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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,
Respondent,

-against-

No. 72

RAPHAEL GOLB,
Appellant.

20 Eagle Street
Albany, New York 12207
March 25, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 72, People v. Golb.
2 Counselor, do you want any rebuttal time?

3 MR. KUBY: I'll take three, if you would,
4 Judge, okay?

5 CHIEF JUDGE LIPPMAN: Three minutes, you
6 have it, go ahead.

7 MR. KUBY: Thank you so much. May it
8 please the court, my name is Ron Kuby. And this case
9 presents the question of whether communicating under
10 the name of another real person, an act of literary
11 impersonation becomes the crime of fraud simply
12 because the writer intends some benefit from his or
13 her writing or intends some harm, as a result of his
14 or her writing, regardless of whether that benefit -
15 - -

16 JUDGE SMITH: Can - - - can this - - - are
17 you really saying that this legal for - - - for you
18 to take - - - to send e-mails in my name confessing
19 to the assassination of President Kennedy or
20 whatever. You can do that?

21 MR. KUBY: Great news, Judge, in your name,
22 no, because you're the government. And the
23 government - - - I recognize you're a branch of the
24 government, but an important one, and the government
25 simulation of court process, official judicial

1 imprimatur is different.

2 JUDGE SMITH: Okay, well - - - so you're
3 saying - - - but - - - but when I'm not the
4 government next January, you can do it?

5 MR. KUBY: I wouldn't, but it would not be
6 criminal. Would it be rude and boorish? Yes. Would
7 you have a remedy for this - - -

8 JUDGE GRAFFEO: Well, what if - - - what if
9 somebody loses their employment because their
10 employers think that they're engaged in some activity
11 that they're not doing, because they - - - they've
12 been represented on the Internet as taking certain
13 positions or engaging in certain activities that they
14 didn't authorize.

15 MR. KUBY: I understand that. And - - -

16 JUDGE GRAFFEO: That's not - - - that's not
17 criminal?

18 MR. KUBY: Well - - -

19 JUDGE GRAFFEO: I mean, there can be some
20 serious financial and employment and personal
21 ramifications?

22 MR. KUBY: Well, yes, there could be, and -
23 - - and when you're talking about generalized
24 reputational damage, I lost my job for this discreet
25 sum of money because this person said these things

1 about me, there is a civil remedy.

2 CHIEF JUDGE LIPPMAN: Where - - - where
3 does it cross over into criminal? Where - - - where
4 would it be in this kind of situation that - - - that
5 you're dealing with? What - - - what - - - what
6 would your client have done that would have made it
7 criminal - - -

8 MR. KUBY: Oh, oh, oh.

9 CHIEF JUDGE LIPPMAN: - - - as opposed to
10 what he did now?

11 MR. KUBY: Easy. He writes, takes the
12 Lawrence Schiffman e-mail.

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. KUBY: Sends an e-mail to the - - - the
15 bursar at NYU saying, you know, because I stole
16 Norman Golb's theory and so much of my success is
17 dependent on Norman Golb, please deposit ten percent
18 of my salary into Norman Golb's checking account.

19 CHIEF JUDGE LIPPMAN: So it's got to be a
20 direct economic benefit? That's criminal.

21 MR. KUBY: Well, if - - - if there is a
22 direct economic benefit, or economic harm, it is
23 criminal.

24 CHIEF JUDGE LIPPMAN: What if - - -

25 JUDGE PIGOTT: You're saying it's a

1 larceny.

2 MR. KUBY: Right. Or in this case, it
3 would be standard as - - - as you put it, Judge
4 Smith, good old fashioned fraud.

5 CHIEF JUDGE LIPPMAN: Okay, that's one
6 criminal - - - that's one thing he could have done.
7 What else could he have done that's criminal? We
8 have a whole bunch of charges here. What else would
9 have been a criminal act in a context of what we're
10 dealing with here?

11 MR. KUBY: He - - - for example, he wants
12 his father to show up at a particular lecture and
13 doesn't want Schiffman to be at a particular lecture,
14 so he takes his Lawrence Schiffman e-mail address,
15 sends the airlines a note, saying I'm canceling my
16 reservation. You lose the value of the plane ticket.
17 Tot - - - clearly, exactly the type - - -

18 JUDGE RIVERA: And if - - - and if someone
19 disinvites him because of the barrage of e-mails?

20 MR. KUBY: I'm sorry?

21 JUDGE RIVERA: Is that - - - if someone
22 disinvites the speaker, and they lose - - -

23 MR. KUBY: Then that begins - - -

24 JUDGE RIVERA: - - - the financial benefit
25 and the reputational benefit of the invitation.

1 MR. KUBY: Well, how is that any different
2 from the type of public criticism that public folks
3 go through every single day? There - - -

4 JUDGE SMITH: Well, because you lie - - -
5 because there's a lie. Because you're - - - you're
6 deceiving people into believing that this is Mr.
7 Schiffman and it's not.

