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TRUTHINESS: LAW, LITERATURE & THE PROBLEM WITH MEMOIRS

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I. INTRODUCTION

Truthiness is “the quality of adhering to concepts one wishes or believes to be true, rather than the facts.”¹ Comedian Stephen Colbert introduced the term on October 17, 2005, during the inaugural episode of *The Colbert Report*, itself a blurring of news and satire. As the inception of truthiness coincided with the scandal surrounding James Frey’s so-called memoir, *A Million Little Pieces*,² the term has previously been applied to the issues addressed herein.³

In this Note, I explore the legal and literary impact of James Frey’s *A Million Little Pieces*, analyzing memoir through the lens of truthiness. First, I sketch a brief literary history of autobiography and memoir, from the genre’s first examples through its most recent developments. Second, I consider the role of the law in literary realms, examining lawsuits involving autobiographies and/or memoirs. Third, I analyze the James Frey debacle, highlighting the circumstances that culminated in the first customer refund issued by a

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¹ See http://www.americandialect.org/Words_of_the_Year_2005.pdf; see also <http://en.wikipedia.org/wiki/Truthiness>.

² JAMES FREY, *A MILLION LITTLE PIECES* (Anchor Books/Random House, Inc. 2003)(hereinafter “AMLP”).

³ See, e.g., <http://en.wikipedia.org/wiki/Truthiness> (noting that Oprah Winfrey mentioned truthiness in her second segment with James Frey, following the revelation that his memoir was fictionalized).

publisher for factual inaccuracies in a memoir. I conclude that Frey’s deception warrants a remedy, though not one that the law can effectively provide.

II. A NONLEGAL HISTORY OF AUTOBIOGRAPHY & MEMOIR

A. Foundations & Early Examples

An autobiography is the story of the author’s life as told in his or her own words.⁴ Autobiography derives from the Greek *auton* (self) + *bios* (story) + *graphein* (writing).⁵ Like biography, autobiography is a nonfiction genre.

Memoir is a subset of autobiography.⁶ Rather than the “self + story + writing” equation, memoir is the author’s subjective recollection of personal experiences, from the French *memoire*, or memory.⁷ Memoir is often less comprehensive and more subjective than other subcategories. Beyond such general definitions, however, little consensus exists as to the precise elements and rules of autobiography and its sub-genres.⁸

Autobiography originated in 1620 with the publication of St. Augustine’s *Confessions*. Addressed to God, not readers, truthfulness is central to Augustine’s pivotal work of introspection.⁹ Following the format of St. Augustine, in 1778, the French philosopher Jean-Jacques Rousseau wrote his own *Confessions*, published in the early 1800s. Rousseau

⁴ See www.dictionary.reference.com/browse/autobiography; Autobiography (hereinafter “Autobiography”).

⁵ *Id.*

⁶ Merriam-Webster Online Dictionary, *memoir*, <http://www.m-w.com/dictionary/memoir> (hereinafter “Memoir”).

⁷ See Memoir, *supra* note 6; see also Col. Fred L. Borch, *Vietnam Stories: A Judge’s Memoir*, 165 MIL. L. REV. 291, 296 (2000)(book review)(defining “memoir” as a “history or narrative composed from personal experience and memory...”).

⁸ See, e.g., William Morrow & Co., Inc., v. Davis, 583 F. Supp. 578 (S.D.N.Y. 1984) (refusing to grant summary judgment in a dispute over Bette Davis’s memoirs, and emphasizing that each party - author, publisher, and ghostwriter - asserted a different understanding of the type of *autobiography* to be written and published).

⁹ John K. Ryan, *Introduction*, THE CONFESSIONS OF ST. AUGUSTINE, 37 (Image Books/Doubleday 1960) (English 1620)(explaining the confessional style and its emphasis on honesty, and noting that for Augustine, “no matter what is his immediate subject, his great concern [is] in making his confession to God and before men the complete and exact truth”).

presented his life experiences as moral learning opportunities, leaving out certain less-flattering episodes.¹⁰

The Autobiography of Benjamin Franklin, published in Paris in 1791 and then in England in 1818, was the first secular work to achieve popularity in the United States. After Franklin, other influential public figures found an audience for their personal stories.¹¹ Early writers were people who attracted public attention, usually due to personal achievements. Not surprisingly, therefore, autobiographies and memoirs were typically published late in the author's life, or posthumously.¹²

In the early 1820s, Victorian philosopher Thomas de Quincey spawned the sub-genre of drug memoirs with his *Confessions of an English Opium Eater*.¹³

[H]e provides the moral dialectic that characterizes so much of the literary and popular drug narrative: that the extent to which the drug provides pleasure or surcease of pain is matched by the extent to which it ultimately inflicts pain. [De Quincey] supplies all the *splendeurs et misères*, the lavish constructionism and the abyss of contrition, that become the genre's conventions.¹⁴

De Quincey's legacy includes William Burroughs, the Beat author of *Junky*, a heroin memoir originally published in pulp fiction format as *Junkie: Confessions of an Unredeemed Drug Addict*.¹⁵ Other followers of De Quincey's tradition are Elizabeth Wurtzel, author of *More*,

¹⁰ NICHOLAS J. KAROLIDES, ET AL., 100 BANNED BOOKS: CENSORSHIP HISTORIES OF WORLD LITERATURE, 278-280 (Checkmark Books 1999) (summarizing the moral exhibitionism of Rousseau's *Confessions* and their subsequent censorship)[hereinafter "BANNED BOOKS"].

¹¹ See Autobiography, *supra* note 4 (stating that Franklin's autobiography was the first such non-religious work published in the United States); BANNED BOOKS, *supra* note 10, at 348-350 (discussing revision and censorship of *The Autobiography of Benjamin Franklin*).

¹² *Id.* See also Memoir, *supra* note 6.

¹³ THOMAS DE QUINCEY, CONFESIONS OF AN ENGLISH OPIUM EATER (Barry Milligan ed., Penguin Books 2003)(1821).

¹⁴ DAVID LENSON, ON DRUGS 99 (Univ. of Minn. 1995).

