls were found, was not inhabited by any band of sectarian monks; rather, it was a military locale, inhabited by a Jewish force, along with other individuals who had nothing to do with the scrolls’ authorship, but who likely assisted the escaping refugees in hiding their scrolls.

To the surprise of the traditionalists (or “Qumranologists,” as they are often also called: doctrinal defenders of the theory of an organic connection between Qumran and the scrolls), the essential elements of this newer theory have, in recent years, been confirmed

by an official archaeological team of the Israel Antiquities Authority, led by Yitzhak Magen and Yuval Peleg, after a decade of detailed research at Qumran. The theory was, however, originally developed considerably before the work of the Magen and Peleg excavation team. It is one of the two theories of scroll origins featured in the *Cambridge History of Judaism* (1998), in an article written by my father, Dr. Norman Golb of the University of Chicago, who published his first study on the subject in 1980.¹ The theory has received the support not only of the Magen and Peleg team, but of a series of other major European and Israeli archaeologists, including Pauline and Robert Donceel, Yizhar Hirschfeld, and Rachel Bar Nathan. Many Hebrew manuscript scholars have also supported one or another variation of it. But this support carries an undeniable price, for the theory's religious implications are quite plain: they include, above all, the lack of any historical foundation for various tenets of orthodox Judaism (such as the "tradition" that Jewish laws were received from God by Moses and passed down orally from one generation to the next until they were written down by the early rabbinical authorities in the second century A.D.), as well as popular beliefs about Christian origins (such as the idea that early Christian doctrines developed from a particularly pure and separate form of Judaism — often, in fact, identified with the Essenes in speculative writings through the centuries, long before the scrolls were discovered).

Having followed this developing debate and the hornet's nest of academic politics and recriminations that have accompanied it for almost 30 years, i.e., since Norman Golb began critiquing the traditional "sectarian" hypothesis in lectures, articles, and books, I have long been aware of efforts to exclude him and others who fundamentally reject the sectarian theory from the inner sanctum of closed "international conferences." Since 1994, I have been aware of an "official" policy of the monopoly to exclude them from museum exhibits. Through all this time, I have been familiar with untruthful statements, both online and in the media, aimed at marginalizing Norman Golb; with efforts by the creators of museum exhibits on the scrolls to fabricate a fake "consensus"; with spurious claims (including "DNA proof" of Essenes, the "latrine" of the Essenes, the "ostrakon" of

¹ See N. Golb, "The Problem of Origin and Identification of the Dead Sea Scrolls," *Proceedings of the American Philosophical Society* (1980), and the other articles listed in the bibliography of his book *Who Wrote the Dead Sea Scrolls* (Scribner, 1995). He had first proposed the theory in a lecture delivered in Jerusalem in 1970, which was reported on at length in the *Jerusalem Post*.

the Essenes, and the “lost tomb of Jesus”) disseminated in the media by defenders of the sectarian position; and with what appear to be systematic misrepresentations designed to conceal material evidence from the public and to convince people not to pay attention to the reality of the current polarization between two basic theories in scrolls studies.

I have long been aware, in short, of a pattern of academic conduct that has always impressed me as unethical. This is not a simple disagreement among scholars, but an abuse of power and of financial influence for purposes that directly violate the basic principles of free and open debate and of mutual collegiality.²

By 2006, it had become apparent to me that, frequently in connection with the biased museum exhibitions, defenders of the traditional theory were using the *Internet* as a publicity tool to disseminate propaganda in their favor. In response, I decided to myself use the Internet to challenge the claims being made and to document the abuses involved. I chose to communicate my views in blogs and emails under a variety of “handles” and pseudonyms, in the hope of avoiding any distress to my father, whose adversaries would undoubtedly seize upon the opportunity offered to them if they learned that I, my father’s son, had involved myself in this dispute. In my communications, I focused mainly on the overtly exclusionary policies in museum exhibits on the scrolls.

My Internet campaign had good and bad moments. Some of my communications, conveyed under a shield of anonymity and devolving at times into a heated online “flame war,” were undoubtedly ill-considered. On the other hand, I documented, I believe effectively, what were quite evidently serious institutional abuses. I was able to determine that individuals affiliated with Evangelical educational institutions were playing a large role, along with some others, in the creation of allegedly “scientific” museum exhibits that actually were catering to a religious audience, from which at the same time their secular, critical-minded opponents who fundamentally disagreed with the “sectarian” interpretation were being systematically excluded. Struck by what I had

² Readers who have any doubt as to the prevalence of such abuses in academia and the severe harm to scholarship and society that they cause, may wish to consult some of the many works on this topic available online or in a local library, including, e.g., *Silencing Scientists and Scholars in Other Fields* by Dr. Gordon Moran.

found, I sent pseudonymous emails to many researchers and museum personnel, pointing to the elements of what, in my view, indicated a pattern of mayhem in their institutions in regard to the treatment of the scrolls.

Not surprisingly, given the discomfoting nature of the issues I was raising and my lack of any institutional platform, my communications received few responses. One of the main individuals whose conduct I criticized, a young academic working in a Digital Humanities department but aspiring to be a Qumranologist, occasionally posted comments under an assortment of his own pseudonyms, darkly hinting at my true identity,³ and the rumor quickly spread among those whom I was criticizing that I was the “Dead Sea Scrolls blogger.” At this point, in the intention of responding ironically to a clearly looming effort to focus on my identity and thereby distract attention from the policies I had begun to expose, I decided to take the further step of splitting my online identity into dozens of shifting aliases or “sock-puppets.” A situation now began to emerge where, on the one hand, such an effort nonetheless did intensify — while, on the other hand, the major institutions and leading academic figures involved continued — from their perspective no doubt sensibly — to greet the concerns I was raising with silence. Over the ensuing months I increasingly adopted satire and parody as rhetorical tools, hoping in this way to finally draw attention to the situation. I was here mindful that “satirical arrows drawn from the quiver of caustic criticism” are often a useful way of ridiculing “what is chimerical and false.”⁴

I also chose to remind readers of specific allegations first put forward on January 29, 1993, by Dr. Avi Katzman, a prominent Israeli journalist teaching at the Hebrew University in Jerusalem. In an article on the Scrolls controversy in *Haaretz*, Dr. Katzman had accused one of the Qumranologists — an influential academic teaching in New York, often consulted by the press on questions regarding the Scrolls and himself a close collaborator with both the monopoly group and the museum exhibitors — of plagiarizing

³ This was an educated guess on his part, given that I live near the academic library where I posted many of my blogs and comments.

⁴ See Margaret Rose, *Parody: Ancient, Modern, and Post-Modern* (Cambridge University Press, 1993), 26-28 (quoting Fuzelier, D’Israeli, and other authors).

portions of my father's work.⁵ I myself, whether rightly or wrongly, had concluded from reading my father's writings as well as that professor's subsequent work that he had indeed egregiously taken over basic elements of my father's theory without attribution, in the course of trying to develop his own, idiosyncratic version of the "sectarian" theory. When I saw that he was involved in an important scrolls exhibit taking place in New York, I decided, in the context of my Internet public-information efforts, to bring this matter, as well, to public attention.

Importantly, plagiarism is a form of research fraud that not only deprives victims of the credit due to them for their original ideas but also tends to silence them by impinging on the motivation to share work with others. Against the backdrop of that damaging reality, when I set myself the task of raising the issue of this particular academic's conduct, it became difficult to separate emotion from reason: in an impulsive moment, for the sake of exposing a full-blown academic scandal within the broader scandal, I opened a "Gmail" account in an informal variant of the professor's name, then mailing out a batch of caricatures from this account, with the fictitious professorial persona "confessing" that he had plagiarized my father's work. These emails portrayed a strangely crude and authoritarian academic figure asserting that if he had credited "this man" (Norman Golb), he (the authoritarian academic) would "never have been invited to give lectures around the world," and even instructing the various recipients that they were "not to mention the name of the scholar involved," i.e., Norman Golb.

Before the "signature" line, the "confessions" linked recipients to a blog in which, writing under the pseudonym "Peter Kaufman," I set forth specific grounds for believing that the professor (who, at the time, had been serving as the chairman of a prestigious New York university's Jewish studies department for over a decade) had not only plagiarized some of my father's key ideas and arguments, but had on numerous occasions misrepresented his interpretation of scroll origins, attributing to him the implausible views of another scholar and thereby disseminating false and misleading information that

⁵ Henceforth I will refer to this individual as "the professor" and variants.

obscured the history of research in this field of studies.⁶

Remarkably, my postings and emails — along with the photocopies of various pages authored by my father and by the professor in question that I sent by regular mail to officials at his university — did produce an effect, albeit hardly one that I might have hoped for. Two former deans of the university in New York testified at my trial that they merely chatted with the object of my satire a few times on the phone, then deciding not to pursue the matter because of his reputation for honesty, and because the source of the allegations lacked “credibility.” But, towards the end of August 2008 — i.e., a few weeks after I posted my articles about his alleged plagiarism and sent out the maliciously worded “confession” linking those articles — the professor, after fifteen years of silence, drafted an 11-page “response to Internet accusations,” i.e., to the plagiarism allegations originally leveled by Avi Katzman and by my father, and which had reemerged in my own unsettling and provocative communications. The document featured, at the top of its first page, a unilateral warning that it was “confidential” and was not to be shown to anyone other than the parties to whom it was “addressed.”⁷ In the text of the “response,” the professor complained he had been “portrayed” as admitting to plagiarism, and informed his colleagues that the Internet accusations concerning the Scrolls were a “sordid attempt to encourage acceptance of [Norman] Golb’s theories.” The text, which later became legally accessible to the public, also contained many paradoxical claims and surprising allegations: for example that Dr. Katzman had never accused the professor of plagiarism; that my father was an “aggressive” man; that there was nothing new about certain fundamental concepts introduced into scrolls scholarship by my father during the 1980s — this notwithstanding the fact that the professor presented them as his own in several publications appearing between 1990 and 1994, describing them there as a “new understanding” and indeed called them “revolutionary”; and that my father had argued

⁶ My father himself, following in the wake of Dr. Katzman, had made these precise same charges in 1995 (for details, see pp. 213-215 of *Who Wrote the Dead Sea Scrolls*), but the professor had never responded, and the matter had been discreetly ignored at his university, even during the process that led, in 1998, to his appointment as department chair.

