New York Court of Appeals Refuses to Dismiss Criminal Conviction for Online Impersonation

Statute Is "Broad Enough to Capture Acts Intended to Cause Injury to Reputation"

By Henry R. Kaufman and Michael K. Cantwell

The New York Court of Appeals recently upheld the criminal conviction of the son of a University of Chicago professor for criminal impersonation and forgery after he was found to have engaged in an elaborate internet campaign to discredit and attack scholars who disagreed with his father. *People v. Raphael Golb*, No. 72 (May 13, 2014).

Background

The dispute involved the arcane issue of whether the Dead Sea Scrolls originated in Qumran, where they were found, or were written in Jerusalem and later brought to Qumran, as the defendant's father, Prof. Norman Golb, had long argued. In addition to his anonymous and pseudonymous attacks on scholars who supported the mainstream view that the Scrolls were written in Qurum by the Essenes, a minor Jewish sect, the defendant created email accounts through which he impersonated his father's critics as well as other academics.

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In perhaps his most byzantine scheme, the defendant first used the pseudonym "Jerome Cooper" to engage in an email exchange with one of his targets, University of North Carolina professor Bart Ehrman, who had been slated to lecture about the origin of the Scrolls. Golb then anonymously denounced the selection of Ehrman as lecturer in an anonymous blog in which he published some of the emails he'd received from Ehrman. The final element in the defendant's scheme was to create an email address in the name of Frank Cross, a retired professor at Harvard and Dead Sea Scrolls scholar. Using the newly created email address to impersonate Cross, the defendant then sent emails to Ehrman's colleagues at the University of North Carolina that linked to the blog and concluded "Bart [had] put his foot in his mouth again." Slip op. at 6.

But the defendant's most insidious scheme involved an attack on NYU professor Lawrence Schiffman. The defendant began by pseudonymously publishing an article entitled "Plagiarism and the Dead Sea Scrolls: Did NYU department chairman pilfer from Chicago historian's work?" The defendant then created an email account "larry.schiffman@gmail.com" and used that account to impersonate Schiffman in emails to Schiffman's students and administrators at NYU that included a link to the article. In the emails "Schiffman" also "confessed" to and expressed regret for "his" plagiarism:

> Apparently, someone is intent on exposing a failing of mine that dates back almost fifteen years ago. It is true that I should have cited Dr. Golb's articles when using his arguments, and it is true that I misrepresented his ideas. Slip op. at 7.

After NYU launched an investigation, the defendant – again posing as Schiffman – forwarded the ensuing email exchange between "Schiffman" and the NYU administrators to the NYU school newspaper, "asking that they not mention this matter and stating that his 'career is at stake.'" *Id.* at 8.

The opinion provides little information on the impact of these attacks on the defendant's targets. (One of defendant's targets, a Ph.D student at UCLA, testified that "everyone in his department, people in the press room, the Provost of UCLA, and his dean asked him 'what the hell is going on, what is this all about?'" Slip op. at 5.). Apparently, however, the attack on Schiffman proved defendant's undoing, as Schiffman apparently had contacts in the FBI, who provided the name of an Assistant DA to call, adding "Tell him you spoke to us."

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This led to a grand jury charging the defendant with numerous counts of identity theft, criminal impersonation, forgery, aggravated harassment, and unauthorized use of a computer and his conviction on 2 counts of identity theft in the second degree, 14 counts of criminal impersonation in the second degree, 10 counts of forgery in the third degree; 3 counts of aggravated harassment in the second degree, and 1 count of unauthorized use of a computer. The Court of Appeals vacated five of the convictions for criminal impersonation, all the convictions for aggravated harassment and all the convictions for unauthorized use of a computer. Significantly, however, the Court affirmed the convictions for 9 of the 14 counts of criminal impersonation and all of the counts of forgery. *Id*. at 3.

The Majority Opinion

Penal Law § 190.25 provides that a person is guilty of criminal impersonation in the second degree when he or she "impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another." The defendant argued that the statute was unconstitutionally overbroad and also that the trial court's refusal to properly limit and define "injure" and "benefit" constituted reversible error because it allowed the jury to interpret the statute as covering *any* benefit or harm. *Id*. at 10-11.

Does the Court's expansion of both statutes to cover acts intended to cause injury to reputation mean, as defendant's attorney has argued, that this is a case of criminal libel in disguise?

The Court acknowledged that cases applying the statute "have traditionally involved monetary fraud or interference with government operations." *Id*. at 11. The Court also agreed with the defendant that the statute should not be applied to "*any* injury or benefit, no matter how slight." *Id*. at 12 (italics in original). Noting, however, that many people, and particularly academics, "value their reputations as much as their property," the majority concluded that "the Legislature intended that the scope of the statute be broad enough to capture acts intended to cause injury to reputation" and went on to hold that the statute applies to "a person who impersonates someone with the intent to harm the reputation of another." *Id*.