¹⁵ See WILLIAM S. BURROUGHS, OLIVER HARRIS & ALLEN GINSBURG, JUNKY: THE DEFINITIVE TEXT OF JUNK (5th Ann. Ed., Penguin Books 2003)(1953).

Now, Again: A Memoir of Addiction, and Ann Marlow, creator of the dictionary-style *How to Stop Time: Heroin from A to Z*.¹⁶

B. Development & Cultural Significance

Autobiography and memoir expanded and converged during the first half of the twentieth century. In the early 1900s, the French author Colette challenged literary boundaries with her series of *Claudine* novels and surrounding publicity.¹⁷ Throughout her celebrated career, Colette produced sensational, transparently autobiographical novels that blurred the fact/fiction divide, and captivated the Parisian public. Both the *Claudine* trilogy and later *Cheri* series,¹⁸ are classified as fiction, but the books' content mirrors Colette's highly public life.

In the 1930s, authors Gertrude Stein and Henry Miller further pushed the bounds of autobiographical taxonomy.¹⁹ Stein published her memoirs in 1933 as *The Autobiography of Alice B. Toklas*. More than twenty years later, the title figure authored her own memoirs, *The Alice B. Toklas Cookbook*. Meanwhile, Henry Miller published *Tropic of Cancer* and *Tropic of Capricorn*, works that defy classification.²⁰ The main character is Henry Miller, and the setting and characters parallel the author's experiences. Yet the texts are not autobiographical, at least not truthfully so, and are generally understood as fiction.

Beyond artistic development, autobiography and memoir became avenues whereby individuals could reclaim, and to some extent rewrite, the stories of their lives. In the decades after World War II, many Holocaust survivors wrote poignant, personal accounts of their oppression. For example, *The Diary of Anne Frank*, published in 1947, provides an intimate reflection of one girl's struggle during the Nazi occupation.²¹ Elie Wiesel published his

¹⁶ See ELIZABETH WURTZEL, *MORE, NOW, AGAIN: A MEMOIR OF ADDICTION* (Simon & Schuster 2002); see also ANN MARLOW, *HOW TO STOP TIME: HEROIN FROM A TO Z*, 133, 153-55 (Basic Books 1999).

¹⁷ COLETTE, *Preface*, *THE CLAUDINE NOVELS*, 7-8 (Penguin Books 1963)(1900-1903).

¹⁸ See COLETTE, *CHÉRI* (Penguin Books 1954)(1920, English 1930); see also *THE LAST OF CHÉRI* (1926, English 1933).

¹⁹ See also Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 97 (1998) (tracing the evolution of the term "author").

²⁰ See *BANNED BOOKS*, *supra* note 10, at 323-27.

²¹ For analysis of the post-publication controversies surrounding Anne Frank's story, see Cynthia Ozick, *Who Owns Anne Frank?*, *NEW YORKER MAGAZINE*, Oct. 6, 1997; Anne Frank's father confessed shortly before his death to removing several pages from her diary, which he provided for

award-winning Holocaust memoir, *Night*, in 1958.²² Like St. Augustine's *Confessions* to God, truthfulness is central to these survivors' works. According to Wiesel, "[a]s [*Night*] is a memoir, my experiences in the book – A to Z – must be true."

Along with memoirs of survival came early hints of deception and fraud. The ghostwriter of a 1948 Holocaust memoir later published the same work as fiction, under his own name.²³ The author of another popular and critically-acclaimed memoir was revealed as an over-psychoanalyzed pretender.²⁴ Still, the public embraced increasing numbers of tales of suffering and redemption, from genocidal oppression to personal hardship.²⁵

C. Modern Trends

Modern memoirs diverge from the genre's historical roots in terms of author, focus, and timing/manner of publication. Although memoirs have traditionally been written by public figures,²⁶ recently, the genre has become an outsider's paradise. Instead of public

subsequent publications. The deleted portions apparently reflected poorly on Anne's relationship with her mother, and on her parents' marriage, and her father had been upset to release them. *See also* BANNED BOOKS, *supra* note 10, at 340.

²² Edward Wyatt, *Next Book for Oprah is NIGHT by Wiesel*, N.Y. TIMES, Jan. 17, 2006, at E1 (quoting Elie Wiesel, explaining the significance of the book's classification as a work of nonfiction, "As it is a memoir, he said, 'my experiences in the book - A to Z - must be true...All the people I describe were with me there. I object angrily if someone mentions it as a novel.'")

²³ Wolfgang Koeppen "served as ghostwriter for the memoir of a Holocaust survivor" in 1948, then "in 1992 that book was republished under Koeppen's own name, and identified as a novel...But when the survivor's original manuscript was discovered and published, Koeppen was excoriated as a plagiarist and a liar." Ruth Franklin, *Speak Not, Memory: A German Writer, a Scandal, and the Necessity of Art*, THE NEW REPUBLIC, Aug. 20, 2001, at 30.

²⁴ Malcolm Jones & Ray Sawhill, *A Classic or a Hoax?* NEWSWEEK, Nov. 16, 1998, at 84; *see also* D.D. Guttenplan, *Why History Matters*, THE GUARDIAN (London), Apr. 15, 2000, at 1.

²⁵ Representative of personally tragic tales is David Pelzer's controversial classic, *A Child Called "It": One Child's Courage to Survive*, published in 1995. Pelzer's account of his alleged child abuse has been repudiated by his siblings and questioned by investigative reporters, though many apparently still believe the author's account of his life. *See, e.g.*, Pat Jordan, *Dysfunction for Dollars*, N.Y. TIMES, July 28, 2002, § 6, at 22.

²⁶ *Id.* In Constitutional law, "public figure" is a term of art denoting individuals other than "public officials", *see* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), who have achieved public status, whether by realizing general notoriety or through involvement in a public controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1973).