⁷ The professor also delivered this document to the prosecution in the fall of 2008, in response to an inquiry from them as to whether he had answered the plagiarism allegations. The prosecution withheld it for two years and handed it over to us on the eve of my trial.

that the scrolls came from the Jerusalem “Temple” (an unsustainable theory of a German scholar that the professor has repeatedly attributed to my father in various publications) on the second page of a “presentation” that, in fact, my father had never presented.⁸

According to the later testimony of the deans, the professor had never been required to submit this remarkable document to university officials, but did so of his own volition. In the aftermath of the events of the years 2009 and 2010 narrated below, my father published, on the University of Chicago’s Oriental Institute website, a detailed response to statements the document contains.⁹ I have no way of knowing whether there has been any discussion among members of the academic community, at the professor’s university or elsewhere, of my father’s article, but it should be observed that the article is dated November 30, 2010. Soon afterwards (on January 12, 2011), a press release issued by another, rather less prestigious (and denominationally affiliated) university indicated that the professor was leaving his chair at his original university, this notably with no previous announcement and in the middle of the academic year, and had been appointed to a mid-level administrative position at the second institution.¹⁰

II

One might have thought the matter would end there and remain, so to speak, within the austere confines of the academy. The plagiarism allegations had been “confidentially” denied by the professor and ignored by officials at his university. But things soon took an altogether unexpected course. During September, 2008, moderators of the NowPublic website, on which I had posted many of my articles, wrote to me that they had received a “legal notice” informing them that I was the “subject of a criminal investigation in New York.” I assumed this was an error or a hoax of some sort, no doubt perpetrated by those

⁸ The professor would later testify that this misattribution was a “mistake.”

⁹ Available at http://oi.uchicago.edu/pdf/schiffman_response_2010nov30.pdf. The letter itself can be viewed at <http://www.sirpeterscott.com/images/schiffmancorrespondence.pdf>.

¹⁰ See <http://blogs.yu.edu/news/2011/01/12/president-joel-appoints-vice-provost/>. The release included references to the professor’s “reputation as a scholar” and to his “collegial sensibilities” which made him the “ideal person” to “lead the effort to ‘re-imagine’ undergraduate education” at the university to which he had suddenly moved.

who had been trying to get my articles removed from the Internet for at least a year.¹¹ As it turned out, I was wrong. The professor would later testify that he had gone to see an “acquaintance” of his at the FBI, who in turn had sent him to see a “friend” of hers at the Manhattan District Attorney’s office. On March 2, 2009, some seven months after my NYU email antics and pursuant to a criminal complaint filed by the professor, Assistant District Attorney John Bandler prepared a search warrant affidavit aimed at getting a close look at my person and belongings, under the theory that I had committed “identity theft,” “criminal impersonation,” “forgery,” and “harassment” by sending out the fake “confessions.” Patrick McKenna, an investigating officer (or, as my attorney David Breitbart would later describe him, a cop) assigned to the New York County D.A.’s identity theft unit, signed this affidavit, and submitted it to New York Criminal Court Judge Carol Berkman (my fellow Harvard alumna), who granted the warrant. In a crucial paragraph of the affidavit, McKenna declared under oath: “the allegations of plagiarism are false.”

One must be clear about the significance of this declaration. In seeking the judge’s signature, McKenna must have explained to her that he, a New York City policeman, had investigated the allegations of plagiarism, and had determined that they were false. Despite lacking the requisite academic training, he was thereby implicitly asserting that he had the competence to evaluate the truth of the allegations and to make that determination. Second, by suborning, from an officer under his supervision, this statement — and, in fact, many other false and misleading declarations that the warrant also contained — concerning an academic controversy, a prosecutor in the State of New

¹¹ In testimony given at the trial that eventually ensued, the above-mentioned aspiring Qumranologist, appearing as a prosecution witness and at the time coordinator of the “digital humanities” program at a university in California, admitted that it was he who sent this “notice” to NowPublic. I have never seen the actual document that he sent. By his own admission in various lectures and writings, the aspiring academic had already previously contacted NowPublic employees with demands that they remove my writings from their site, just as he later contacted the University of Chicago with demands that an article by my father be taken down from the University website. This article was my father’s critique of the script accompanying the academic’s “Virtual Qumran” video, provided to the Oriental Institute by the San Diego Natural History Museum where the video was being shown, and where the script, or something close to it, was being read out loud to thousands of visitors in a giant auditorium. The University’s counsel replied to the complaints with a letter informing the complainant that his emails were regarded as “threats of nuisance litigation” and recommending that he respond to my father’s critique “on the merits,” rather than by attempting to stifle “academic debate.” The critique, which in the meantime had been slightly revised, may be read at http://home.uchicago.edu/~ngolb/san_diego_virtual_reality_revised.pdf.

York had taken the bold step of endorsing one side in a heated dispute over scholarly ethics, one that has been playing out over the past twenty years and more. In effect, a public official had taken on the role of private, or rather public, counsel to a professor who had been accused of research fraud.

Apparently, the offensive character of the “Gmail confessions” the NYC policeman had supplied to the judge allowed her to ignore their actual nature as ironical *accusations* intended to expose the professor’s plagiarism. She did not pause to challenge the sworn statement that “the allegations of plagiarism are false,” but forthrightly granted the warrant, and on the morning of March 5, 2009, the police raided my apartment in search of “evidence” of the allegedly criminal conduct in which I had engaged. As the New York Times reporter Jim Dwyer would later explain, I was a “guerrilla fighter” who was “caught red-handed.” I had stayed up blogging until 5:30 in the morning (as shown by the timestamp of a comment I had posted on my article “Antisemitism and the Dead Sea Scrolls,” which had become a topic of discussion on several websites); two hours later I was awakened by a large man with a gun standing over my bed, accompanied by five more armed policemen. Shaking with fear, I was arrested, taken down to Centre Street in handcuffs, and placed in a cage with a convicted felon in transit.

Only those who have seen or experienced what is commonly known as an “acute stress reaction” can understand the abnormal mental processes that I went through the morning of my arrest. The policeman told me several times that I had not yet been charged with a crime and that if I would agree to “speak with the D.A.” I would be allowed to go home. I then offered to be interrogated without an attorney. (Many have pointed out that the very fact that I, the recipient of a law degree from NYU, would agree to this is a sign I was suffering from such a reaction.) As I was led in handcuffs into the interrogation room, I resolved that I would simply attempt to figure out what *crime* I was being charged with and refuse to cooperate in any manner. As the “interview” progressed, I foolishly denied having anything to do with the emails. In questioning me, my eventual prosecutor handled the matter cunningly. He helpfully explained three different times that I had not been charged with a crime. As the interrogation wore on, I insistently began to demand that he show me the text of the specific emails he was referring to, but

he refused to do so. Had he indeed shown these emails to me, I might well have pointed out their satirical nature word by word. He may simply have been concerned that I would explain what the email “confession” meant. It might not have looked good to have me signaling on video, from the outset, all the signs of an academic lampoon in those “confessional” texts.

As soon as the interrogation was over, I was, however, shown a list of the crimes that I *had* of course in fact been charged with, and taken to the all-night lock-up or “tombs.” While I was incarcerated, then-District Attorney Robert Morgenthau — at the time over ninety years old, and who has served as chairman of the Museum of Jewish Heritage since its establishment in 1997 — announced that I had engaged in an illegal “scheme to influence a debate.”¹² The ethical rules applicable to press releases are a bit complicated for prosecutors to navigate, but can simply be set aside when necessary: thus, the release put out by Morgenthau did not include the normally required statement that I was innocent until proven guilty. As I found out the next day when I exited the “tombs,” this release was picked up by hundreds of news services around the globe. In this way, the machinery of the law was set in motion, with the aim of punishing me for having used crudely satirical methods to “influence a debate”: a debate, that is, over museum exhibits, plagiarism, the monopolization of ancient sources by a particular closed group; and many other ethical issues involved in Dead Sea Scrolls research.

* * *

Normally, the core of the charges against me (hinted at in the assertion that the “allegations of plagiarism are false”) would be treated as a claim of *libel*, which, since

¹² The text of the March 5, 2009 press release has been removed from the Manhattan District Attorney’s website; it is, however, available at: <http://raphaelgolbtrial.wordpress.com/press-releases-and-news-coverage/>. — The Museum of Jewish Heritage (located in Battery Park) has hosted many interesting exhibitions, including one on loan from the Skirball Cultural Center. The Skirball Cultural Center is funded by the well-known Skirball Foundation, which also contributes annual funds to the university where the professor taught and its Jewish studies program. Until his sudden move from his university, the professor had, for approximately a decade, chaired the Skirball Department of Jewish Studies at that institution. — Mr. Morgenthau resigned from his position as district attorney some nine months after my arrest, and was replaced by his chosen successor, Cyrus Vance, Jr. Mr. Vance would eventually issue the same type of statements as Morgenthau, to the effect that I engaged in an illegal scheme to “promote” my father’s “unpopular” research.

1965, has been dealt with in most of the United States (including New York) in the civil courts, and not as a criminal matter. Be that as it may, the constitutional principle of due process must, of course, control any legal proceeding — including one based on the criminalization of satirical verbal communications. The Manhattan District Attorney’s intricate understanding of due process was reflected on the day of my indictment — some five months after my arrest — when the New York court rules regulating the judicial assignment of criminal cases were disregarded pursuant to a request of the prosecutor. Contrary to those rules, a judge was not randomly selected to preside over the case, despite its classification as a criminal matter.¹³ Rather, upon the prosecutor’s specific request, the case was sent directly to none other than the same judge who had signed the search warrant of March 2, 2009, on the basis of an affidavit containing statements that, in their combined falsehood, may well have amounted to perjury. Visibly upset at the assignment of the case to this judge, my attorney David Breitbart then submitted a motion asking her to recuse herself from the case. At a hearing, she acknowledged that the prosecution’s request was “not appropriate,” but she declined to recuse herself. It then became clear that as a defendant, I had no recourse against the assignment of my case to the specific judge who granted the search warrants — for at least one New York appellate court has held that criminal defendants have no “right” to have Rule 200.11(c) enforced. In essence, this means that application of the Uniform Rules is discretionary, an arbitrary matter for magistrates, prosecutors, and judges to handle as they see fit among themselves.