8 MR. KUBY: Well, that's right, Judge. But
9 that - - - unfortunately, we're - - -

10 JUDGE SMITH: Why - - - why - - - I mean,
11 does it make sense that you say it could be criminal
12 to cancel a guy's plane reservation - - -

13 MR. KUBY: Right.

14 JUDGE SMITH: - - - using his name, but it
15 - - - but it's not to destroy his reputation?

16 MR. KUBY: Well, again, it depends how you
17 destroy somebody's reputation. If you destroy
18 somebody's reputation by sending out this false
19 confession that is directly linked to the true
20 account of plagiarism, and people read that and say,
21 oh, my God, Lawrence Schiffman, in fact, is a
22 plagiarist, if you - - - if you tease them in by the
23 use of - - - of the Schiffman name, and then they
24 come to the conclusion that Schiffman has done these
25 terrible things, and he loses his job because he's a

1 plagiarist - - -

2 JUDGE RIVERA: But what you're saying is
3 the person admits to the plagiarism?

4 MR. KUBY: Pardon me?

5 JUDGE RIVERA: You're saying through the e-
6 mail that he's admitting to the plagiarism - - -

7 MR. KUBY: Well - - - well - - -

8 JUDGE RIVERA: - - - which is different
9 from someone - - -

10 MR. KUBY: Right.

11 JUDGE RIVERA: - - - simply claiming the
12 person is a plagiarist.

13 MR. KUBY: How is that any different from -
14 - - from Tucker Carlson sending out his e-mail under
15 the name Keith Olbermann, and sending out something
16 that actually sounds like Keith Olbermann, only a
17 little crazier than Keith actually is, and - - -

18 JUDGE RIVERA: So - - - so - - -

19 MR. KUBY: - - - and people say, wow, he's
20 really nuts. And - - -

21 JUDGE RIVERA: So apparently - - -
22 apparently to the research assistants they thought it
23 was the professor.

24 MR. KUBY: Well, one - - - yeah, that's
25 right. One student thought it was the professor and

1 came up to Professor Schiffman and in substance said,
2 don't worry, Professor Schiffman; your - - - your
3 history of plagiarism and your desire to conceal is
4 safe with me. That's - - -

5 JUDGE SMITH: But you're - - - you're - - -
6 is it - - - is it necessary to your argument that
7 Schiffman's in fact guilty of the - - - of the crime
8 that - - - that your - - - you know, your client had
9 him admit to or used his name to admit to?

10 MR. KUBY: It - - - it is not, although
11 frankly, it's - - - it's helpful, but it's not
12 necessary. Los Angeles Times - - -

13 JUDGE SMITH: But it could be - - - it
14 could be - - - he - - - he - - - he could have done
15 the - - - he could have admitted that he's, you know,
16 that he's an assassin, that he's a thief. And you -
17 - - are you saying that's because the statute doesn't
18 cover it, or because it's constitutionally protected?

19 MR. KUBY: I'm saying that the statute
20 doesn't cover it on vagueness grounds. The statute
21 doesn't cover it, because the statute has never been
22 read to cover that. And as to whether you ultimately
23 could criminalize conduct that you have not yet
24 criminalized in the State of New York, I will go in
25 the same direction as the Skilling Court. I'm not

1 going to start to define with precision when
2 intangible harm crosses the line into vagueness. All
3 I will say is that - - - that as in Skilling, if - -
4 - if your definition of harm or benefit is anything,
5 psychic joy, savage pleasure in demolishing an
6 opponent in an Internet argument, that goes way too
7 far. Now - - -

8 JUDGE SMITH: What the stat - - - what the
9 statute says is the person is guilty of "criminal
10 impersonation when he impersonates another and
11 doesn't act in such assumed character with intent to
12 obtain a benefit or to injure or defraud another."

13 MR. KUBY: That's right.

14 JUDGE SMITH: It sounds - - - sounds like
15 it describes what your guy did.

16 MR. KUBY: Well, it does. As long as you
17 want to define benefit or harm to be anything.

18 JUDGE SMITH: Well, I was actually defining
19 the word "injure". I mean, isn't - - - I mean, isn't
20 - - - isn't injuring Schiffman exactly what your guy
21 was trying to do?

22 MR. KUBY: Well, I would maintain that what
23 my guy was trying to do was expose Schiffman for the
24 mendacious plagiarist that he was. Now - - -

25 JUDGE SMITH: Okay. Okay, okay - - -

1 MR. KUBY: Now, obviously Schiffman sees it
2 differently.

3 JUDGE SMITH: Okay, but the jury did not
4 seem to agree with you.

5 MR. KUBY: Right. Well, the jury wasn't
6 given the opportunity to consider that question - - -

7 JUDGE RIVERA: And he did it by
8 impersonating him, as opposed to simply saying, he's
9 mendacious.

10 MR. KUBY: That's right.

11 JUDGE RIVERA: Right?

12 MR. KUBY: That's right. But how is this
13 any different from the impersonations that are done
14 of Cormac McCarthy to the Koch brothers, from Sarah
15 Palin to the mayor of Paris.

16 JUDGE SMITH: No, no, but wait a minute.
17 No, but - - - I mean, if - - - because nobody - - -
18 because everybody knows that Tina Fey isn't Sarah
19 Palin.

20 MR. KUBY: I'm not talking about that. The
21 New York Times was fooled enough by a tweet from
22 Sarah Palin that they published it. Governor Scott
23 Walker actually thought he was talking with David
24 Koch when the radio host impersonated him.

25 JUDGE SMITH: But why - - - why - - - why

1 should - - - why should we assume that the people who
2 - - - who pulled those little capers are not
3 punishable?

4 MR. KUBY: Well, if you're going to assume
5 that, in fact, all of these people are publishable
6 (sic), including the Republican Party, which opened
7 up eighteen websites in the names of democratic
8 candidates who they wished to attack, you're
9 attracted - - - wow, it's Nancy Pelosi. I'm a Nancy
10 Pelosi supporter. I click on and I read all kinds of
11 things I didn't know about Nancy Pelosi.