First Amendment guarantees of free speech and free press prevent a public figure from recovering for defamation absent proof that the defendant published the false and defamatory statement with actual malice. *Id.* A public plaintiff must prove that the defendant actually knew that the statements were false, or entertained serious doubts regarding their truth or falsity. *St. Amant v. Thompson*, 390 U.S. 727, 731-732 (1968). Since actual malice must be shown by clear and

familiarity with their authors' lives or works, readers start from total ignorance of the people behind the texts, or the truthfulness of their assertions.²⁷

At the same time, there has been an undeniable shift in subject matter: "Memoirs have become increasingly lurid in recent years, oozing with child abuse, poverty, drugs, alcohol, violence and insanity, and sex in any number of unsavory flavors."²⁸ While the private status of modern authors reduces public evidence of the truth or falsity of their claims, the authors' focus on emotionally charged taboos inhibits open investigation. Although a publisher or reader might openly question the facts contained in a presidential memoir²⁹ or celebrity retrospective,³⁰ it is more difficult to challenge the veracity of an alleged victim of rape, child abuse, incest or addiction.³¹

Thirdly, and perhaps most significantly, memoirs are increasingly published early in authors' lives. Writers have ample opportunity and motive to comment on their memoirs - to explain meaning, to answer readers' questions, and to respond to reviewers' critiques.³²

D. Recent Literary Frauds

Literary imposters have taken a variety of forms, with the majority of autobiographical hoaxes involving misrepresentations of authorial identity and/or literary genre.³³ It is often

convincing evidence, it is difficult for public figures to prevail in defamation claims, particularly against media defendants, or concerning issues of public concern. *See* *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

²⁷ *See* Julia Watson, *Two-Way Reflections*, IND. UNIV. CLIO 179(9) (reviewing SUSANNA EGAN'S *MIRROR-TALK: GENRES OF CRISIS IN CONTEMPORARY AUTOBIOGRAPHY*, which explores "what autobiographical narration has become as many people who would not have been considered 'great authors' a century ago turn to telling their lives").

²⁸ Lev Grossman, *The Trouble with Memoirs*, TIME, Jan. 23, 2006, at 60.

²⁹ *See* Solomon L. Weisberg, *Sins of Omission: Bill Clinton, My Life*, 9 TEX. REV. L. & POL. 389 (2005)(book review)(offering an eviscerating review of former President Clinton's memoirs).

³⁰ *See* Daniel J. Kornstein, *The Case Against Lillian Hellman: A Literary/Legal Defense*, 57 FORDHAM L. REV. 683, 685 (1989) (noting that author-playwright Lillian Hellman's "fidelity to facts in her memoirs has been doubted").

³¹ *See, e.g.*, ALICE SEBOLD, *LUCKY: A MEMOIR (rape)*, JEANETTE WALLS, *THE GLASS CASTLE (child abuse and neglect)*, KATHRYN HARRISON, *THE KISS (father-daughter incest)*, HEATHER KING, *PARCHED (alcoholism)*, MARYA HORNBACHER, *WASTED: A MEMOIR OF ANOREXIA AND BULIMIA*.

³² Graeme Hammond, *The Great Pretenders*, THE SUNDAY TELEGRAPH (Sydney, Australia) May 12, 2002, at 22 (examining the undoing of various literary and other frauds, and describing how the more the creators speak about their fabrications, the more likely they are to be revealed); *see also* Geoffrey Cowan, *The Future of Fact: The Legal and Ethical Limitations of Factual Misrepresentation*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 155, 158-59 (1998) (commenting on the memoirs of Secretary

difficult to determine whether the deceit concerns the writer, his story, or both. Since the 1990s, literary deception has been on the rise.

In 1993, Anthony Godby Johnson's *A Rock and a Hard Place* was published in the United States, attracting immediate attention and eventual controversy.³⁴

The tale of 15-year old Anthony Godby Johnson is one to freeze the blood: abused, starved and beaten by his parents who allowed their friends to rape him, ... he ran away to the protection of a New York family and a new life. Then he discovered he was dying of AIDS.³⁵

Due to his medical fragility, no one - including author Paul Monette, who wrote the book's Foreword, and television's Fred "Mr." Rogers, who wrote its Afterword - could meet him in person, though many maintained regular telephone communication.³⁶ Shortly after *A Rock and a Hard Place* was published, doubts surfaced that Tony Johnson did not exist.³⁷ Skeptics demanded something beyond the attestations of those who had spoken with Johnson over the phone, but the minor's guardian refused to produce him, citing his fragile condition. Although *A Rock and a Hard Place* remains in print, "the mystery of Tony and his book has erupted into one of the most discreditable sagas in the annals of modern media."³⁸ Except for a few die-hard advocates, most people have concluded that Tony never existed³⁹ but was the

of Labor Robert Reich, which were published shortly after Reich left office, leaving plenty of time for him to explain the inaccuracies that surfaced thereafter).

³³ Compare Jonathan Bate, *The Thursday Book: The Rehabilitation of Literature's Conmen*, INDEPENDENT, Sept. 12, 2002 (describing Romantic era forgers and frauds, and their impact on literary history; including Thomas Chatterton, who forged medieval poetry, and his contemporaries) to R. Sorensen, *Faking It: The Fiction About Publishers' Noble Calling*, COURIER MAIL (Queensland, Australia) Nov. 24, 1998, at 15 (exploring several highly-publicized literary hoaxes since the 1990s).

³⁴ See, e.g., Hammond, *supra* note 32.

³⁵ Ben Macintyre, *Hoax Claims Spark Debate on Praised Book by Aids Boy*, TIMES, May 27, 1993.

³⁶ Michelle Ingrassia, *The Author Nobody's Met*, 63 NEWSWEEK, May 31, 1993.

³⁷ *Id.*

³⁸ John Cornwell, *This Boy's Account of Childhood Abuse and His Fight For Life Shocked America and Became a Bestseller: But is he for Real? – The Ghost Writer*, WEEKEND AUSTRALIAN, Apr. 20, 2002, at R1.

³⁹ Perhaps the most accepted theory is that proposed by Tad Friend of *The New Yorker*. Friend attempted to prove Johnson's existence, but "was given a five-star runaround - berated, bullied and threatened before finally concluding that "Tony" was, in fact, an overweight middle-aged woman from Union City, New Jersey...who duped Monette, Armistead Maupin, Mr. Rogers, Jermaine Jackson and

fabrication of a social worker from Union City, New Jersey.⁴⁰ Author Armistead Maupin portrayed his strange relationship with “Tony” and his guardian in *The Night Listener*, a novel made into a film in 2006.