Once it was clear that my case had been assigned to this particular judge, my attorneys warned me that the “danger” was grave and that I must, above all, cease any blogging activities and not speak with the press, for anything I said could — and would — be used against me. I was told that she was considered by many to be a defendant’s “worst nightmare.” I learned that in 1999, the Legal Aid Society had publicly petitioned against

¹³ Rule 200.11(c) of New York’s Uniform Rules for criminal courts states that “upon commencement of a criminal action... the action shall be assigned to a judge by the clerk of the court in which it is pending *pursuant to a method of random selection* authorized by the Chief Administrator” (italics mine).

her reappointment to the Criminal Court, to no avail.¹⁴

Much of this struck me as hard to believe. I had further cause for reflection several months after my indictment, when the judge — the selfsame judge who, I must emphasize, had granted the search warrant of March 2, 2009 despite the peculiar and, in large part, demonstrably false statements that it contained — ruled, in a three-page summary order, that for purposes of my trial, all that was necessary was that I had “assumed the name of another” with the intent to “obtain” any kind of a “benefit.” The prosecution, she explained, did not even need to specify what sort of “benefit” I intended to “obtain.” The truth or falsity of the allegations of plagiarism against the professor, she explained, was simply irrelevant, because, as she put it, “neither good faith nor truth is a defense to any of the crimes charged here.”

The parameters of the case were now set. The proceedings would mainly bear on whether I had committed a crime — the felony of identity theft — predicated upon the further crime of engaging in a “scheme to defraud.” Whether I had authored the fake “confessions” in a context where serious accusations of plagiarism had been discreetly hushed up over a period of 15 years, was irrelevant. Whether this was a provocative jest, in the form of a crude parody or satire, was irrelevant. The prosecution’s task would be to demonstrate that the emails “deceitfully” attributed outlandish statements to the professor and contained (deadpan) assertions that, particularly seen from his perspective, were malicious in tone. Whether they were designed to draw attention to accusations of plagiarism was irrelevant, because the truth or falsity of those accusations was irrelevant to the meaning and intent of the communications. Since good faith was irrelevant, it made no difference whether the “confessions” referred to parodied text, consisting of specific statements that the professor had made (both in his own writings and in newspaper interviews) over the years; the judge had excluded all such information as “irrelevant.” And for good cause: had my attorneys been allowed to methodically introduce those statements and explain their logical nexus with the “confessional” emails, a rational jury might have had difficulty concluding beyond a reasonable doubt that the emails were really anything more than a perhaps rather clumsily perpetrated satirical

¹⁴ For recent news coverage concerning this judge, see, e.g., <http://tinyurl.com/carol-berkman-nypost>.

hoax.

* * *

After the judge issued her summary order, I was urged to accept a plea deal. The order, I was told, was “deeply troubling,” and it would be folly to proceed with this particular judge presiding over the trial. I refused this advice, however, when it became clear that my right to express my opinion on the Internet was going to be taken away from me for three years, as part of the probation I would be forced to accept. The deal being offered would predictably hamper my ability to express myself in any context, both on- and off-line, about issues involving academic controversy, religious beliefs, freedom of speech, and other pertinent matters.

Then came the trial.¹⁵ During jury selection, the prosecution systematically eliminated persons who revealed any knowledge of the Dead Sea Scrolls controversy. They also eliminated actors and others with an artistic background. When one of my two trial attorneys asked a potential juror if she was familiar with the concept of parody, the prosecution immediately objected and the judge severely sustained the objection. My attorneys became wary of even mentioning the term “parody,” let alone seeking to raise that issue which had been implicitly dealt with under the “good faith is not a defense” rubric in the short pre-trial ruling. The judge explained to the jury pool that the case dealt not with a financial crime, but with “the other kind” of identity theft. Thus, she helped the jurors understand that there is “another kind” of identity theft, in which the gain is not financial, but any kind of amorphous “benefit,” “gain,” or “advantage.”

In other words, attempting to “influence a museum exhibit” and to “falsify the business records” of a university by addressing, to a group of professors and graduate students, a series of accusations taking the form of “Gmail confessions,” is now a crime. The judge cautiously avoided suggesting to the jurors that my case might actually be the first of its kind in an American criminal court. She of course did not mention that a California State

¹⁵ The transcripts, filled with errors that reveal that much of the testimony was incomprehensible to the court stenographers, are available at <http://raphaelgolbtrial.wordpress.com/>.

Senate committee, in a report on legislation aimed at counteracting the phenomenon of malicious email impersonations, had warned that the proposed law would raise First Amendment concerns, and had decided that the planned impersonation law should “not include an element that the defendant intended to obtain a *benefit*,” because “arguably, an impersonation that caused no harm but that created some sort of benefit or sense of satisfaction to the impersonator does not involve criminal conduct.”¹⁶ She did not mention to the jurors that the Texas legislature, in enacting a similar statute six months before the trial, also did not include the term “benefit,” and, like the California lawmakers, *did* include a provision requiring that the defendant intended readers of the email to “reasonably believe” that it was authored by the impersonated person. And, of course, she did not point out that many groups and individuals, ranging from the Yes Men to all sorts of individuals whose identity is unknown, have impersonated other people on the Internet for purposes of social criticism, and that their conduct, since what I did is a crime, is also, it would appear, criminal.

The prosecutor began his opening statement by explaining that this was a “simple case” of impersonation, harassment, and identity theft, but soon he mixed in claims that while “pretending to be someone else” I made “false accusations” and “false complaints.” He added that my emails generated an “inquiry and a reaction” at the professor’s university which were based on “false premises.” He asserted that I had proffered a “false allegation” of plagiarism that “smeared” the professor, a “lead [*sic*] scholar,” and that I had engaged in a scheme to “influence the Jewish Museum” because of a “disagreement” that was “mostly of [my] own mind.” He expressed open contempt for the intellectual controversy at stake and reduced my claimed concern for scientific standards, due credit, and free and open debate to a personal whim, explaining that

the defendant does not like the fact that many in the academic world do not agree with his father or they don’t acknowledge his father’s theory properly, or perhaps he feels they misstate his father’s theory or they don’t give his father the credit his father deserves for developing that theory.

¹⁶ See the Committee on Public Safety report on Senator Simitian’s proposed law at http://info.sen.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1411_cfa_20100412_141750_sen_comm.html.

Exaggerated personal resentment over a natural little “disagreement” among scholars was, the prosecutor explained, my “motive” for “hatching” an illegal “scheme.” In the course of examining his first witness, who was the professor, as well as several others who followed, the prosecutor echoed the undercurrent of his opening statement by casually eliciting testimony about the “false accusations.” Since the judge’s pre-trial ruling that “neither good faith nor truth is a defense” applied only to me and my inappropriate efforts to introduce an academic tenor into the proceedings, she allowed the prosecution’s recurrent allusions to my “smears” and “false accusations” to pass without comment.¹⁷ The controversy, according to her and the prosecutor, was merely irrelevant “background.” As a result, the prosecutor could elicit whatever claim he wished to make about this “background,” but when my defense team began to challenge what had been elicited, they were carefully blocked from doing so. She likewise carefully prevented my attorneys from engaging in overly specific cross-examination of witnesses and, above all, from introducing evidence pertaining to the Dead Sea Scrolls controversy and what we regarded as the truth (rather than the falsity) of the allegations of plagiarism against the professor. At one point, the judge angrily explained to the jury that the professor was “not on trial for plagiarism.”

Thus, the prosecutor and the judge worked effectively together to exclude any extraneous information from seeping into the process, blocking Mr. Breitbart (at least eight times) first from cross-examining the professor about his alleged plagiarism and the nature of his association with members of the Dead Sea Scrolls monopoly group, and then from questioning the policeman who signed the search warrant affidavit about how he came to swear under oath to the truth of various statements (e.g., “the allegations of plagiarism are false”) in that affidavit. Breitbart was immediately blocked from asking the officer if he knew what parody was.¹⁸ I myself was interdicted from testifying about the

¹⁷ The trial transcripts contain 30 references to my allegedly “false” accusations, and an additional 140 references to my “accusations” in which their alleged falsity is simply implicit. By contrast, the transcripts contain only 17 references to the fake “confessions.” See the appendix below.

¹⁸ In the jury’s absence, Berkman told my attorneys that the policeman’s apparent perjury in signing the affidavit would not have prevented her from granting the search warrant; later, when Mr. Breitbart was giving his summation, she interrupted him to observe that there was no proof that the policeman was *aware* that the affidavit contained a false statement.

professor's 11-page, confidential "response to Internet accusations," thereby allowing the jury to infer, without any inappropriate persuasive interference on my part, that he had successfully rebutted the charges. I was repeatedly guided by the judge and prosecutor to answer complicated questions about my motivations with a "yes" or a "no"; each time I stepped beyond these bounds and requested permission to explain my answer, the judge declined to grant it. (When my attorney Ronald Kuby injected a note of confusion by protesting that no such limitation was imposed on the prosecution's witnesses, she answered: "the record speaks for itself.") She explained to the jury that she was "neutral," but, in unmistakable fashion, she found ways of letting them know who the real culprit was, for instance grimacing at my attorneys and warning them that she would have them sit down if they continued to ask irrelevant questions.

In his closing summation, the prosecutor explained to the jury that the "plagiarism accusations were untruthful"; that the professor is "reputable and respectable," and would not "plagiarize someone with a different theory"; that I'm "obsessed" with "wanting [my] father's theory to get more credit"; that Avi Katzman's statements are "irrelevant"; that I'm an "angry and bitter" person who "knows how to twist language, stir up controversy," and that what I can do with this knowledge "is much more devious and disturbing than what a less educated person can do." He added many other similar statements, including: "this was not for parody, this was for maliciousness," and "there is no way to sugarcoat this, the defendant is a menace to anyone who gets in his way."

After these remarks, the judge instructed the jury that the First Amendment is not an excuse for breaking the law; as she put it, "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." She avoided, of course, discussing whether someone can say "Your money or your life" in satirical contexts including blogs or emails without committing a crime.¹⁹ She was careful to briefly mention parody and

¹⁹ E.g., one could have written, in a satirical "Gmail confession": "I say to all of you, my dear colleagues, 'your money or your life!' Because that's what our endeavors here are all about, are they not? It's all about money, not the search for the truth, isn't it?" Etc.

satire, giving definitions of these terms that highlighted their role as humor while skirting the more provocative and socially offensive range of meanings they have.²⁰ Hence, she explained, Tina Fey would still be able to continue imitating Sarah Palin if the jury found me guilty. She concluded this portion of her instructions by explaining to the jurors that “the questions for you are not the legal issues of freedom of speech ... but rather whether the elements of a charged crime have been proved beyond a reasonable doubt.” She went on to indicate that if they decided that I had “assumed the name of another with the intent to gain a benefit,” they were to find me guilty of identity theft. She explained that the word “benefit” means “any gain or advantage,” and she firmly declined to impose any specific definition of what type of “gain” or “advantage” was meant, despite my attorneys’ repeated requests for her to do so.²¹ In effect, the judge assisted the jurors in seeing that since I had committed a crime of deceit and provocation, they were to find me guilty. And so it was not particularly surprising when, after a mere five hours of deliberation over a case that involved hundreds of pages of detailed documents — most of which they did not request to see — the jury did, in fact, find me guilty. At the ensuing sentencing hearing, the judge again brushed aside my attorney’s constitutional arguments and sentenced me to six months in prison and five years’ probation, during which time my so-called free-speech rights were to be limited by a variety of conditions fitting the abuse I had, as the jury had clearly concluded, made of them.