12 JUDGE SMITH: Okay, but if - - - yeah - - -
13 well, wait - - -

14 MR. KUBY: If - - - if those prosecutions
15 are going to go forward, then Mr. Rivelles should do
16 them.

17 JUDGE SMITH: Wait a minute. Wait a
18 minute. They - - - yeah, those - - -

19 MR. KUBY: Do something useful.

20 JUDGE SMITH: Yeah, there might be a
21 problem there, but - - - but you don't go to that - -
22 - the Nancy Pelosi, then you don't see Nancy Pelosi
23 confessing all her sins on that website.

24 MR. KUBY: Oh, say - - - I actually didn't
25 click on. Let's say you do. Nancy Pelosi confesses,

1 yes, I'm destroying America through Obamacare. Yes,
2 I have. I have handed over the reigns of power to a
3 Kenyan-born Muslim - - -

4 JUDGE SMITH: And - - - and - - - and - - -

5 MR. KUBY: - - - who wants to destroy
6 America. Then they get prosecuted?

7 JUDGE SMITH: And you say that I - - - I,
8 the Republican Party, am entitled to do that? That's
9 legal?

10 MR. KUBY: I'm sorry, Judge?

11 JUDGE SMITH: You say that the people who
12 put up a website like that are entitled to do it?

13 MR. KUBY: Well, you know what? Nobody,
14 nobody has prosecuted them yet, and I suspect that
15 it's not going to happen from this side of the table,
16 nor is Tucker Carlson going to get prosecuted. The
17 person - - - as with all broad sincerest power, the
18 people who get prosecuted are not the people who have
19 power who can push back. They're the nerds and the
20 dweebs.

21 JUDGE GRAFFEO: So what - - - so what - - -
22 what are you asking us to define - - -

23 MR. KUBY: The dissidents.

24 JUDGE GRAFFEO: - - - as to when the line
25 is crossed between civil or criminal liability in

1 on the harassment charge, I think. The - - - the - -
2 - I think the Chief's - - - the Chief's question
3 really is - - -

4 MR. KUBY: Yes, I think that's right.

5 JUDGE SMITH: Yeah, spend a minute on - - -
6 spend a minute on the harassment charge.

7 MR. KUBY: That's right. And if we want to
8 - - - and I do want to go to that, because Judge
9 Berkman was extremely careful to make sure she
10 imposed a jail sentence for each and every conviction
11 to make sure that, even if I won ninety percent of
12 this case, this guy was still going to do some time
13 at Rikers Island.

14 So I do want to address that, and in
15 Dupont, Smith, Bethea, Dietze, they all say, okay,
16 you can convict somebody for alarming and annoying a
17 person as long as the way you anar - - - alarm and
18 annoy them is within one of the five areas that have
19 no First Amendment protection. And - - - and what
20 the People have carved out here is they've said, this
21 is invasion of privacy in an essentially intolerable
22 way. You have no privacy right to - - -

23 JUDGE SMITH: But even - - - even if
24 they're right, isn't there a rather serious
25 overbreadth problem with the statute.

1 MR. KUBY: Completely. If it's interpreted
2 this way, which is why it is always been cabined by
3 every court to consider it.

4 JUDGE SMITH: In the time you don't have
5 left, do the - - - do the computer fraud prosecution.

6 MR. KUBY: Simply stated - - - I mean,
7 first and foremost, this is - - - this is Drew all
8 over again, except instead of a Terms of Service
9 Agreement, it's an agreement between NYU.

10 Not only would no one have a clue, that by
11 violating the computer policy, they're committing an
12 independent crime, the only subsection in - - - in
13 that policy itself that makes independent reference
14 to criminal liability is subsection C, I believe,
15 which has nothing to do with what Mr. Golb did. It
16 has everything to do with giving other people who
17 aren't authorized to be at NYU access to the
18 computer.

19 In addition, the other question, which we
20 will not address right now, unless you want to ask me
21 some questions, is the very notion that somehow
22 acting in excess of authorization means acting
23 without authorization. And so far, the consensus of
24 opinion around the country construing statutes very
25 much like this, is, no, we really don't want to go

1 there.

2 JUDGE SMITH: That's - - - that's what
3 you're not going to say, right?

4 MR. KUBY: That's what I didn't say, yeah,
5 thank you.

6 CHIEF JUDGE LIPPMAN: But we'll ask you
7 more questions.

8 MR. KUBY: Oh, good.

9 CHIEF JUDGE LIPPMAN: Let's - - - let's get
10 to your adversary.

11 MR. RIVELLESE: May it please the court,
12 I'm Vincent Rivellese for the Manhattan District
13 Attorney.

14 CHIEF JUDGE LIPPMAN: Start with the
15 aggravated harassment. What's that about? Can you -
16 - -

17 MR. RIVELLESE: Well, well - - -

18 CHIEF JUDGE LIPPMAN: Is this aggravated
19 harassment or is this just annoying behavior?

20 MR. RIVELLESE: Well, it's both, that's for
21 sure. What's the - - -

22 CHIEF JUDGE LIPPMAN: Well, but is it
23 technically a crime? Can it be in this kind of - - -

24 MR. RIVELLESE: Yes.

25 CHIEF JUDGE LIPPMAN: Isn't that a little

1 bit overbroad?