Deceit sometimes involves questions of authorial honesty and sincerity. In 1995, Benjamin Wilkomirski’s *Fragments: Memories of a Wartime Childhood* was published to critical acclaim.⁴¹ The author’s account of his early years in Nazi concentration camps earned numerous awards, including the National Jewish Book Award for Autobiography and the *Prix de la Memoire de la Shoah*.⁴²

Shortly thereafter, European journalists exposed Benjamin Wilkomirski as Bruno Doessekker, “a lifelong Swiss gentile...well-known in Zurich as a clarinetist.”⁴³ The once-celebrated autobiographer stuck to his memories, but the controversy surrounding his Holocaust story remains unresolved.⁴⁴ Unlike cases of made-up authors, “no one seems to think that Wilkomirski maliciously faked his story.”⁴⁵ In fact, many advocates still defend the author and his work: “*Fragments* is a fabrication, yet thousands of people have been moved by it; the sufferings of a child made the Holocaust real as nothing else had.”⁴⁶

In late 2005, another fictitious writer was exposed. J.T. Leroy, purportedly a teenage hustler who had been “pimped out as a cross-dressed prostitute by his mother” was revealed to be the literary creation of Laura Albert.⁴⁷ Albert and her longtime companion, Geoffrey Knoop, fabricated Leroy, and Knoop’s disguised younger sister appeared in public as the mysterious, reclusive author.⁴⁸ J.T. Leroy’s followers, including various celebrities, expressed

many other upright citizens with regular correspondence and lengthy phone calls...” Doug Harvey, *Lie of the Land*, L.A. WKLY., April 2, 2004, at 38.

⁴⁰ In a recent follow-up segment aired January 12, 2007, the ABC television news program 20/20 revealed that the photographs on the cover of *A Rock and a Hard Place* were misappropriated childhood pictures of a local man, now in his mid-twenties.

⁴¹ Jones & Sawhill, *supra* note 24, at 84.

⁴² *Id.* See also Guttenplan, *supra* note 24, at 1.

⁴³ Samuel G. Freedman, *Memory or Fiction?*, NEWSDAY, Feb. 17, 2002, at D26.

⁴⁴ Jones & Sawhill, *supra* note 24.

⁴⁵ *Id.*

⁴⁶ Inga Clendinnen, *Whose Pain Is It?*, THE AUSTRALIAN, Oct. 13, 1999, at B16.

⁴⁷ Stephen Beachy, *Who is the Real J.T. Leroy?: A Search for the True Identity of a Great Literary Hustler*, N.Y. MAGAZINE, Jan. 9, 2006.

⁴⁸ Grossman, *supra* note 28, at 62.

disappointment at the revelation of the author's true identity.⁴⁹ A film company with production rights to a movie version of Leroy's *Sarah* filed a civil action in federal court versus Albert and her publisher, among others.⁵⁰

III. THE LAW OF AUTOBIOGRAPHY & MEMOIR

A. Terminological Ambiguity

In the past 20 years, memoir has changed substantially from its traditional roots. At the same time, memoir has become "one of the best-selling categories in publishing."⁵¹ Yet the rules of the genre – even the meaning of memoir itself - remain fiercely debated. Compare the views expressed by award-winning author Gay Talese and his wife, *A Million Little Pieces* publisher Nan Talese, regarding memoir:

Gay Talese: "Nonfiction takes no liberties with the facts, and it should not...The trouble with book publishers is that they don't have the staff or they don't want to have the staff to ensure the veracity of a writer."

Nan Talese: "Memoir is personal recollection. It is not absolute fact. It's how one remembers what happened. That is different from history and criticism and biography, and they cannot be measured by the same yardstick."⁵²

Many writers acknowledge a professional duty to adhere to truth. Native American memoirist Sherman Alexie described the injury inflicted by an author whose memoir was revealed to be a fraud:

His lies matter because he has cynically co-opted as a literary style the very real suffering endured by generations of very real Indians because of very real

⁴⁹ Leroy's works, unlike Johnson's and Frey's, were classified as fiction, though described as "semi-autobiographical" and promoted as based on the author's real life. *See id.*

⁵⁰ *Antidote Internat'l Films, Inc. v. Bloomsbury Publ'g, PLC*, 2006 U.S. Dist. LEXIS 93649 (Jan. 3, 2007) (dismissing Lanham Act claims against publisher, but denying motion to dismiss common law fraud, and declining to dismiss claims against author).

⁵¹ Lev Grossman, *supra* note 28 (observing that "memoirs have also become one of the best-selling categories in publishing...[and] according to Nielson BookScan, nonfiction outsells fiction by about 100 million books a year.").

injustice caused by very real American aggression that destroyed very real tribes.⁵³

Author Carrie Fisher likewise explained her decision to publish fiction only:

I was going to write this as a memoir. But then I couldn't do it as a memoir. The truth is a very stern taskmistress, and I can't adhere to it. I have a very bad memory.⁵⁴

And in the related realm of news media, factual inaccuracies are simply not tolerated, as evidenced by recent high-profile scandals surrounding reporters.⁵⁵

Writers' willingness to take on a duty of truthfulness seems generally sufficient to satisfy publishers. It is not unusual for publishers to accept their first impressions of memoirs and their authors: according to some, "the writer is assumed to be truthful and accurate until proven otherwise."⁵⁶ Notwithstanding their lack of investigation, it is publishers who advise booksellers whether a text should be shelved in fiction or nonfiction.

⁵² Wyatt, *supra* note 22.

⁵³ Sherman Alexie, *When the Story Stolen is Your Own*, TIME, Feb. 6, 2006, at 72.

⁵⁴ Quoted by Bernard Weinraub, *For Hollywood Misery, an Alter Ego Helps*, N.Y. TIMES, Feb. 11, 2004, at E5 (referring to her second autobiographical novel, *The Best Awful*, which is based in large part upon the author's struggle with bipolar disorder).