²⁰ For parody, she gave: “the close imitation of the style of an author or a work for **comic** effect or in ridicule”; and for satire: “a **form of humor** where a writer tries to make the reader have a negative opinion of another by **laughing** at that person or making that person seem ridiculous or foolish, and the like.” Cf. the following definitions and descriptions of both terms:

A parody (also called send-up or spoof), in contemporary usage, is a work created to **mock, comment on, or** poke fun at an original work, its subject, author, style, **or some other target**, by means of humorous, **satiric or ironic imitation**.

Satire is **trenchant wit, irony, or sarcasm** used to **expose and discredit** vice or folly; it arouses laughter **or scorn** as a means of ridicule and derision, with the avowed intention of correcting human faults. Common targets of satire include individuals (‘personal satire’), types of people, social groups, institutions, and human nature.

I have taken these statements from Wikipedia, Merriam-Webster, and the *Writer’s Guide* of the University of Victoria; many other similar ones can easily be found online. Cf. below, note 29.

²¹ In *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the United States Supreme Court has explained that fraud, in the legal sense, must involve deceit, reliance thereon, and a “material benefit” derived therefrom.

The limitations included the inability to use any pseudonyms, “whether historical, fictional,” or otherwise, apart from the term “anonymous,” when blogging about the Dead Sea Scrolls controversy. Because of the trouble I had caused, the judge declined to grant me a “stay,” by which she meant that I was to be immediately incarcerated in the penitentiary located at Rikers Island. Only this punishment, she suggested, would teach me not to “imitate someone in that manner.” While I was waiting in handcuffs, however, in the “tombs” under the courthouse in Manhattan, Judge Rosalyn Richter of the First Appellate Division issued an order staying the sentence. The prosecutor had followed my attorney Ron Kuby over to Richter’s chambers, where he had opposed staying the sentence on grounds of my moral turpitude and propensity for “stirring up dispute,” demanding that bail, if granted, should be set in the amount of \$500,000. Richter set it at \$25,000. She rejected the prosecutor’s arguments and asserted that this was a case of “first impression,” meaning that the issues involved had never arisen before. This assertion was actually an implicit rebuke to the trial judge, who had explained to the jury that the case was simply an ordinary, run-of-the-mill example of the “other” kind of identity theft. Meanwhile, I had no idea what was going on, and was taken in an armored bus to Rikers Island, where I was held for 24 hours before being allowed to make a phone call to Ronald Kuby’s office. I was released after a total of 41 hours spent in the company of many other convicted felons, most of whom seemed to be serving sentences in the order of 10 to 20 days for drug-related crimes.²²

III

We now need to take a closer look at the trial, bearing in mind that the concern of paramount importance is not to justify or reiterate the content of my anonymous email complaints and “Gmail confessions,” but as far as possible to grasp the reasoning and processes engaged in by the prosecutorial authorities who have chosen to criminalize those communications. That is what I try to do in the following pages. This is no easy task, and the reader will excuse the occasional, involuntary note of sarcasm or any other

²² I have attempted to describe some of what I saw at Rikers in a text published on the Manhattan Chronicles website. See: <http://www.manhattanchronicles.com/A-Night-And-Day-at-Rikers-Island.php>.

element that may appear an ill-conceived effort at satire, or otherwise betray my own perspective. Despite its faults, this method may at least have the small advantage of helping to shed some light on, precisely, the nature of the kind of discourse that has now been criminalized in the State of New York.

For a start, a few words need to be said in response to those who have suggested that this verdict, and the costly two-year investigation and prosecution that preceded it, were disproportionate to any “harm” caused. It is true that during the trial, two deans from the professor’s university testified that they found the emails “weird,” that they did not take them seriously, and that, apart from a few conversations on the phone with the professor, they had failed to investigate the allegations of plagiarism because the source was not “credible.” The professor himself testified that he had suffered no financial harm.²³ But such admissions notwithstanding, much lies at stake in this matter. Viewed from the prosecution’s perspective, the issue raised is not one of “proportionality”; it is the government’s capacity to police, regulate, or establish order within the seething controversies and complicated disputes over a large variety of issues that, often in the form of email innuendos boomeranging around the Internet, have arguably come to play a *highly damaging* role in our nation’s academic and intellectual life. The right to level accusations at one another in the context of such controversies is of course protected by certain constitutional principles that defense attorneys like to invoke, but again arguably, *if genuine scientific and social progress* is to occur in the educational community, the

²³ Interestingly, he also insisted that he had never previously been accused of plagiarism, despite the accusations in the 1993 article by Avi Katzman and in my father’s own 1995 book. He explained that the assertion by a prominent Israeli journalist that he had “adopted portions of Golb’s theory and presented them as his own without giving him appropriate credit” did not constitute an accusation of plagiarism. Both of the deans actually contradicted the professor on this point by testifying that such an allegation would fall under the university’s definition of plagiarism. But all of this was of course a mere distraction, not only because — as the professor himself testified — “nobody reads” NYU’s faculty code of conduct, but because the possible validity of the plagiarism allegation was, pursuant to the judge’s pre-trial ruling, irrelevant to whether or not I had committed the felony of identity theft. Here are some of the professor’s exact words rendered in the official transcript of his testimony as a witness for the prosecution at my trial: questioned about Dr. Katzman, he says: “I do not see that he charged me with impropriety” (p. 103). He translates Katzman’s statement as follows: “But you also in various articles that you published did not hesitate to adopt pieces of the theory of Golb, without admitting it or acknowledging it, and without giving him appropriate credit” (p. 175), and then, in response to a question by defense counsel, he asserts that this is merely “an accusation of too few footnotes to a guy... Norman Golb is footnoted in everything I’ve written. I have written seven books on the scrolls. I have written 139 scholarly articles. No one has ever accused me of plagiarism” (p. 176); “nobody reads” the NYU faculty code (p. 144).

government *must* be able to police, regulate, and patrol the verbal means used to draw attention to such accusations.

To hold otherwise — that is, to assert that the provocative verbal act consisting of a blatantly fake “confession,” merely because of the element of irony and caricature that is obviously involved in it, does *not* constitute identity theft — is to send us down a slippery slope of *complete lack of control* over the form and content of speech, of the expression of ideas. Somewhere along that slope, *any* caricature or parody, no matter how great the element of deceit or falsity in it, becomes protected “speech,” regardless of whatever degree of personal satisfaction, influencing of a debate, or other “benefit” or “advantage” is obtained.

To be sure, in the context of prosecutions brought under the federal mail fraud and, more recently, the “honest services” mail fraud statutes, the United States Supreme Court has held such sweeping interpretations of fraud to be “void for vagueness” (i.e., too vague for a defendant to have known that he was committing a crime) unless limited to bribes and kickbacks or to some other illicit form of monetary gain. My attorneys submitted lengthy arguments to the judge pointing out these decisions and urging that the case be dismissed on First and Fourteenth Amendment grounds. Clearly aware of the aforementioned social dangers that would arise if we extended the “honest services” rulings to an academic context, she responded with the above-cited three-page ruling, in which she explained that there was no need to address our arguments.

* * *

The trial took an interesting turn when (perhaps in a moment of weakness) the judge informed the prosecution that she was having difficulty understanding the object of the “scheme to defraud” in which I was alleged to have engaged. Apparently, after explaining to the jury, at the outset, that this case involved “the other kind” of identity theft, she checked the books, and found that under New York law, a “scheme to defraud” required that the defendant defraud one or more people of the minimal sum of \$1,000.

Since we had raised this issue at length in our legal memorandums submitted a year

earlier, the prosecutors were, of course, already aware of the difficulty. And so, in order to fit the criminalization of the fake “confession” into known legal precedent involving “schemes to defraud,” they prepared a deft ad hoc argument. They had inadvertently omitted to present this argument to the grand jury or to the public before we raised the so-called “void-for-vagueness” issue; but they ran it by the judge when she announced, in the jury’s absence, that she was having difficulty understanding what I was accused of doing; and, after they obtained her approval, they proposed it to the jury at the conclusion of the trial. The core of this argument was the claim that my intent in sending the emails to the professor’s colleagues must have been to induce the Jewish Museum in New York to cancel a lecture that he was scheduled to give there, and to get my father invited instead. Hence, they argued, since the professor was paid \$650 to give his talk, and since travel and hotel expenses would ostensibly be involved for my father, I had actually intended to defraud the professor and the Jewish Museum of at least \$1,000.

There were, to be sure, a number of bothersome difficulties with this argument, beginning with the fact that in my writings dealing with the Scroll exhibitions,²⁴ I had regularly defended a policy not of excluding, but of including representatives of both of the two basic theories of scroll origins: that is, I had never suggested that anyone’s lecture should be canceled, but had instead argued that scholars who favor the non-sectarian theory should also be invited to participate. This problem could perhaps be dealt with by not drawing too much attention to the pertinent — but of course *irrelevant* — passages in my blogs and emails. Far more troubling were the words of one of the prosecution’s key witnesses, the curator of the New York Jewish Museum scrolls exhibit, who — apparently becoming somewhat confused about her assignment — testified that I never contacted her about the professor or any other matter during the course of the exhibit; that I never even met her until the exhibit was over, several months after the professor gave his talk; and that when I did meet her, at a lecture that *she* gave, we simply discussed the content of the exhibit in an utterly polite manner. (I note in passing, that the curator also testified — again irrelevantly, of course — that there are indeed “two basic theories” of

²⁴ This material (comprising all sorts of articles published on various websites under a variety of pseudonyms such as “Charles Gadda” and “Robert Dworkin”) was introduced as evidence during the trial; while the issues raised in the material were of course irrelevant, it is unfortunate that the jury lacked sufficient time to read any of it during their five hours of deliberation.

Dead Sea Scroll origins, the “sectarian” theory and that of Prof. Golb, and that the Jewish Museum scrolls exhibition was the first to break with the approach taken by various museums over recent years and to make this fact systematically known to the exhibition’s visitors.)