2 MR. RIVELLESE: No.

3 CHIEF JUDGE LIPPMAN: No? Go ahead. Why
4 not?

5 MR. RIVELLESE: This - - - this is the
6 closest argument obviously in the case, but the
7 aggravated harassment involves an intent to harass,
8 annoy or alarm, and it's - - - it's got an intent
9 that's required. It's also got the likelihood of
10 harassing or alarming the recipients or the victims.
11 It's also got - - -

12 JUDGE SMITH: If I - - - if I ask you a
13 question that I expect to be an annoying question,
14 and is likely to be an annoying question, am I
15 committing a misdemeanor by asking the question?

16 MR. RIVELLESE: No, because there's no
17 writing. The aggravated harassment - - -

18 JUDGE SMITH: Oh, but - - - oh, but if I
19 submitted the question in writing, it would be a
20 misdemeanor?

21 MR. RIVELLESE: Well, if - - - if you
22 conveyed to somebody. So if you e-mailed somebody or
23 you wrote a letter - - -

24 JUDGE SMITH: Really? Really?

25 MR. RIVELLESE: That's the statute - - -

1 JUDGE SMITH: If I e-mail someone an
2 annoying question, I get a year?

3 MR. RIVELLESE: Well, it has to be likely
4 to annoy, harass, or alarm - - -

5 CHIEF JUDGE LIPPMAN: So if Judge Smith put
6 what he's asking you now in writing, this is a crime?

7 MR. RIVELLESE: I'm not annoyed. I'm not
8 annoyed. So I'm fine.

9 CHIEF JUDGE LIPPMAN: Oh, okay, you're not
10 annoyed. Okay. It might have been mis - - -

11 JUDGE SMITH: Give me - - - give me time.

12 MR. RIVELLESE: The proper discussion - - -

13 JUDGE ABDUS-SALAAM: Counsel, is it that
14 subjective that the person who receives the question
15 has to feel that it's annoying?

16 MR. RIVELLESE: Well, no, it is - - - it's
17 reasonableness.

18 JUDGE ABDUS-SALAAM: It has to have an
19 objective right.

20 MR. RIVELLESE: It has to likely to harass
21 or alarm - - -

22 JUDGE PIGOTT: I read this too to mean,
23 it's almost like there's a third-party one, that - -
24 - that if I write to you, and - - - and say something
25 that harasses or annoys Judge Smith, about Judge

1 Smith, that that's aggravated harassment, even though
2 I'm writing to you and he thinks it's annoying.

3 MR. RIVELLESE: Well, if I'm the governor
4 and I could fire him, that would - - - that could be
5 the case, but what's happening here is that he's
6 targeting the people that have control over his
7 victims - - -

8 JUDGE PIGOTT: But as a third - - - you're
9 saying there can be a third-party aggravated
10 harassment.

11 MR. RIVELLESE: Yes, if still - - - there's
12 still an intended victim.

13 JUDGE PIGOTT: So if - - - well, that's I -
14 - - you get - - - you get three college kids - - -
15 you get some college kid who write - - - who e-mails
16 the girlfriend of his roommate saying, you know, he
17 really is a useless person. Is that aggravated
18 harassment with respect to the victim,
19 boyfriend/roommate?

20 MR. RIVELLESE: Yes, because it's got - - -

21 JUDGE PIGOTT: Really?

22 MR. RIVELLESE: It meets all the elements.
23 It does not require that the person that you send the
24 communication to is the same person that you intend
25 to harass, annoy and alarm. It's - - -

1 JUDGE SMITH: Wasn't - - - wasn't - - -
2 didn't the First Department hold this - - - or at
3 least say in Dupont, that this statute is
4 unconstitutional?

5 MR. RIVELLESE: Well, the First
6 Department's decision in Dupont wasn't very clear,
7 because it says in the alternative a few different
8 things. One thing it said was that the statute did -
9 - - wasn't even violated at all by the conduct.
10 Another thing it said was that it was
11 unconstitutional.

12 JUDGE SMITH: So what's - - - what's
13 unclear about that? It said two things in the
14 alternative. It sounds clear to me. And how - - -
15 how - - - my question is how can they then affirm a
16 conviction under the same statute, without even
17 citing Dupont?

18 MR. RIVELLESE: Well, Dupont is - - - if
19 you read Dupont closely, it's rather hard to
20 understand because it says things in the alternative
21 that don't seem consistent with each other, by saying
22 it's not a violation of the statute, and at the same
23 the statute unconstitutionally violated the
24 defendant's rights. It can't really be both at the
25 same time. But in Dupont there was no - - -

1 JUDGE SMITH: Isn't - - - isn't it a little
2 odd to in - - - if you said, whether oddly or wrongly
3 or not, if you said a statute is unconstitutional,
4 isn't it kind of funny to enforce it in the next case
5 without mentioning the precedent?

6 MR. RIVELLESE: Well, well, in Dupont, it
7 was a little different, because in Dupont the
8 communication wasn't made from one person to another.
9 It was just a publication. So - - - so the defendant
10 in Dupont just published his comments that - - -
11 granted they were about a particular person - - - but
12 he wasn't conveying his writing to a person, saying
13 here, I'm saying this about so-and-so, or giving it
14 to the person himself. He was just publishing it.

15 JUDGE SMITH: But why is - - - why is - - -
16 why is Dietze - - - what it is - - - forget about
17 Dupont - - - why doesn't Dietze knock out this
18 statute? How does Dietze - - - how is the statute in
19 Dietze distinguishable from - - - from this one?