⁵⁵ See, e.g., Linell Smith, *Memoir-Writing: Stick to the Truth or Take Liberties?*, BALTIMORE Sun, Jan. 11, 2006, at 1C, (explaining that "[u]nlike a newspaper that bears legal responsibility for what its reporters write, a publishing house treats authors as independent contractors rather than employees. An author signs documents indemnifying the publisher against such claims as copyright infringement and, in some instances, libel..."); David Wiegand, *After Getting Fired by the New York Times for Lying in Print, a Reporter Stumbled onto the Story of his Life*, S.F. CHRON., June 11, 2005, at E1 (examining the consequences for Michael Finkel, a reporter who "took interviews with a number of subjects on a story ... and created a composite character out of them" and explaining that "[e]ven now, there are some publications that won't give Finkel any ink and consider him a journalistic pariah"); see also Hammond, *supra* note 32 (discussing *Washington Post* journalist Janet Cooke, who returned a Pulitzer Prize after her story of an eight-year old junkie was revealed as a fake).

⁵⁶ Karen Sandstrom, *Taking a More Skeptical Look at Nonfiction Book Reviews*, PLAIN DEALER, Dec. 23, 2001, at J11.

B. Legal Responses

Historically, terms like autobiography and memoir have been fodder for literary disputes, not litigation. Nevertheless, the law has long recognized the tension between individual privacy rights and freedoms of speech and press.

In one of the first autobiography lawsuits, a company with contract rights to publish the autobiography of eccentric millionaire Howard Hughes sued the would-be publisher of a fake memoir. New York courts enjoined publication of the work as autobiography or biography, but declined to issue an injunction preventing publication of the same text as fiction.⁵⁷

Courts have upheld the right of individuals to publish true stories of their own lives, even when such disclosure reflects negatively on third parties. For example, Susanna Kaysen, author of *Girl, Interrupted*, won a victory regarding the publication of a subsequent memoir, which the author's former boyfriend claimed was defamatory.⁵⁸ In dismissing under the Massachusetts analog to Federal Rule of Civil Procedure 12(b)(6), the Court emphasized the author's right to disclose her private affairs.

In this case, it is critical that Kaysen was not a disinterested third party telling Bonome's personal story in order to develop the themes in her book. Rather she is telling *her own* personal story – which inextricably involves Bonome in an intimate way. In this regard, several courts have held that where an autobiographical account related to a matter of legitimate public interest reveals private information concerning a third party, the disclosure is protected so long as there is a sufficient nexus between those private details and the issue of public concern.⁵⁹

⁵⁷ *Rosemont Enterprises, Inc. v. McGraw-Hill Book Co.*, 85 Misc.2d 583 (N.Y. Spec. Term. 1975), *Rosemont Enterprises, Inc. v. Irving*, 49 A.D.2d 445 (N.Y. App. Div. 1975).

⁵⁸ *Bonome v. Kaysen*, 2004 Mass. Super. LEXIS 172 (2004) (describing the defamatory potential of the book, the Court explains: “[T]he light in which Bonome is portrayed would be highly offensive to a reasonable person. Indeed, the ruminations in the book depict Bonome engaging in sexual activity and being emotionally unavailable and insensitive to Kaysen's condition. They culminate with the suggestion that he raped her.” *Id.* at *13).

⁵⁹ *Id.* at 18-19 (internal citations omitted).

However, an ongoing civil action filed against *Running with Scissors*⁶⁰ author Augusten Burroughs challenges that general legal principle. The lawsuit, filed by members of the family with whom Burroughs lived during the period chronicled in *Scissors*, alleges that Burroughs fabricated substantial portions of his memoir, including his disturbing descriptions of the plaintiffs.⁶¹

The law further safeguards an author's right to prevent unauthorized publication of his or her personal writings. In a well-known example, reclusive author J.D. Salinger obtained an order enjoining a would-be biographer from publishing Salinger's personal writings kept on file at a university library.⁶² Typically, it is up to an author to publish or not to publish his life story, although there are occasional exceptions in the criminal law context.⁶³

IV. ANALYSIS OF THE JAMES FREY SCANDAL

A. *A Million Little Pieces*: Scandal to Settlement

In his own words, James Frey was “an Alcoholic,” “a drug Addict,” and “a Criminal.”⁶⁴ At the age of twenty-three, he was sent by his parents to the prestigious Hazelden rehabilitation facility in Minnesota, where he stayed for six weeks. Frey rejected the

⁶⁰ AUGUSTEN BURROUGHS, *RUNNING WITH SCISSORS: A MEMOIR* (Picador/St. Martin's 2002).

⁶¹ Buzz Bissinger, *Ruthless with Scissors*, VANITY FAIR, January 2007, available at <http://www.vanityfair.com/fame/features/2007/01/burroughs200701>.

⁶² *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (holding that *Catcher in the Rye* author's private unpublished letters could not be published in unauthorized work by third-party biographer).

⁶³ See, e.g., *Colorado v. Larson*, 92 P.3d 246, 250-251 (Colo. App. 2004) (holding that any error was harmless where the prosecution in a child molestation case introduced excerpts of the defendant's seized autobiography, which had been prepared during mandatory counseling, for the asserted purpose of proving modus operandi and intent); *Krist v. Olympia Press, Inc.*, 346 F. Supp. 182, 184-185 (S.D.N.Y. 1972) (denying prisoner-author's request for a preliminary injunction and temporary restraining order preventing the publication of an autobiography that he had provided before considering that revelations contained therein could negatively impact his chance of parole); *Louisiana v. Billiot*, 370 So. 2d 539 (La. 1979) (finding no error where the defendant's handwritten autobiography was accepted into evidence at trial, the prosecution read excerpts aloud, but the judge denied the jury's request to examine a copy of the autobiography).