But this problem, too, did not turn out to be quite so serious for the prosecution as it might have seemed. For the curator also testified that the late Daniel Friedenberg, an art collector and curator emeritus at the Museum who was a friend of my family, had lunch with her before the exhibit opened; and that, even though he never suggested that the Museum should drop the professor from its roster, he urged her to invite my father to participate in the museum’s lecture series — even offering to fund the lecture and my father’s travel expenses himself. And, significantly, she also testified that she was aware, before inviting the professor to lecture, that he had been accused of plagiarism in my father’s 1995 book, *Who Wrote the Dead Sea Scrolls*. Surely in these details, as well as in the multitude of emails rapidly flitting across a screen before the twelve keenly focused jurors, there was enough to establish an *extraordinary likelihood*, even beyond a reasonable doubt, of a link between my “Gmail confessions” and a *criminal intent* to get the professor’s lecture canceled. There was also, for example, a blog of September 25, 2008, in which I announced the professor’s upcoming lecture and asked whether the Jewish Museum was aware of allegations that he had committed plagiarism.

Unfortunately, there was no document in which I said, for example, “The professor has confessed to plagiarism, and you still invite him to lecture?” or “I have attributed a fake confession to the professor; let us hope this convinces the Jewish Museum to drop his lecture”; nor was there any email in which I expressed or suggested such an intent, whether to my family or anyone else; but a lack of direct evidence is never an *absolute* bar to determining that an intent to injure, defraud, or otherwise engage in subversive or criminal activity, existed in a defendant’s mind at the time of the crime.

Thus, despite the lack of concrete, factual evidence that I had authored the sinister confessions with the specific intent of somehow getting Jewish Museum personnel to rely on them as a fact and to cancel the professor’s lecture, the prosecution was able to appeal to a different, and highly effective, sort of argument. By the sum total of my emails and

blogs, they suggested, I had “created new developments,” ones that *must have been* designed to get the lecture canceled. As a result, the jury had the opportunity to speculate as to the nature of my calculations about how readers of my communications would react, and to conclude, *beyond a reasonable doubt*, that I had calculated that word would reach the Jewish Museum that the professor had “admitted” to being a plagiarist, and that this would lead the exhibitors to cancel his lecture.

Or, as the prosecutor put it: “thus the defendant’s elaborate scheme of deception was hatched.” Interestingly, my attorney Ronald Kuby, in one of his pre-trial memorandums, had pointed out that speculation about a defendant’s calculations as to how people would react to his speech was, in 1964, held unconstitutional by the United States Supreme Court in *Ashton v. Kentucky* (holding a criminal libel statute void for vagueness); but since I was to be punished for my illicit *conduct* rather than for my *speech* — a fact Judge Berkman emphasized at my sentencing: the *giving of an impression* has nothing whatsoever to do with speech — the court did not need to address *Ashton*’s implications for the prosecution’s strategy in my trial. This distinction between words and actions was in general very useful at various moments during the trial, for it helped the jurors see that my attorneys’ entire defense strategy, to the extent it had anything to do with freedom of “speech” or “expression,” was simply irrelevant to the actual fraud laws of New York, just as the truth about the scrolls controversy, plagiarism and other such matters was irrelevant to my actual intent to gain a “benefit” or “advantage.”²⁵

A defining moment came when the prosecutor pointedly asked me if did not *resent* the fact that the professor was invited to give a lecture at the Jewish Museum. In response, I attempted — of course irrelevantly — to explain that my resentment bore not on that fact alone, but rather on the fact that he was invited to lecture at nearly every Dead Sea

²⁵ The fundamental distinction between “speech” and criminal conduct is entirely ignored in the amicus brief filed on my behalf by the National Association of Criminal Defense Lawyers, where we read that “if Schiffman and other like him feel aggrieved by online speech with academic value, they have adequate remedies in tort,” i.e., in civil rather than in criminal courts. The brief, incidentally, quite inexplicably calls my prosecution “unprecedented and inappropriate,” asserts that it is wrong to “jail the actor for causing a bruised ego or, at worst, diminished credibility as a scholar,” and even goes so far as to suggest that if my conviction stands, “virtually anyone who impersonates others on the Web for wholly innocuous reasons” can be unjustly prosecuted. See: <http://raphaelgolbtrial.files.wordpress.com/2011/11/raphael-golb-amicus-brief.pdf>.

Scrolls exhibit, while his academic opponents, including my father, whom he is alleged to have plagiarized, have been systematically excluded; all of this in violation of Chapter 9 of the Code of Ethics of the Museums Association.²⁶ The judge helped maintain at least a veneer of clarity in the proceedings by cutting me off and instructing me that if I resented the fact that the professor lectured at all the exhibits, then I also, *by definition*, resented the fact that he lectured at the Jewish Museum. Pursuant to the judge's instructions, I then dutifully answered: "Yes, I resented the fact that the professor was invited to lecture at the Jewish Museum."

Clearly, the words fit the crime: part of my punishment for sending out "Gmail confessions" that "put words into the professor's mouth," was the necessary retributive silencing of my continued, and *highly inappropriate*, expressions of indignation, or the putting of words into my own mouth to help me enunciate the precise and revealing answer, "yes." My admission of resentment over the lecture became a key part of the prosecution's closing argument that the attaching of the "Gmail smear" to the professor's "reputation" was, beyond a reasonable doubt, by any semblance of logic timed to produce the "gain," "benefit," or "advantage" of *getting his lecture canceled*. In this regard, it was again *entirely irrelevant* that I had decided to expose the plagiarism allegations approximately a year before that lecture, as one step of an ongoing campaign challenging the conduct of an entire group of scholars supposedly involved (1) in silencing opposition to their favored theory, (2) in creating a series of biased museum exhibits designed to

²⁶ According to Chapter Nine of that code, the duties incumbent on museum governors and employees include:

- "Enable ... others to keep up to date with developments in their field";
- "Make the museum a forum in which ideas can be discussed and tested";
- "Cultivate a variety of perspectives ... to reflect the diversity of the communities served by the museum";
- "Represent ideas, personalities, events and communities with sensitivity and respect";
- "Respect the views of others and their right to express those views....";
- "Strive to dispel prejudice and indicate clearly the part played by opinion or conjecture in interpretation"; and
- "Reflect differing views striking a balance over time."

See <http://www.museumsassociation.org/publications/10963>. Needless to say, each and every one of these duties has been *entirely irrelevant* to what matters to the museums in question in respect to the Dead Sea Scrolls exhibits they have hosted over the past fifteen years: nearly three million people have visited these exhibits in the United States alone.

conceal the current state of research on the Dead Sea Scrolls from the public, and (3) in rigging an accompanying series of one-sided lectures that have been taking place all over the United States during the past five years.

Another small, but potentially even more serious, difficulty had to be dealt with. The strength (otherwise decisive) of the prosecution's case would have been significantly weakened if one of the jurors — perhaps the fashionable, yet somewhat solemn-looking woman who had smiled at me when I mentioned Fernando Pessoa — had concluded that the “Gmail confessions” were satirical in nature, and that no one was intended to *seriously believe* that the professor, a distinguished department chairman in a major university, had authored them. New York's felony identity theft statute says that the crime of “identity theft” occurs if one assumes a name with the *intent to defraud*, i.e., to deceitfully obtain someone's money or some other illicit material benefit.²⁷ Accordingly, since some courts have suggested that the socially controversial “intent” involved even in the most offensive forms of parody and satire is protected by the First Amendment, the prosecution, diligently pursuing its effort to precisely define the nature of my crimes and misdemeanors, also took a further step — they set out to demonstrate that my intent in sending the emails was not satirical. This too, just like the claims about my calculations as to the reactions of recipients of the communications, offered the jury the privilege of playing an exceedingly important social role: that of conducting an investigation into my exact mental state (or, so to speak, my authorial intent) on the basis of the circumstantial evidence admitted at trial.

The jury, in other words, had the privilege of literally conducting what the French language calls a *procès d'intention* or “trial by intent.” Reflecting certain longstanding cultural differences, we have no direct equivalent for this term in English. It refers to moral reasoning that bases itself not on the harmful nature of an act that someone has performed, but on attributing to the actor a motive that is both wrongful and unverifiable, and which fundamentally changes the meaning of his conduct. The strength of this type

²⁷ As many authors have indicated, the term “identity theft” is in fact a misnomer. This crime does not involve the stealing of an identity; it involves the borrowing of an identity with the intent to steal something else: namely, money.

of accusation lies in the fact that by its very nature it *cannot be disproved* — as if, for example, I should accuse you of giving a sum of money to Oxfam simply to make yourself look better than other people. In the right circumstances, the logic involved in this type of reasoning can enable designated finders of fact to grasp an important, and often unseen, aspect of human reality: namely, that there is a certain class of accusations which all good judges and prosecutors recognize, precisely because they are not entirely implausible, to *necessarily be true*. Usefully, attempts to cast doubt on such accusations can be recast as additional acts of dishonesty: if you insist that you gave to Oxfam because you wanted to help impoverished children, then you have merely proven that you care more about what people think about you, than about the children Oxfam assists. Some critics have argued that this kind of logic was at work in various “inquisitorial” episodes including, for example, the Salem witch trials and the charges brought against Communist sympathizers by Senator Joseph McCarthy. Be that as it may, this is undoubtedly the *best method* for evaluating words and actions introduced as evidence of an intent, as long as the evaluator is not himself subjectively involved in the particular controversy at stake, and is thus not vulnerable to claims of “legitimate” intents related to that controversy — in my instance, a claimed intent to aim a “satirical” barb at a specific audience directly concerned by the controversy. After all, if what I did was so “funny,” why wasn’t anybody laughing? As the prosecutor explained, “this was not for parody, this was for maliciousness.”²⁸

* * *

It is, no doubt, the lack of humor in my communications that led the prosecution to

²⁸ Another highly recommendable prosecutorial technique is to carefully refrain from mentioning any so-called “evidence” which could mislead the jury, and hope that it will not be spotted by defense counsel. In my case, this excellent technique was used to conceal several direct statements reflecting the intent that I *claimed* to have, and which I succeeded in locating in the mounds of trial “evidence” only many months after the trial was over. For example, on August 4, 2008, I informed my brother that I had written “an article *exposing* Lawrence Schiffman’s plagiarism.” During the same period, I informed my mother of my concern that a “skewed pair of lecturers” scheduled to take place at the Jewish Museum in New York would “egregiously *misinform* the public.” The previous year, I had explained to my brother that the “idea” of my letters of complaint to UCLA faculty members was to “embarrass” two academics “by *informing people of the truth* (which many of them might not know).” These statements, never addressed by the prosecution, are found in other portions (or in more complete versions) of the email threads from which the prosecutors culled and patched together casual banter to help the jury understand that I intended not to expose any kind of professional misconduct and inform the public, but to “harm” various scholars.

realize that I had also committed a second felony identity-theft crime. For, as anyone could see, I had clearly authored the notorious “Gmail confessions” with the fraudulent intent of *falsifying the business records* of the university where the professor taught. This additional charge rested on the *obvious fact* that I must, beyond a reasonable doubt, have calculated (1) that people would *actually believe* the professor was “confessing” to plagiarism and pointing them towards an accusatory article concerning himself in a message emanating from a Gmail address he had never used; and (2) that university officials would make false entries to their important business records on account of that belief. Despite any allegedly speculative nature of this accusation, here again the proof was in the pudding of my “deceit,” and of this crime too I was necessarily found guilty.