20 MR. RIVELLESE: Could Your Honor remind me
21 - - - is that the speaking - - - calling the names
22 against the people?

23 JUDGE SMITH: Well, that's the case, but
24 they - - -

25 MR. RIVELLESE: Right.

1 JUDGE SMITH: - - - but they - - - but I
2 think we - - - I thought - - - I thought we held that
3 statute unconstitutional, not just - - -

4 MR. RIVELLESE: But that's - - - that's the
5 speaking of the bad words and calling names - - -

6 JUDGE SMITH: Yes, yes.

7 MR. RIVELLESE: - - - it's a different - -
8 - it's a different subdivision of the harassment.

9 JUDGE SMITH: Yes, yes, but it seems to me
10 that that subdivision is narrower than this one.

11 MR. RIVELLESE: Well - - -

12 JUDGE SMITH: That one was overbroad. How
13 can this one possibly survive?

14 MR. RIVELLESE: Well, well, if - - - I
15 guess, if you're saying that it's possible that
16 somebody could violate the statute in a way that would
17 be unconstitutional, is different from saying it was
18 unconstitutional as applied to this defendant - - -

19 JUDGE SMITH: No, this is - - - I mean,
20 isn't - - - when you're talking about a First
21 Amendment claim, and we are, right? Isn't over - - -
22 isn't it - - -

23 MR. RIVELLESE: On the - - - on the
24 aggravated harassment?

25 JUDGE SMITH: Yes. I mean, he's - - - he -

1 - - as I understand it, the claim your adversary
2 makes is that this statute infringes on protected
3 rights - - - rights protected by the First Amendment.

4 MR. RIVELLESE: Right - - - by being too
5 vague in this case.

6 JUDGE SMITH: Or too broad.

7 MR. RIVELLESE: Or overbroad.

8 JUDGE SMITH: And then isn't - - - isn't he
9 - - - even assuming that his conduct could be made
10 criminal, in a First Amendment situation, you're
11 entitled to do that, aren't you? Saying the statute
12 is overbroad and therefore you can't enforce it, even
13 against the narrow category who might be - - - who it
14 might be legitimate to punish.

15 MR. RIVELLESE: Well, no, it should - - -
16 it has to be - - - he's not the one who can claim
17 that some other defendant could be violated here.
18 That would be the case where another defendant who's
19 closer to the line - - -

20 JUDGE SMITH: I'm - - - I'm not suggesting
21 to you that in the First Amendment area, that's not
22 the law, that the - - - that the guy who - - - that
23 the guy who is doing something punishable, can indeed
24 assert the rights of others. Do you think - - - do
25 you think I'm wrong about that?

1 MR. RIVELLESE: Well, I - - - I think
2 you're wrong that he can say that it's
3 unconstitutionally overbroad, when he has clearly
4 fallen within the statute. He - - - because he has
5 clearly intended to harass, annoy or alarm. He has
6 clearly sent hundreds of e-mails. He has clearly
7 succeeded in harassing, annoying, and alarming.

8 JUDGE SMITH: Okay, okay, but you don't
9 seem to be narrowing the statute that much. I mean,
10 you - - - you - - - maybe I'm back where I started,
11 but you're really saying that any e-mail intended to
12 annoy somebody that succeeds is a misdemeanor.

13 MR. RIVELLESE: Well, it has to be
14 reasonably likely. The fact that it might succeed
15 could be unreasonable, depending on the - - -

16 JUDGE SMITH: Okay, any - - - any - - -
17 yeah, suppose - - - I can - - - I - - - I'm pretty
18 good at annoying e-mails. I could send out a lot of
19 e-mails that I guarantee you will be annoying. You
20 say everyone of those is a misdemeanor.

21 MR. RIVELLESE: Well, the legislature has
22 said so, and in this case, I would give it much more
23 - - -

24 JUDGE SMITH: And you - - - you don't think
25 there's anything overbroad about that?

1 MR. RIVELLESE: I think you could find a
2 case where it would be, I just don't think this is
3 that case.

4 JUDGE PIGOTT: Going - - - going from there
5 to the - - - to the other charges, I was trying to
6 figure out where you draw this line of the People
7 versus somebody, as opposed to what is civil.

8 And if - - - if the victims here went into
9 their local police station and said, you're not going
10 to believe this, but this is what happened to me,
11 would they immediately pull out some forms and start
12 to - - - to put together some charges, or do they
13 say, go fi - - - well, go hire a lawyer. You've got
14 - - - you know, you got libel; you got slander; go
15 sue.

16 MR. RIVELLESE: Well, well, yeah, the
17 gravamen of these offenses here is that the defendant
18 intended to impersonate another person and to
19 convince people he was someone other than who he was,
20 and get reliance on that deception. So that's the
21 thing that makes this different from any kind of a
22 civil libel case.

23 In a civil libel case, you - - - you can be
24 the person who's accusing someone else, and - - - and
25 you're being honest about who you are, but you can

1 still say something bad about the person, right?
2 Here, you have the defendant pretending to be someone
3 else, getting reliance on his deception. That's the
4 thing that's different here than in a civil case.

5 JUDGE SMITH: I mean, you're talking about
6 the impersonation count?

7 MR. RIVELLESE: Well, all of the counts,
8 except the aggravated harassment at this point. The
9 identity theft - - -

10 JUDGE SMITH: Well, and the - - - and the -
11 - - and the use of the computer.

12 MR. RIVELLESE: Right, right. The
13 impersonation of the - - -

14 CHIEF JUDGE LIPPMAN: But most of these
15 situations are not - - - are not prosecuted. What -
16 - -

17 MR. RIVELLESE: Well - - -

18 CHIEF JUDGE LIPPMAN: What is it exactly
19 that makes this different from all of the
20 circumstances your adversary mentioned that you read
21 about all the time? Why aren't all those people
22 prosecuted?