⁶⁴ AMLP, *supra* note 2, at 94.

traditional Twelve-Step approach but nonetheless overcame his addictions; a few years later, he transcribed his astounding recovery.⁶⁵

In September 2001, James Frey sent his manuscript to eighteen publishers, seventeen of whom rejected it entirely.⁶⁶ It remains unclear exactly what happened with the remaining publisher, Nan A. Talese, a highly respected subsidiary of Doubleday, itself a division of Random House. According to some accounts, Frey inquired about publishing the manuscript as an autobiographical novel rather than a memoir, purportedly to protect his family and other individuals mentioned therein.⁶⁷ Others, including Ms. Talese, claim that “the book was always seen as a memoir.”⁶⁸ At the opposite extreme, some blame Ms. Talese entirely for the classification of *AML*P as nonfiction.⁶⁹

Although the events leading up to publication remain contested, their culmination is undisputed: in April 2003, Nan Talese/Doubleday published Frey’s manuscript as *A Million Little Pieces*, classified and advertised as the author’s nonfiction memoir.⁷⁰ In contrast to many autobiographical books, especially those dealing with altered states of consciousness or spheres of questionable legality, *AML*P did not contain a disclaimer indicating changes to factual content.⁷¹ *AML*P was categorized as Literature/Memoir, and the back-cover synopsis described the book as “Frey’s acclaimed account of his six weeks in rehab.” In the paperback

⁶⁵ JAMES FREY, *a note to the reader*, to be published in upcoming editions of *AML*P, available at <http://www.randomhouse.biz/media/pdfs/AML020106.pdf> (explaining that the author “first sat down to write the book in the spring of 1997”)(last visited March 30, 2007).

⁶⁶ The Smoking Gun, *A Million Little Lies: The Man Who Conned Oprah*, Jan. 8, 2006, available at www.thesmokinggun.com/jamesfrey/0104061jamesfrey1.html, at 1, ¶ 28 (hereinafter “TSG”)(last visited March 30, 2007).

⁶⁷ See Anne-Marie O’Connor & Josh Getlin, *Does Frey Have Trouble in Hollywood?*, L.A. TIMES, Feb. 6, 2006 (quoting Frey’s then-agent, Kassie Evashevski, regarding the memoir vs. novel issue: “I told him I would bring it up with a few publishers, which I did, and the response was unanimous: If the book is true, it should be published as a memoir.”).

⁶⁸ *Id.*

⁶⁹ See *Paglinawan v. Frey*, 2:06-cv-00099-RSM (W.D. Wash. 1/19/2006), http://cdn.digitalcity.com/tmz_documents/060130_frey.pdf, at ¶ 5.2 (alleging that “Nan A. Talese/Doubleday agreed to publish Mr. Frey’s manuscript if he recast the novel as a memoir.”)(last visited March 30, 2007).

⁷⁰ TSG, *supra* note 66, at 1, ¶¶ 16, 28.

⁷¹ A quick glance at other similarly situated works reveals that *AML*P’s lack of any disclaimer or prefatory note is an exception to the general rule. See, e.g., SUSANNA KAYSEN, *GIRL, INTERRUPTED* (1993)(prefacing memoir of time in psychiatric institution: “Though this book is nonfiction, some of the names and distinguishing traits of patients, doctors, and staff have been changed.”); ELIZABETH WURTZEL, *supra* note 16 (stating before memoir of drug rehabilitation: “The author has changed the names and characteristics of some individuals in this book.”).

edition published in 2004,⁷² four reviews⁷³ refer to *AML* as Frey's memoirs, while one extols his "description of the experience and another the "poetic account of his recovery."⁷⁴ One proclaims, "[t]he strength of the book comes from the truth of the experience."⁷⁵ In short, all external indicia support the conclusion that *AML* is Frey's nonfiction account of his personal addictions and recovery, including true depictions of the people and events involved in his six-week rehabilitation stay.

In September 2005, Oprah Winfrey selected *AML* for her popular book club.⁷⁶ In October, she dedicated an entire segment to James Frey, during which audience members shared how *AML* had influenced their lives.⁷⁷ Frey reiterated on-air that *AML* was his true story.⁷⁸

In December 2005, investigative journalists at (t)The Smoking Gun started searching for a mug shot of Frey for their website.⁷⁹ Confronting difficulty, they (the investigators) became suspicious of Frey's asserted criminal background. TSG contacted Frey and conducted several off-the-record interviews, during which Frey defended the truth of his work but refused or failed to provide any evidence to back up his claims.⁸⁰ Later that month, Frey was involved in a dispute regarding the script for the film version of *AML*.⁸¹

In response to TSG's investigation, Frey hired the Los Angeles-based law firm Lavelly & Singer. On January 6, 2006, Frey's attorney sent an email advising TSG to refrain from

⁷² O'Connor & Getlin, *supra* note 67, claiming that Ms. Talese acknowledged in 2003 that the lack of a disclaimer was a mistake ("It's a total slip-up that we didn't have a disclaimer page...I'm embarrassed." But not enough, apparently, to correct the mistake when the paperback edition of 'A Million Little Pieces' came out in 2004.").

⁷³ On the back cover: S.F. CHRON.; on the front introductory page: N.Y. PRESS, PLAIN DEALER and SALON.

⁷⁴ NEW YORKER; CHIC. SUN TIMES.

⁷⁵ OREGONIAN.

⁷⁶ TSG, *supra* note 66, at 1, ¶ 23.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1, ¶¶ 6, 12, 29.

⁷⁹ *Id.* at 2, ¶¶ 3, 4.

⁸⁰ *Id.*(passim); see also *Good Morning America, Memoir Controversy: Author Accused of Lying* (ABC television broadcast Jan. 10, 2006).

⁸¹ O'Connor & Getlin, *supra* note 67 (describing alleged controversy involving Frey and producers: "Frey said they didn't have the right to alter the facts in the book... 'How could they do this? This was his life!' ... eventually Frey fired his [Hollywood] agency.").

publishing allegations that *AML*P was inaccurate.⁸² The next day, Frey posted an email from The Smoking Gun on his website, www.bigjimindustries.com. Frey explained that:

he was posting [TSG's] letter to inform his fans of the 'latest attempt to discredit me...So let the haters hate, let the doubters doubt, I stand by my book, and my life, and I won't dignify this bullshit with any sort of further response.'⁸³

Considering publication of its email a waiver of confidentiality, TSG included portions of the off-the-record interviews, as well as links to Frey's legal threat letter and his online statement, in its Internet publication.⁸⁴

On January 8, 2006, The Smoking Gun published an exposé of *AML*P, entitled *A Million Little Lies: The Man Who Conned Oprah*.⁸⁵ On January 11, Frey defended himself on "Larry King Live," and Oprah called in to voice her support.⁸⁶ Less than two weeks later, Oprah denounced James Frey and Nan Talese, and much of the publishing industry, on live television.⁸⁷ Oprah's vitriolic episode marked the climax of the James Frey scandal, and it focused public attention, at least momentarily, on the problem of truthiness in memoirs.