IV

Other “crimes,” the jury determined, were also committed.

One of the academically employed individuals at whose expense I obtained a “gain,” “benefit,” or “advantage,” is a so-called stacks maintenance employee at the Duke University library, who received a Ph.D. in religion at Duke in 1991. Over the years, this Duke employee has posted many insightful comments about my father on various websites, including the suggestion that he should “retract” the claims made in his book *Who Wrote the Dead Sea Scrolls*, offer refunds to those who had purchased it, and issue an apology to them for having written it. The author of these comments has been — *clearly inappropriately* — removed from several websites; at one point, scholars at the University of Copenhagen “rebuked” him for what they imagined to be the antisemitic implications of some of his statements. Using one of the 72 pseudonyms I had invented, I sent emails to several Duke University officials asking whether it was appropriate for this employee of theirs to use Duke library computers to regularly publish such statements concerning a purportedly respected historian; the Duke provost did not inquire into the nature of my connection with the matter, but — *clearly imprudently* — thanked me for my message, and explained that he had taken steps to inform the gentleman of his responsibilities.

In addition — reader, be forewarned of a shock about to come — I opened a “Gmail” account *using a variation* of the name of the individual concerned. It is important here to be precise about the nature of my crime, so that others may avoid being prosecuted for the same missteps. Perhaps somewhat surprisingly, the evidence revealed that I never sent any messages from this account. Rather, I used it to *store the email addresses* of the academics I intended to contact. For example, I sent notices of the NowPublic article on the plagiarism allegations, directly through the NowPublic site, signing with the name “Sam Edelstein,” to many faculty members at the New York professor’s university. I saved all of these addresses in the account newly opened in a variation of the Duke employee’s name. I also used the address of this account when opening one of the blogs about the plagiarism allegations (one must always fill in an email address when opening a blog, for automatic verification purposes). This was visible to no one but myself, and during my testimony, I explained that I had used the name as a private joke. The prosecutor, however, pointed out that my actual purpose must have been to “pass the blame” to one of my victims.

The suggestion rests on at least three speculative, but *not entirely implausible*, suppositions: (1) that I felt there was something to “blame”; (2) that I expected investigators to subpoena information on my blogs dealing with the Dead Sea Scrolls, and on an email account that had never been seen by anyone apart from myself; and (3) that I calculated that they would believe that a Duke University employee had either asked someone in a New York university to open an account in his name, or had himself, forsaking the “duke.edu” address that he had always previously used, traveled from Durham, N.C. to an academic library in New York to open a “Gmail” account using a variation of his name that he had never before used.

This logic undoubtedly posed a few minor difficulties, but the prosecution had a seemingly conclusive argument. While rapidly scrolling through hundreds of emails on a large screen, they were able to deftly focus in on isolated sentences that they had helpfully selected for the jury to see. In one of those sentences, referring to the same Duke employee, I asked my brother if he wanted to “set him up” or “finish him off.” I tried to testify that these statements actually referred to an online debate we were engaged

in with the man in question, in which we were defending our father against one of the Duke librarian's many attacks. By "setting him up" and "finishing him off," I suggested, I had been referring to the different "roles" we were playing in that debate, and to certain insidious answers we had contrived to the arguments emanating from Duke, and I was asking my brother which of our two intended roles in the argument he preferred to play. But my claimed explanations were to no avail: the criminal intent that *must* have motivated these outrageous statements of mine, was, like all of the other evidence in the case — including my mother's astonishing description, in a personal email to me, of the New York professor as a "snake" — skillfully established by the prosecutors. The jury saw through my claims and found me guilty of "criminal impersonation" and "aggravated harassment" of this second victim.

Similarly, I was found guilty of "aggravated harassment" of the earlier-mentioned aspiring Qumranologist based, at the time, in California (see above, p. 4), on the grounds that I inappropriately used fictitious personae to inquire of several dozen faculty members at a university in Los Angeles whether it was appropriate to award a Ph.D. to a doctoral candidate in their department (the aspiring Qumranologist in question) who had refused to answer my father's detailed, published critique of a film script that he had authored concerning the Dead Sea Scrolls, which had come into my father's possession after it had been read aloud to some 100,000 visitors to the Scrolls exhibit that had taken place in 2007 at the San Diego Natural History Museum. This crime of mine was the focus of one of the more interesting moments of the trial.²⁹ The young academic in question had actually not only failed to *respond* to my father's critique; but, in numerous emails addressed to University of Chicago officials, he had pointed out that my father had no right even to *quote* from the film script; accordingly, he had demanded that the University remove my father's critique from the University website. Russell Herron, the University

²⁹ It was also the focus of an interesting exchange between the prosecutor and several of the judges reviewing the case at the New York Court of Appeals in Albany. "Is this aggravated harassment, or just annoying behavior?" Chief Judge Jonathan Lippman asked. "It's both, that's for sure," Assistant District Attorney Vincent Rivelles responded. "Isn't that a little overbroad?" Lippman asked. "No," Rivelles said. Judge Robert Smith then asked whether he could be prosecuted for harassment if he asked a question that he knew was going to be annoying. Rivelles said he could, if the question was in writing. Smith replied: "Really? Really? If I email somebody an annoying question, I get a year?" See the transcript of the hearing at: <http://www.nycourts.gov/ctapps/arguments/2014/Mar14/Transcripts/032514-72-Oral-Argument-Transcript.pdf>.

of Chicago legal counsel, had indicated in a response that my father's citations from his script were protected by the so-called fair use doctrine of copyright law, and that the young academic's email complaints were regarded as "threats of nuisance litigation." My attorney Ronald Kuby attempted to enter Herron's letter into evidence and to question the witness from California about it, but the judge rapidly blocked Kuby from doing this, explaining that the University of Chicago's defense of my father's purported right to engage in scholarly criticism was a mere *expression of opinion concerning Illinois law that was not relevant* to the case.³⁰ (I note, as an irrelevant aside, that during his testimony, the aspiring academic in question provided interesting details on how he had participated with the curator of the San Diego scrolls exhibit in an agreement to avoid any mention of my father's name or of his theory in the exhibit. Whether this was precisely the sort of action that my Internet "campaign" was designed to expose was, again, an irrelevant question.)

Perhaps the best of all the additional charges concerned a name I claimed to have *invented*. I used this pseudonym to send out emails (obviously not satirical, because, as the prosecutor indicated, they were not "just for fun") presenting themselves as *attacks* on my father, and to write to museum curators inappropriately inquiring about the content of a forthcoming Dead Sea Scrolls exhibit. Like many of my aliases (Joshua Reznick, Simon Adler, Jesse Friedman, Albert White, Peter Kaufman, Sam Edelstein...), it turns out that there are many people who actually have this name — a fact I should have considered when putting myself at risk of arrest, trial and incarceration with such actions. In this instance, there happens to be a rabbi in Oregon with the name in question, who apparently once almost studied with the New York professor and who has never published anything on the Dead Sea Scrolls, but who once gave a seminar on the topic in a college in California. A highly revelatory coincidence came out in his testimony: he graduated from Oberlin College four years before I did. Even more revealing: he testified that he was introduced to my father in England in 1986 and discussed the Jews of medieval Rouen (about which my father has written three books), and not the Dead

³⁰ The criminal court judge was apparently unaware that copyright, fair use, and related issues are a matter of federal law, not the law of Illinois or any other state. The University of Chicago's letter is included as an appendix in one of the briefs submitted on my behalf by Ronald Kuby to the New York Court of Appeals. See: <http://raphaelgolbtrial.files.wordpress.com/2014/01/raphael-golb-reply-brief.pdf>.

Sea Scrolls, over a coffee with him.

I had never heard of this man, not from my father and not from anyone else, yet the combined impact of all of this evidence naturally allowed the jury to convict me — *beyond a reasonable doubt* — of several counts of “criminal impersonation” on the grounds that I “assumed his name with the intent of obtaining a benefit or injuring another.” The conclusive proof in this instance seems to have been the fact that — towards the same time my mother referred to the professor as a “snake” — I asked my father in an email if he had any contacts at the Jewish Theological Seminary on New York’s Upper West Side, in the hope that such a contact might have some influence with the curators at the Jewish Museum on the other side of Central Park (my father replied that he had no such contacts). The prosecutor efficiently demonstrated that this showed I had an “unusual interest” in the Jewish Theological Seminary, and therefore that somehow I must have known of the existence of the rabbi in Oregon, who had received his JTS degree in 1981 (the year I received my degree from Oberlin). With respect to the crime I committed against this rabbi, it would be pointless to repeat what I asserted on the witness stand — namely, that when I invented this pseudonym I had a certain well-known New York poet with a similar name in mind, and not a rabbi in Oregon. This may hopefully serve as a notice to anyone inclined to invent “real-name” pseudonyms for use in online “whistle-blowing” campaigns.

Finally, many of my emails were found to constitute the crime of “harassment,” on the grounds that they were intended to “annoy” the victims of the complaints they contained. As the prosecution brilliantly demonstrated, the act of annoyance itself was to be *performed by the recipients* of the emails, who were to become my *weapons in a scheme of harassment*. This result put the case on the cutting edge of harassment law, marking a major exception to the so-called rules (undoubtedly unsound, or in need of revision) that speech cannot be criminalized merely because it is annoying, that harassment must not be confused with libel, and that emails only constitute harassment if they are sent directly to their victims.