23 MR. RIVELLESE: Well, those - - - those
24 people did not try to convince other people that they
25 were someone else. So for example - - -

1 CHIEF JUDGE LIPPMAN: Happens all the time.

2 JUDGE PIGOTT: They do - - - they do it on
3 the radio. That's what Mr. Kuby was pointing out,
4 where, you know, somebody's on the radio, and they
5 pretend to be somebody, and they're - - - you know,
6 they're - - - then all of a sudden it turns out not
7 to be true. There were a couple in Florida that did
8 that, ended up - - - I do think they were prosecuted
9 - - -

10 MR. RIVELLESE: Well - - -

11 JUDGE PIGOTT: - - - but they ended up - -
12 -

13 MR. RIVELLESE: Well, it would be
14 prosecutable if you're actually trying to convince
15 people you are someone else and get reliance on that.

16 CHIEF JUDGE LIPPMAN: Could you do an
17 interview program, and you call in, and you pretend
18 to be someone else, do you get prosecuted?

19 MR. RIVELLESE: Well, you have to meet all
20 of the elements of the crime. You have to intend to
21 get people to rely on your deception, to believe that
22 you're the other person, and also intent to defraud.

23 JUDGE PIGOTT: Well, what about the poor
24 Republican Party that Mr. Kuby just beat up? I mean,
25 is that true what he said, that all of those websites

1 might be criminal?

2 MR. RIVELLESE: But - - - but they're not
3 trying to convince people that they are those other
4 politicians. That's the whole point is that this is
5 - - - it's a spoof. It's a parody; it's a mockery.

6 JUDGE SMITH: But - - - but if they - - -
7 but if they were, if people are actually deceived,
8 you say it's punishable.

9 MR. RIVELLESE: It would be against the
10 law. The examples you gave before, if you pretend to
11 be a judge, or if you pretend to be a private
12 citizen.

13 CHIEF JUDGE LIPPMAN: So if you succeed,
14 it's punishable, but if you don't, you're okay. If
15 you're so bad at it, that you don't succeed - - -

16 MR. RIVELLESE: Well, it's your intent. If
17 you're intending to convince people you're someone
18 else, get them to rely on it - - - it's the elements
19 of the crime. You intend to get - - -

20 CHIEF JUDGE LIPPMAN: But if you're - - -
21 if you're really bad at it, though, you're not going
22 to get prosecuted, right?

23 MR. RIVELLESE: If you intend, you will.

24 CHIEF JUDGE LIPPMAN: If you don't succeed
25 - - - if you intended, but they know who you are, so.

1 is, not that's a crime. He may assume that he
2 shouldn't do that, but he may not assume that it's
3 criminal to do that. I think that's the distinction
4 he's drawing, if I'm understanding him correctly.

5 MR. RIVELLESE: Well, then that goes to you
6 don't have to know that conduct's criminal, if you
7 know you're committing the conduct. So - - -

8 JUDGE SMITH: But is it - - - is it - - - I
9 mean, is it more generally - - - are you - - - is it
10 - - - is it a crime in New York anytime anyone
11 exceeds the te - - - the terms of use of his
12 computer? So if my - - - if I work at a place that
13 doesn't let me go on Facebook, and I go on Facebook,
14 that's a crime?

15 MR. RIVELLESE: I don't think that would be
16 a crime. If - - -

17 JUDGE SMITH: Why not? I mean, it's a - -
18 - you're authorized to use this computer, but you're
19 not authorized to go on Facebook.

20 MR. RIVELLESE: Well, I think that would be
21 a very difficult question, but I think that once - -
22 -

23 JUDGE SMITH: That's why I asked it.

24 An annoying question.

25 CHIEF JUDGE LIPPMAN: Annoying, annoying.

1 Very annoying question. Go ahead.

2 MR. RIVELLESE: It's possible that would be
3 a crime. It's just not what this case is about,
4 because this - - -

5 CHIEF JUDGE LIPPMAN: How could that be a
6 crime? That you - - - that you - - - that you don't
7 follow the exact - - - half the people in this - - -
8 three-quarters of the people in this world work in
9 places where they have computers and they have
10 policies and what they can use it for and what they
11 can't. And each time a person does that, it's a
12 crime?

13 MR. RIVELLESE: Well, according to the
14 statute, but - - -

15 CHIEF JUDGE LIPPMAN: If they ma - - - mean
16 to commit a crime? But you're saying if it's - - -
17 if it's - - - if it differs from the terms of how
18 they're allowed to use it, it's a crime?

19 MR. RIVELLESE: Well, it's the same as if
20 somebody doesn't give you permission to use their car
21 in a certain way, and you use it a certain way - - -

22 JUDGE SMITH: Couldn't - - - can't - - -
23 can't the statute be read more narrowly? A person's
24 "guilty of unauthorized use of a computer, when he or
25 she knowingly uses, caused to be used, or accesses a

1 computer without authorization". In other words, if
2 you're allowed to be at the computer, it's okay, even
3 if you violate that terms of use. What's wrong with
4 that?