Doubleday postponed printing *AML*P and issued a statement to readers, which was published online, in print advertisements, and in later editions of the book.⁸⁸ In early February, James Frey released an author's note, also included in future printings.⁸⁹

⁸² TSG, *supra* note 66, at 1, ¶ 9.

⁸³ *Id.* at 1, ¶ 9.

⁸⁴ *Id.* at 1, ¶ 10.

⁸⁵ *Id.*

⁸⁶ See Hillary Frey, *Oprah's Revenge*, SALON, Jan. 27, 2006.

<http://www.salon.com/books/feature/2006/01/27/oprah/index.html>.

⁸⁷ *Id.* See also Lauren Beckham Falcone, *Liar, Liar: Oprah's Frey Fury*, BOSTON HERALD, Jan. 27, 2006, at 3 (opining that Oprah's response to the Frey debacle may prove most significant).

⁸⁸ *News From Doubleday & Anchor Books*, <http://www.randomhouse.com/trade/publicity/pdfs/AML012706.pdf> ("We bear a responsibility for what we publish, and we apologize to the reading public for any unintentional confusion surrounding the publication of A MILLION LITTLE PIECES.").

⁸⁹ FREY, *supra* note 65.

Meanwhile, Frey was dropped by his literary agent⁹⁰ and encountered problems with Doubleday and the publisher of his second memoir, *My Friend Leonard*.⁹¹

After *A Million Little Pieces* was revealed to be largely fictional, a slew of lawsuits were filed against James Frey, Nan Talese, and Doubleday / Random House. In June 2006, the various actions were consolidated in the United States District Court for the Southern District of New York.⁹² On September 7, 2006, the New York Times reported that Frey and Random House had negotiated a preliminary settlement agreement, whereby approximately \$2.35 million will be allocated to customer refunds, attorneys' fees, and a charitable donation.⁹³ Neither Frey nor Doubleday / Random House will admit any wrongdoing under the proposed settlement agreement. Customers who purchased *AML*P before January 26, 2006 will be eligible for a refund if they produce the front cover of the paperback edition, or page 163 of the hardback book, and sign a sworn statement that they would not have bought *AML*P "if they knew that certain facts had been embroidered or changed."⁹⁴

B. Regulation of Writing "In" vs. "On" Books

The critical juncture of publication crystallizes the relations among author, publisher, and audience. A published book conveys dual assertions: the author's story, and the publisher's statements on the book cover or jacket. Legally, these statements fall within distinct categories of speech.⁹⁵ Whereas the interior story is fully protected by the First

⁹⁰ See *Frey Loses Support of Agent*, GUARDIAN UNLIMITED, Feb. 1, 2006 (quoting Frey's former agent, Kassie Evashevski, as saying, "In the last week, it became impossible for me to maintain a relationship once the trust had been broken.")

⁹¹ Carol Memmott, *Million Little Problems Follow Writer: Two Publishers Throw the Book at James Frey*, USA TODAY, Jan. 30, 2006, at 1D (describing why Riverhead, the publisher of *My Friend Leonard*, is reconsidering a contract with Frey for future books).

⁹² Transfer Order, *In Re "A Million Little Pieces" Litigation*, Judicial Panel on Multidistrict Litigation, No. 1771, 435 F. Supp. 2d 1336 (June 14, 2006) (listing cases filed in California, Illinois, New York, Ohio, and Washington, and consolidating actions in the federal district court for the Southern District of New York).

⁹³ Mokoto Rich, *Publisher and Author Settle Suit Over Lies*, N.Y. TIMES, Sept. 7, 2006, at E1.

⁹⁴ *Id.*

⁹⁵ In *Keimer v. Buena Vista Books, Inc.*, the court rejected the defendant publisher's claim that statements published on the jacket of a book were absolutely protected by the First Amendment because the same statements were contained within the book. 89 Cal. Rptr. 2d 781 (1999), *review denied*, 2000 Cal. LEXIS 1740.

In contrast to statements in the book itself, excerpts published on the book jacket were commercial speech and, therefore, entitled to only limited constitutional protection. When printed on the book

Amendment, statements on the cover are commercial speech, and thereby potentially subject to rational regulation.⁹⁶

To members of the audience, moreover, the claims of author and publisher are inextricably intertwined. Frey represented *AML*P, whether sincerely or fraudulently, as his true story of addiction and recovery. Nan Talese, and Doubleday/Random House, likewise promoted the work as nonfiction.⁹⁷ Would readers accept as true the story of an avowed addict and criminal, based solely upon the author's attestation? If audience members did accept such statements as accurate, and relied upon said assertions to their detriment, then any injury would be avoidable through the exercise of ordinary prudence. However, where the scenario is altered to include confirmatory statements by a reputable publisher, readers' reliance seems much more reasonable.

Consider the facts as compared to those in *Hanberry v. Hearst Corporation*.⁹⁸ In *Hanberry*, a customer purchased shoes from a retailer, based upon an advertisement and endorsement published in defendant's *Good Housekeeping* magazine.

[P]roducts, including the shoes she purchased, were advertised as meeting the "Good Housekeeping's Consumers' Guaranty Seal." With respect to this seal, the magazine stated: "This is Good Housekeeping's Consumers' Guaranty" and "We satisfy ourselves that products advertised in *Good Housekeeping* are good ones and that the advertising claims made for them in our magazine are truthful."⁹⁹

jacket, statements about the authors' investment returns were advertisements. Because the statements were provably true or false, the publisher could be held liable under the Unfair Trade Practices Act. *Cf. Lacoff v. Buena Vista Publishing, Inc.*, 705 N.Y.S.2d 183, 189 (2000) (In holding that statements on a book jacket are not commercial speech, the court noted that "[t]o permit a publisher's economic motivation to convert protected expression into commercial speech would turn every article published in the newspapers or periodicals into commercial speech, because they are sold for profit.").