The Court affirmed the conviction on most of the counts of criminal impersonation, but held that the statute did not reach the mere creation (as opposed to the use) of an email account in the name of another, nor did it reach the use of such an email without proof of "the requisite intent to cause injury, either to reputation or otherwise." *Id*. at 13. On this basis, the Court reversed 5 of the 14 counts for criminal impersonation.

As to the remaining counts, the Court also affirmed the conviction for forgery in the third degree, holding that there was "sufficient evidence to show that defendant deceived people by sending emails from accounts in the names of Schiffman, Seidel and Cross." *Id*. at 16. ("A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument," Penal Law § 170.05.)

The Court went on to strike down the statute for aggravated harassment in the second degree, ruling that it was unconstitutionally vague and overbroad. Finally, the Court held the evidence insufficient to support the convictions for unauthorized use of a computer and identity theft in the second degree.

Chief Judge Lippman's Dissent

Chief Judge Lippman, who would have reversed all convictions, issued an opinion concurring in part and dissenting in part.

He begins by arguing that Penal Law § 190.25 is unconstitutionally overbroad:

> There is, of course, nothing in the language of the statute to prevent its use in the manner proposed by the majority – but that is the problem. The statute, as written, allows a criminal conviction for impersonation provided only that it is meant to be harmful or beneficial in any way. It is hard to imagine any pseudonymous communication that could not be prosecuted under this statute. And, in an age in which pseudonymous communication has become

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> ubiquitous, particularly on the internet, this statute, literally understood, criminalizes a vast amount of speech that the First Amendment protects.

Dissent at 2.

He then goes on to reject the majority's attempt to cure the statute's overbreadth by limiting its operation to acts "intended to cause real harm," arguing that "many things said using an assumed identity are constitutionally protected from civil or criminal sanction, even though they are more than pranks and are intended to cause real harm or to obtain real benefit." *Id*. at 3.

Chief Judge Lippman also argued that the statute was not only unconstitutional on its face but unconstitutional as applied – that is, even assuming that the limitations proposed by the majority could have cured the alleged statutory overbreadth, the defendant was denied the benefit of those limitations:

> Although defendant, after the denial of his motion to dismiss on the ground, among others, of statutory overbreadth, sought to have the jury charged so as to limit the statute's reach, the trial court's charge did not do that and there is no basis now to suppose that the convictions at issue were rendered in observance of the distinction this Court has retrospectively drawn; five of the criminal impersonation convictions concededly were not, and it is entirely speculative that the remaining nine were.

Id.

Chief Judge Lippman would also have vacated the convictions for third degree forgery on similar grounds: "Treating pseudonymous emails as forgeries when they are made with some intent to 'injure' in some undefined way is no different than penalizing impersonation in internet communication for the same amorphous purpose." *Id*. at 4.

Finally, he argues that any reputational injury caused by the defendant can – and should – be treated as a civil tort and not a crime:

> Criminal libel has long since been abandoned (see Garrison v Louisiana, 379 US 64, 69 [1964]), not least of all because of its tendency in practice to penalize and chill speech that the constitution protects (see Ashton v Kentucky, 384 US 195, 200-201 [1966]), and it has been decades since New York's criminal libel statute was repealed. The use of the criminal impersonation and forgery statutes now approved amounts to an atavism at odds with the First Amendment and the free and uninhibited exchange of ideas it is meant to foster.

Id. at 4.

Nothing in the opinion does – or indeed could – override Supreme Court holdings that prohibit the use of criminal libel statutes to sanction constitutionally protected speech.

Discussion

Both the majority and the dissent in *People v. Golb* agree that the penal statutes under which the defendant's conviction was upheld were historically limited to punishing monetary fraud. Does the Court's expansion of both statutes to cover acts intended to cause injury to reputation mean, as defendant's attorney has argued, that this is a case of criminal libel in disguise? Or, as Chief Judge Lippman argues, that the Court has "give[n] prosecutors power they should not have to determine what speech should and should not be penalized?"

These fears seem overblown. None of the counts as to which the defendant's conviction was affirmed involved statements made in his anonymous blog or pseudonymously published article. That is, the Court did not apply any penal statute to the defendant's own speech, but only to speech that he intentionally and falsely placed in the mouths of third parties.

Moreover, nothing in the opinion does – or indeed could – override Supreme Court holdings that prohibit the use of

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criminal libel statutes to sanction constitutionally protected speech. The rub, for Golb, was the difficulty of claiming the benefit of this precedent when his speech was intentionally false and thus would not have been constitutionally protected in the first place under *Sullivan* and its progeny.

That said, it is both unfortunate and troubling that the majority did not respond in any manner to the dissent. The majority opinion therefore leaves one to speculate whether there might be other circumstances where the Court of Appeals would affirm a criminal conviction in a case involving speech that traditionally has been protected by the Constitution. And the majority's failure to speak more clearly could certainly embolden prosecutors to bring charges against speakers whose message they oppose.

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