5 MR. RIVELLESE: Well, if - - - if you're
6 committing crimes with the computer, that should be
7 enough to - - -

8 JUDGE SMITH: Well, you - - - well, you can
9 be prosecuted for the crimes you're committing, but
10 are you committing the crime of unauthorized use of a
11 computer, if, in fact, you are authorized to use the
12 computer?

13 MR. RIVELLESE: Well, if - - - if you know
14 that you're not authorized to use the computer
15 because you're using the computer to commit conduct
16 that you're not supposed to be using on it - - -

17 JUDGE SMITH: Like going on Facebook, for
18 example.

19 MR. RIVELLESE: If you knew for a fact you
20 weren't supposed to use a computer to do it, and you
21 went and did it, you'd be violating that - - - that
22 term.

23 JUDGE SMITH: I'll say a misdemeanor.

24 MR. RIVELLESE: But - - - but - - -

25 CHIEF JUDGE LIPPMAN: Counsel, but isn't

1 the fact that we're going through these - - - these
2 scenarios, doesn't it almost get to the point of
3 being a comedy and looking at what you're alleging
4 are crimes and when it is and when it isn't? Doesn't
5 it get to the point where it's almost, you know,
6 ludicrous? I mean, we're looking at this, and we're
7 here looking at criminal violations in the context of
8 the factual - - - the facts as we know it in this
9 case.

10 MR. RIVELLESE: Well, you can - - -

11 CHIEF JUDGE LIPPMAN: Almost ethereally
12 absurd, I guess, is what I'm saying.

13 MR. RIVELLESE: What happened here is he
14 really got charged with everything that he could be
15 alleged to have done, whereas there was a very
16 central gravamen of crime, which was the
17 impersonating Schiffman, the stealing of Schiffman's
18 identity, and pretending to be - - -

19 CHIEF JUDGE LIPPMAN: What's the crimes
20 that are most defensible to you, from your point of
21 view? What's your strongest case against - - -

22 MR. RIVELLESE: Schiffman. Everything
23 against Schiffman, because he pretended to be him - -
24 -

25 CHIEF JUDGE LIPPMAN: Everything that he

1 had to do with Schiffman, because he was using his
2 name?

3 MR. RIVELLESE: Yes, he pretended to be
4 him. He convinced people he was him. He got
5 responses to his e-mails, believing that they were
6 responding to Schiffman, not just from the students,
7 but also from the Provost, informing defendant that
8 he was going to be referred to the proceedings to
9 determine whether he was a plagiarist. So he got
10 responses indicating everyone thought he was
11 Schiffman.

12 He then continued to respond, for example,
13 to the students he - - - he responded back. So he
14 was clearly orchestrating an identity theft, having
15 people believe he was Schiffman, in order to get
16 Schiffman, either fired, uninvited to the Jewish
17 Museum, otherwise damage his career, and help his own
18 father. And that's - - - that's clearly every
19 element of the statute.

20 JUDGE GRAFFEO: That you feel is the
21 strongest proof on a crime in this case?

22 MR. RIVELLESE: Absolutely, and - - - and
23 those are the most solid and central, and then the
24 other ones are the ones that are tangential, and also
25 - - -

1 JUDGE SMITH: And the ones - - -

2 JUDGE GRAFFEO: And for those crimes that
3 you - - - the Schiffman crimes that you've just
4 mentioned, what is it that crosses the line then from
5 the civil to the criminal? What makes it criminal
6 activity? Just to focus in on those crimes.

7 MR. RIVELLESE: The strongest thing is that
8 he's trying to convince other people that he is
9 someone other than who he is. He's stealing the
10 identity of Schiffman, pretending to be him, and
11 getting them to rely on that, by saying - - -

12 CHIEF JUDGE LIPPMAN: Counsel, what would
13 you advise someone who came to you? Would you advise
14 them to go get themselves a lawyer to sue, or would
15 you advise them to go to the prosecutor? In this
16 particular set of facts?

17 MR. RIVELLESE: Well - - -

18 CHIEF JUDGE LIPPMAN: Put - - - take off
19 your hat for a second, and - - -

20 MR. RIVELLESE: Well, given what happened
21 to Schiffman, the prosecutor - - - that's clearly the
22 central and the most - - -

23 CHIEF JUDGE LIPPMAN: You would clearly say
24 go to a prosecutor; it's a criminal offense.

25 MR. RIVELLESE: Yes.

1 CHIEF JUDGE LIPPMAN: These are criminal
2 offenses.

3 MR. RIVELLESE: Yes. And no, it's not an
4 A-I felony; it's not state prison, but it's
5 definitely wrong. If you pretend to be someone else,
6 get people to believe you, and have them take actions
7 or expect them to take actions based on your
8 deception, not based on your personally saying what
9 you think, but pretending to be someone else,
10 confessing to something that they did or did not do,
11 because you can't pretend to be a criminal defendant
12 and confess to a crime either.

13 You have to be honest about who you are.
14 That's the real gravamen of the offense. It's not
15 that he's alleging that someone's a plagiarist. That
16 doesn't matter; he could be right about that. But
17 he's saying that Schiffman is confessing to
18 plagiarism and pretending that he is Schiffman
19 confessing. Judge Rivera mentioned that before, I
20 think.

21 If you're pretending to be someone and
22 confess to something that person did, that's the
23 dishonesty there. It's not that the person may or
24 may not have done the thing, it's that they didn't
25 really confess to it; you did.