One acquaintance of mine who actually bothered to *attend* the trial wondered (rather

unwisely I might say), whether the verdict — guilty on 31 of 32 counts — corresponded not only to the judge’s incisive instructions, but if it was perhaps also a reaction to the jurors’ sheer fatigue at the sight of hundreds of incomprehensible emails rapidly flitting past on a screen — and at sitting through so much testimony about all sorts of recriminations the truth or falsity of which was irrelevant. The simple fact, of course, was that I was guilty because I had sent all these emails. The single crime of which I was *not* convicted involved yet another Internet blogger who has been hostile to my father. I opened an account in a variation of this fellow’s name too which, exactly as with the account that “passed the blame” to the Duke librarian, I never used to send any messages, and which I also used for automatic verification purposes when opening a blog. There is no difference at all between my actual *use* of these two email accounts, yet I was convicted in the one instance and not the other. I am a bit dubious of the explanation that has been proposed to me, that the jury spared me on this one particular count because this final victim testified that he himself had been convicted of draft evasion during the Vietnam War period; I am more inclined to believe I was spared because at one point I testified that I could probably settle my differences with him over a cup of coffee because he has a sense of humor. The same, of course, is true of most of the other complainants, but since I must have intended to “gain a benefit” by dangerously assuming all these names, my combined email antics, regardless of the jury’s motivations concerning a draft evader, are a crime punishable by a lengthy prison term.

V

Approximately three and a half years after the “Dead Sea Scrolls trial,” following previous litigation in the First Appellate Division in Manhattan and many lengthy delays, the New York Court of Appeals (New York State’s highest court, located in Albany), issued a concise decision in the case which will help clarify the nature of further appellate litigation.³¹ Briefly summed:

(1) The court vacated the remaining “identity theft” felony conviction, premised on the claim that I intended to “falsify the business records” of New York University. The other

³¹ The court’s May 13, 2014 decision is available at:
<http://www.nycourts.gov/ctapps/Decisions/2014/May14/72opn14-Decision.pdf>.

identity theft conviction, premised on the claim that I intended to gain \$1,000, had been vacated by the First Appellate Division on the ground that it was based on “speculation.”

(2) In a surprising rebuke to prosecutors that will have an immediate — and *clearly nefarious* — impact on many other cases, the court held that New York Penal Law § 240.30(1) is unconstitutional, and accordingly vacated all of the “aggravated harassment” convictions predicated on the “annoying” nature of the criminalized communications. The court, however, failed to consider whether these charges had the effect, as former prosecutor Scott Greenfield put it in his discussion of the decision, of “wreaking prejudicial havoc and deflecting attention from the real issues.”³² According to various press accounts, pursuant to this ruling some 900 pending aggravated harassment prosecutions will now be dismissed around the State of New York—a result the Manhattan prosecutors certainly did not contemplate when they set out to criminalize my annoying emails.

(3) The court also vacated my conviction for “unauthorized-access-to-a-computer,” as well as various impersonation convictions that criminalized the mere opening of email accounts from which no messages were sent. According to the peculiar logic developed by the court in this portion of its decision, I was authorized to use the computers at New York University’s Bobst Library to commit my crimes, because I had an NYU alumnus library card.

(4) The court affirmed a set of criminal impersonation and forgery misdemeanor convictions, on the ground that I allegedly sought to “harm the reputations” of the complainants. However, the court’s chief judge, Jonathan Lippman, dissented from the majority opinion, arguing that the statutes invoked are “unconstitutionally broad, and substantially so,” and that “criminal libel has long since been abandoned, not least of all because of its tendency in practice to penalize and chill speech that the constitution protects....” According to the chief judge, “the use of the criminal impersonation and forgery statutes now approved amounts to an atavism at odds with the First Amendment

³² See Greenfield’s article at: <http://blog.simplejustice.us/2014/05/14/golb-decided-and-the-sockpuppet-dies>. See also the discussion by Jacob Sullum at: <http://reason.com/blog/2014/05/14/new-yorks-highest-court-upholds-the-right>.

and the free and uninhibited exchange of ideas it is meant to foster.”

(5) Finally, the court remanded the case for resentencing. Was this perhaps a tacit admission on the court’s part that there was perhaps something not quite entirely kosher about the initial sentencing hearing, at which I was allowed to speak only after Judge Berkman had declared her sentence? However that may be, since Carol Berkman has now retired from the bench, the resentencing will take place before a different judge.

Thus, five years after my arrest, a certain clarity has now been brought to the proceedings, and one key legal issue will now undoubtedly be the focus of a certiorari petition to the United States Supreme Court and, should certiorari be denied, of a habeas corpus petition to the appropriate federal court. This issue involves what is generally called “criminal libel”: does the state have the right to criminalize alleged harm to reputation? Needless to say, this issue is one that is hotly debated around the world. In England, for example, libel was decriminalized in 2009. Most American states decriminalized it during the 1960s, but it has remained a crime in some states, where the past few years have seen a resurgence in prosecutions. New York decriminalized it in 1965, and the question thus arises whether the New York Court of Appeals can reintroduce the same crime by interpreting the term “harm” in the criminal impersonation statute to include “harm to reputation.” And, if it *can* do so, the further question arises whether libel can be criminalized at all consistent with the principle that criminal laws may not be unconstitutionally vague and overbroad. Arguably, a “reputation” can only be damaged if it’s deserved, and whether it’s deserved is something reasonable people can always disagree about. Yet, in criminal trials the burden of proof is “beyond a reasonable doubt.” When “neither good faith nor truth is a defense to any of the crimes charged,” when the prosecution is allowed to repeatedly argue that the defendant made “false accusations,” but the defendant is systematically blocked from introducing any evidence that his accusations were true, then it is perhaps not entirely clear that such a burden has been met.

Whatever one’s attitude towards imposing criminal sanctions for alleged harm to reputation, that question is surely related to the issue of the assault — one with obvious

reputational consequences — against academic etiquette currently manifesting itself in so many quarters. And thus, a further question arises, as to whether my criminalized conduct could possibly correspond to the kind of Internet campaign described as a positive social phenomenon by Ron Robin in his book *Scandals and Scoundrels: Seven Cases that Rocked the Academy*. If so, not only does the outcome of my case — involving the parameters of irony and anonymity, two insidious elements of such campaigns — pose several important issues, but the hitherto non-criminalized “scandals” described by Dr. Robin deserve renewed attention in light of that outcome.

We may begin by recognizing that liberal critics of prosecutorial efforts to impose law and order have often stated that the reach of the nation’s criminal laws must be “clear” and “predictable.”³³ To commit a legally cognizable crime, they say, it does not suffice to do something that seems “unkosher” or despicable; the act has to fall within the terms of a “recognizable” criminal interdiction. People, according to this perspective, “offend” each other in the most abominable ways every day, without thereby committing felonies or other crimes. Nor — again according to this perspective — must the terms of a statute, whether it concern identity theft, forgery, or any other crime, be “stretched” too far (a favorite concept in this line of logic) at the discretion of one or another “zealous” prosecutor.³⁴ “Civil” disputes involving issues of reputation, libel, plagiarism, the dissemination of offensive claims through annoying — and hence surely illegal — emails, obnoxious parodies and the like are, according to these critics of prosecutorial ways, appropriately adjudicated in “civil” law suits, not criminal actions, since they cause no “tangible” injury or harm.

If prosecutors and criminal courts, however, *are* allowed to indict an act of so-called “satirical” impersonation because of the benefits deceitfully obtained, this could ultimately open the door to combatting other forms of intellectual dishonesty, including what is commonly known as “research fraud.” Indeed, under the logic deftly employed

³³ See, e.g., the New York Times editorial entitled “Vague Cyberbullying Law,” September 7, 2009 (p. A24), at: <http://www.nytimes.com/2009/09/08/opinion/08tue2.html>.

³⁴ See, e.g., J. Oliphant, “Sotomayor Is Remembered as a Zealous Prosecutor,” Los Angeles Times, June 9, 2009, at: <http://www.latimes.com/la-na-sotomayor-prosecutor9-2009jun09.0.1224643.story>.

against me, many academic stunts could be criminalized on the grounds that they were engaged in with the intent to harm the reputation of others. Under such a theory, if a prosecutor could convince a jury that a professor in New York intentionally plagiarized my father and used the U.S. mails or electronic wires to engage in this act, then the professor could himself be criminally prosecuted for “intellectual property theft,” and he could, under that theory, be found guilty of that crime on the ground that he engaged in plagiarism with the intent to wrongfully obtain a benefit for himself and thereby harm my father’s reputation.

Admittedly, to stretch our fraud laws to cover any such act of so-called research fraud, would be an innovation in our tradition of intellectual freedom and institutional independence. I have consulted numerous works on academic fraud, without finding a single case elicited in them that has ever been treated as a criminal matter. All such cases, ranging from the fraudulent “Piltdown man” claim, through the famous “Sokal hoax,” to the most egregious falsifications of historical and scientific data — all of which fraudulent acts have the tendency to harm the reputations of those who are caught up in the resulting scandals — have regularly been handled on the academic, institutional level, or at the most as civil disputes. It is clear that, at least until recently, our tradition has drawn a line between offenses that take place in the intellectual realm and the type of tangible — i.e., financial, bodily, or intolerably invasive — harms or threats to safety that the criminal laws are often said to be intended to punish and deter.

My conviction, efficiently handled by New York’s more-than-capable prosecutorial and judicial officials, opens the door to a reassessment of these principles. Let the message of my trial ring loud and clear: “deceitfully” deadpan satirical impersonation is a crime. Posting a blog in someone’s name containing the most preposterous and unbelievable confessions is swiftly indictable under our nation’s “criminal impersonation” laws, as long as the perpetrator can be shown to have intended to “harm a reputation.” And this is no small innovation of the law. For any inappropriately conceived act of mockery, particularly in the academic context, can virtually always be seen as expressing a desire to cause someone to lose a job or an invitation to give a lecture. And if the perpetrator takes the witness stand (as I did during my trial) and denies that he had such an intent,

and pretends that his actual intent was to lampoon, or to expose the actual alleged misconduct of the individual in question, or to refer readers to a set of accusations charged with emotional indignation, then it will not be the jury's province to decide whether what the perpetrator did constituted a legally cognizable parody; rather, the jury will limit itself (bearing in mind the pointed reminder of the judge at my trial that the First Amendment is not an excuse for breaking the law) to simply deciding whether he was motivated — beyond a reasonable doubt — by a more sinister, fraudulent intent to engage in reputational harm.