1 CHIEF JUDGE LIPPMAN: Okay, thanks,
2 counsel.

3 MR. RIVELLESE: Thank you.

4 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

5 MR. KUBY: Yes, thank you. First of all,
6 it is state prison. The - - - he's convicted of one
7 felony, the identity theft in the second degree. The
8 prosecution asked for one and a third to four years.
9 Judge - - - Justice - - - former Justice Berkman, in
10 her infinite kindness, only gave him six months. So
11 we are talking state prison here.

12 JUDGE SMITH: Is - - - is six months so
13 very harsh for this - - - wasn't this a vicious thing
14 to do to try to ruin a man like this?

15 MR. KUBY: If - - - if you start with the
16 assumption that this is a good man - - -

17 JUDGE SMITH: Suppose - - - suppose a
18 mediocre man like everyone else, is it - - -

19 MR. KUBY: Or - - - or - - - or maybe a bad
20 man, telling the truth about a bad man in a specific
21 way, is that a bad thing to do? I don't know. I'm
22 sort of okay with it. You're not. That's fine.
23 That's fine. But we're talking about the use of the
24 criminal sanction - - -

25 JUDGE SMITH: I mean, if - - - if - - -

1 yeah, I mean - - - I suppose, yeah.

2 MR. KUBY: Yeah.

3 JUDGE SMITH: You aren't really saying it's
4 okay to do it to bad people, and not good people, are
5 you?

6 MR. KUBY: No, I - - - I - - - I'm saying
7 that - - - that if you sat here and - - - and you
8 believed that in fact, Schiffman was a rank
9 plagiarist and had ripped off the work of many other
10 scholars, it would have did - - - different
11 atmospherics and moreover, it never would have been
12 brought in the first place, because - - -

13 JUDGE PIGOTT: Well, so, if you - - - if
14 you - - - if you say I'm A-Rod, and I admit that I
15 did drugs and I - - - you know, and I'm really sorry
16 about it, and I wish I could give the money back to
17 the Yankees, you don't see a problem with that?

18 MR. KUBY: Well, I - - - I don't actually
19 see a criminal problem with that for the same reason
20 there's not a criminal problem here. Exactly the
21 same situation. Schiffman makes this confession.
22 What happens isn't the university fires Schiffman;
23 he's confessed to plagiarism. The record reveals
24 they said to him, hey, this looks weird; is this you?
25 He says, no, it's not me.

1 JUDGE SMITH: But suppose he's not going to
2 sue - - - he - - - he - - - he did do it, I guess, to
3 a tenured professor. Suppose he - - - suppose he
4 gets mad at some poor adjunct who has to make a
5 living and does the same thing, shouldn't the adjunct
6 be protected by the criminal law?

7 MR. KUBY: The - - - the adjunct is - - -
8 is protected by the way things actually work on
9 Planet Earth. Nobody gets fired in - - - in the real
10 world based on a Gmail account, where they confess to
11 something that you haven't asked.

12 CHIEF JUDGE LIPPMAN: But is it, counsel -
13 - -

14 JUDGE RIVERA: But is that - - - is that
15 what had to happen, that he would have had to have
16 been fired that - - - you have to actually have that
17 as the result?

18 MR. KUBY: No, no, you don't actually have
19 to have that, and - - - and even - - -

20 JUDGE RIVERA: What if his reputation is
21 tarnished in the institution? Nobody actually
22 believes him even if he - - -

23 MR. KUBY: But if want to go - - -

24 JUDGE RIVERA: - - - he's found not guilty.

25 MR. KUBY: If we want to go back and

1 resurrect criminal libel in the Internet era, then we
2 can do that. But - - - but at least, since 1965, the
3 law has been these types of reputational harms - - -

4 CHIEF JUDGE LIPPMAN: Counsel - - -

5 MR. KUBY: - - - are beyond the scope of
6 criminal law.

7 CHIEF JUDGE LIPPMAN: Counsel, is your
8 basic argument that in the practical common-sense
9 world, these are not crimes in the year 2014? And -
10 - - and if that is your argument, why is it that you
11 think that they've chosen to prosecute? That they
12 chose to prosecute the defendant?

13 MR. KUBY: Yes, it is my argument, Judge
14 Lippman. And as we say in our brief, this type of
15 Internet impersonation, causing people to think it's
16 the real person, is absolutely ubiquitous in American
17 public life.

18 CHIEF JUDGE LIPPMAN: But why - - - but why
19 did they choose to prosecute this?

20 MR. KUBY: I can give you a de hors the
21 record answer.

22 CHIEF JUDGE LIPPMAN: Go ahead.

23 MR. KUBY: Because according, at least, to
24 Larry Schiffman when he gave an interview, what
25 happened was, he was upset about this, and - - - and

1 things weren't happening enough, so he contacted one
2 of his pals in the FBI, because he had done forensic
3 work for the FBI in the past.

4 The FBI hooked him up with the prosecutor,
5 and - - - and unfortunately, both Robert Morgenthau,
6 the former New York County District Attorney with his
7 long relationship to the Skirball Center, and
8 Lawrence Schiffman with his long relationship to the
9 Skirball Center, had a lot of sort of overlapping
10 types of relationships.

11 And the assumption was that this guy, who
12 really has no power, no authority, would just take
13 the plea that was offered, which is, hey, a single
14 misdemeanor and three years probation.

15 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
16 you both.

17 MR. KUBY: All right.

18 CHIEF JUDGE LIPPMAN: Appreciate it.

19 (Court is adjourned)
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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Raphael Golb, No. 72, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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