It is crucial that jurors in criminal trials *limit their focus to this type of precise determination of intent*; for they are ill equipped to go further, and to ask them to do so on the basis of quickly formed judgments would be to do violence to their own integrity, and ultimately to the integrity of the judicial process itself. For example, an alternate juror in the *People v. Raphael Golb* case explained to a reporter, in words that I have allowed myself to plagiarize above, that she was leaning against me because if these emails were parody, “why wasn’t anyone laughing?” Lacking, it would appear, a full preparation with respect to the concepts of parody, humor, and satire, she did not have the tools with which to fathom the precise nature of my intent in this respect. I never claimed that the emails were comical or intended to provoke innocent laughter — and it’s a good thing I didn’t make such a claim, because otherwise I could have been facing perjury charges as well. Both satire and humor have many registers; arguably, that does not detract from the socially constructive role that they play in many contexts.³⁵ The judge, however, was able to steer us all away from distracting discussions of such issues, just as she was able to avoid having the proceedings bog down in the quagmire of a debate over the difference between civil disputes and criminal prosecutions. The “nature of parody” was not the topic of the debate, and the jurors were spared the necessity of viewing my writings in light of the many scholarly discussions of this complex phenomenon. As indicated

³⁵ See “Satire,” in *Princeton Encyclopedia of Poetry and Poetics*, 1255-56 (“Satire... is polemical, contentiously attacking its victims.... [S]atire explores the lowest range of potential human actions within a framework... that best serves its ridiculing function... [T]here are few if any genres that the satiric mode cannot adopt with effects that range from the richly comic to the devastatingly tragic... The satirist serves as self-appointed prosecutor, judge, and jury, exposing and condemning the worst excesses of human behavior, sometimes... with the object of provoking the wicked to guilt, shame, rage, and tears....”).

above, the judge read out two well-chosen definitions that she found of the words “parody” and “satire” to the jurors. Interestingly, in view of the numerous counts of “criminal impersonation” that accompanied the identity theft charges, she forgot or otherwise failed to read out the ordinary dictionary definition of “impersonate,” which includes: “To imitate the appearance, voice, or manner of; mimic: [e.g.,] an entertainer who impersonates celebrities.”

This definition, incidentally, gives rise to a further question: Does an “entertainer,” or even any other person, who “benefits” from this type of impersonation commit the *crime* of impersonation? What now seems clear, at any rate, is that if one is not an entertainer, and “imitates the manner” of a well-known academic department chairman, with the intent of raising doubts about the chairman’s academic reputation, one thereby commits that crime. It is, in a sense, regrettable that none of these issues were explored during the trial, since the judge rejected my attorney Ronald Kuby’s impertinent First Amendment arguments without analysis.

However we regard these issues, if the verdict stands, *The People v. Raphael Golb* will have created extraordinarily remarkable legal precedent. It remedies a clear defect in our law: the perpetrator of an intolerable online annoyance will no longer be able to avoid punishment by pleading that he or she caused no “legally cognizable” harm; instead, he or she will now face the prospect of spending an appropriate period of time (whether it be months or years) in jail. Previously, to make out a civil case for defamation, alleged victims had to demonstrate that they had actually incurred monetary damages; victims of the Yes Men or other similar “activist” groups can now consult with their local district attorney instead of spending time and money on cases that would likely be rejected by the civil courts. This, perhaps, is a welcome development in our justice system, which has hitherto given so much weight to the distinction between two standards, that (criminal) of “reasonable doubt” and that (civil) of the “preponderance of the evidence,” the former harder to meet than the latter.

More importantly, the decision sends a much-needed warning to makers of mischief

everywhere. I have accumulated a file of dozens of cases³⁶ involving online “impersonation,” and what is most remarkable in it is the total lack of any criminal prosecutions. These controversies have all been handled as so-called civil disputes, with parody being judicially recognized as a constitutional defense against a charge of defamation. As far as I have been able to tell, there is but one exception to this tendency. Dr. Howard Fredrics, a well-known professor of music, opened a satirical blog in the name “Sir Peter Scott.” Sir Peter Scott is, in fact, a knighted British scholar who previously served as the vice chancellor of Kingston University — controversial information and questions pertaining to which were published on Dr. Fredrics’ blog. Initially Scott filed a complaint with the World Intellectual Property Organization, in relation to the domain name registered by Dr. Fredrics, “sirpeterscott.com.” WIPO determined that Scott held no “trademark” rights in this name, and dismissed the complaint. Then Scott took the same action as the professor in New York: he complained to the police, and a British court convicted Dr. Fredrics in absentia of “harassment.” The conviction, however, was overturned on appeal, on the British-law grounds that anti-harassment laws were not intended to protect an individual’s reputation, and that the blog contained information of “public interest” and therefore belonged to the highest category of protected speech.

By contrast, the judge at my trial understood, as we have seen, that the issue of the professor’s alleged plagiarism, far from being a question of public interest, was simply irrelevant. Indeed, she saw that the public interest of this issue was so slight that it was worth setting aside Rule 200.11(c) of the Uniform Rules so she should preside over my trial. And, since any electronic communication, whether it be sent from Beijing, Mumbai, Sofia or Aix-en-Provence, can physically pass through New York (such is the nature of the world-wide web), anyone who engages in impersonation in the “public interest” on the Internet — anywhere in the world — and thereby harms a reputation, can now be brought to justice and face prosecution for criminal impersonation in New York. Furthermore, “neither good faith nor truth” will be a defense at any such trial.

³⁶ See <http://raphaelgolbtrialtranscripts.files.wordpress.com/2011/03/public-source-references-to-critical-or-satirical-impersonations2.pdf>.

The ultimate outcome? Either a higher court will take the unusual step of entirely overturning my conviction, or certain academic gatekeepers will succeed in having me punished, and thus in silencing the campaign of criticism that I directed against a group of individuals who, as I inappropriately argued at length in my blogs and emails, have been engaged in what appears to be a pattern of unethical conduct. The duplicitous Scrolls exhibits that I criticized are likely to continue, cleverly scamming a significant portion of the American public out of millions of dollars (a sum easily reached by multiplying the number of visitors to these exhibits by the average \$20 entrance fee). And the New York educational institutions involved will continue to exercise appropriate discretion by ignoring the allegations of plagiarism directed at the professor who had me brought to justice. All of this, because I allowed my campaign to devolve into efficiently demonstrated acts of criminality and provocation, instead of abiding by the required rules of academic civility and discretion.

Will this legal episode serve some higher purpose? Only time will tell. Perhaps, as the appeals process unfolds, the appropriate conclusions will be drawn from the proceedings engaged in during this trial; and regardless of my — efficiently demonstrated — criminal scheme of fraud and harassment, I continue to hope that members of the public will weigh the considerable amount of evidence contained in my Internet pieces that, oddly enough, have been allowed to remain online: evidence regarding an ongoing campaign of smears, plagiarism, exclusion, and silencing directed against my father and other independently-minded scholars who have confirmed the results of my father's research.

Raphael Golb
r.golb@post.harvard.edu

(see appendix next page)

Appendix:

Raphael Golb Trial: Table of Testimony Elicited and Claims Made by the People about False Accusations

Terms used	# of times	Tr. page #
“ <u>false</u> accusations,” “ <u>false</u> allegations,” “ <u>false</u> complaints,” “ <u>false</u> premises”	13	25, 26, 30, 149, 157 (2), 158, 302, 461, 462, 466, 1249, 1260
“false confession <u>and</u> accusations” [suggesting that <u>both</u> the satirical confession <u>and</u> the accusations are false]	3	250 (3) ³⁷
“accusation <u>or</u> false confession” [suggesting <u>equivalency</u> between accusation and satirical confession]	2	322 (2)
“the plagiarism accusations were <u>untruthful</u> ,” or were “ <u>not true</u> ”	2	255, 1255
“decided to <u>craft</u> these plagiarism allegations”	1	1241
“ <u>terrible</u> allegation”	1	158
complainant “very <u>upset</u> ” at allegation	1	302
plagiarism charges “not <u>credible</u> ”	7	249, 250, 255, 301, 303, 304, 322
accuser “not <u>credible</u> ” because he concealed his identity rather than using his “ <u>true name</u> ”	1	322

³⁷ Parenthetical numbers indicate number of multiple occurrences on a single page.

“the accusations have no <u>credibility</u> ”	1	1229
colleagues might “wonder or think maybe it’s <u>true</u> ,” or might wonder “if there’s any <u>truth</u> at all to this... when it’s just a campaign to harass me”	3	91, 744, 1220
plagiarism charges “not <u>substantiated</u> ”	1	250
complaint about plagiarism “ <u>wrong</u> ”	1	729
“attacks” were “ <u>personal</u> ,” “crossed a <u>big line</u> ”	1	742
fake “ <u>credibility</u> ” or fake “journalistic <u>credibility</u> ”	2	716
that Dr. Golb accused professor of plagiarism “doesn’t make it <u>true</u> ”	2	646, 1229
a “ <u>negative</u> accusation,” or a “ <u>very serious</u> accusation”	2	156, 300
accusations were a “ <u>smear</u> ” or a “ <u>stain</u> ”	2	1219, 1221
defendant “ <u>falsely accused</u> ” complainant of falsely accusing him of committing a crime	1	1104
defendant made “ <u>accusations</u> ,” or “ <u>accused</u> ” others of misconduct, or disseminated a text “ <u>accusing</u> ” others, or was an “ <u>accuser</u> ” [this list does not include other uses referenced elsewhere in this table]	75	25, 64 (2), 66, 67 (2), 73, 78 (2), 90, 91, 110, 137, 139, 141, 147, 148, 154, 226 (2), 240, 242, 244, 245 (3), 247, 248 (2), 252, 253 (4), 254, 258, 260, 295, 301 (2), 318 (2), 319 (3), 320 (2), 321 (4), 323, 656, 727, 1080, 1081 (2), 1105, 1129, 1130 (2), 1219, 1221, 1228, (2), 1229 (5), 1230 (2), 1247, 1248, 1254

defendant made “ <u>allegations</u> ” of misconduct	11	89, 90, 156, 247, 321, 324 (3), 623, 1219, 1240
defendant made a “ <u>complaint</u> ” or “ <u>complaints</u> ,” or sent an email “ <u>complaining</u> ” of others’ conduct	26	112, 322 (3), 628 (4), 629 (2), 712, 714 (2), 715, 717, 718, 719, 734, 735, 736, 1219 (2), 1220 (2), 1229 (2)
the defendant “ <u>attacked</u> ” someone in his writings	11	717 (2), 718, 720 (2), 722, 727, 740, 743, 1247, 1249
total	170	(this figure breaks down into approximately 30 explicit assertions that the defendant’s accusations were false, and 140 derogatory references to his accusations, in which the claim that they were false or unjustified is merely understood or implied)
“confession,” “confessed,” “admission”	17	25 (2), 30, 64, 157, 248, 250 (3), 252, 296, 301, 322, 1218, 1239, 1249, 1260