⁹⁶ See Samantha J. Katze, *A Million Little Maybes: The James Frey Scandal and Statements on a Book Cover or Jacket as Commercial Speech*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 207, 218-230 (2006)(advocating the approach followed in *Lacoff*, *supra* note 95, rather than treating statements on book covers as purely commercial speech).

⁹⁷ See, e.g., Joe Hagan, *Meet the New Staggering Genius*, N.Y. OBSERVER, Feb. 3, 2003, at 6 (providing a harsh critique of Frey and *AML*P).

⁹⁸ 276 Cal. App. 2d 680 (1969).

⁹⁹ *Id.* at 682.

The customer alleged that she had relied upon the *Good Housekeeping* endorsement in purchasing the shoes; therefore, she argued, defendant was liable for injuries caused by the allegedly defect. Reversing an order of summary judgment for the defendant, the court held that the plaintiff stated a valid claim of negligent misrepresentation.¹⁰⁰

Having voluntarily involved itself in the marketing process, having in effect loaned its reputation to promote and induce the sale of a given product...[defendant] has placed itself in the position where public policy imposes upon it the duty to use ordinary care...so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm.¹⁰¹

Although it could not be strictly liable, the court reasoned that the publisher nonetheless owed a duty of reasonable care to prevent foreseeable harm to consumers.

Claims of negligent and intentional misrepresentation were filed against James Frey and Doubleday / Random House. Some plaintiffs additionally filed claims for false advertising and unfair business practices under state consumer protection statutes. In contrast to the contract-based claims, plaintiffs' latter claims emphasize parties' duties of care, rather than any specific agreement.

Negligent misrepresentation is defined as follows:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.¹⁰²

¹⁰⁰ *Id.* at 684.

¹⁰¹ *Id.*

¹⁰² Restatement (Second) of Torts, § 552 (2005). Information Negligently Supplied for the Guidance of Others.

Under the Restatement definition, the first issue is whether the purchase of a memoir constitutes a business transaction. However, in light of the pecuniary interests retained by Frey and Doubleday, the transaction seems at least partly commercial. Moreover, some purchasers bought and read *AMLP* for work-related purposes.¹⁰³

A conceptual hurdle arises if negligent misrepresentation claims are levied against both author and publisher. Under a contributory or comparative negligence framework, plaintiffs could concede their own liability by proving that Nan Talese's gullibility constituted lack of due care.¹⁰⁴ Similarly, plaintiffs confront a difficult burden in their claims against the admittedly alcoholic, drug-addicted author. In light of Frey's disclosures and the audience's knowledge, it is difficult to determine which party, if any, failed to exercise ordinary care. Even if reliance on Frey's assertions of truthfulness is established, claimants must convince a trier of fact that such reliance was reasonable, and that they should not be held primarily responsible for their injuries. Of course, if the proposed settlement is finalized, the legal success or failure of the plaintiffs' various claims against Frey and his publisher will never be known.

C. An Ordinary Fraud

Though interesting from a literary/legal perspective, James Frey's scam is quite common. For example, consider the equally notorious Kevin Trudeau, author, salesman, and guru. While *AMLP* led the *New York Times* best-seller list in the non-fiction category, Trudeau's *Natural Cures "They" Don't Want You to Know About* topped the hardcover advice rankings.¹⁰⁵ Like Frey, Trudeau challenges mainstream beliefs about illness and

¹⁰³ See David Hafetz, Susan Edelman & Laura Italiano, *Frey Sparks a Million Little Lawsuits*, FOX NEWS, Jan. 31, 2006 (reporting that "Jennifer Cohn, a Manhattan social worker" sued Frey and Random House for \$10 million after recommending the allegedly true *AMLP* to clients struggling with addictions and criminal records).

¹⁰⁴ *But see* H. Frey, *supra* note 86 (reporting Oprah's argument that Nan Talese should have recognized implausibility that might escape ordinary readers of *AMLP*).

¹⁰⁵ Bill Toland, *Neither Jail Nor Fines Nor Discredited Products Can Stop Kevin Trudeau From Being...King of the Infomercial World*, PITTSBURGH POST-GAZETTE, Sept. 9, 2005, at E1.

recovery, claiming to have personally discovered superior alternatives.¹⁰⁶ Like *AMLP*, Trudeau's *Natural Cures* has generated popular demand, public controversy, and litigation.

Before becoming an author, Trudeau gained fame and fortune as a radio and television salesman.¹⁰⁷ Allegations of fraud and false advertising resulted in numerous legal battles, and in 2004, "the Federal Trade Commission banned Trudeau from peddling his cure-all products on television, an unprecedented legal restriction."¹⁰⁸ While authorities stopped Trudeau's product sales, attempts to regulate his book have been less successful. False claims about medicinal products support regulatory actions; however, false statements about non-product methods are more problematic.¹⁰⁹ Preventing the sale of snake oil is one thing, but "[p]rohibiting an author from talking and marketing his work brings up all sorts of First Amendment and censorship issues."¹¹⁰ Thus, despite government regulation of Trudeau's tangible fake products, *Natural Cures* remains popular within its nonfiction category.

Prior literary frauds, including Anthony Godby Johnson, J.T. Leroy, and Benjamin Wilkomirski, deceived their readers and undoubtedly caused emotional harm. Yet none of these authors, or their books, quite compares to Frey and *AMLP*, at least in part because none extends beyond mere self-reporting. The distinction between descriptions of oneself and directives based upon personal knowledge separates *AMLP* from the other fraudulent memoirs. In its advisory content, *AMLP* shares more in common with Kevin Trudeau's *Natural Cures*. If Frey, like Wilkomirski, had merely recounted sincere beliefs that were objectively untrue, then perhaps his lies could be excused, though not justified.¹¹¹ But *AMLP* is much more than the author's rose-colored recollections: it is his manifesto in opposition to the only scientifically-supported method of overcoming addiction, and in support of an alternate route to recovery.

¹⁰⁶ *Id.* Trudeau specifically claims that the "government and the doctors cover up [] natural remedies...to protect the pharmaceutical industry, which wants to keep people sick so it can sell more medicine.

¹⁰⁷ See Stephanie Zimmerman, *Radio Ad Pitch A Scam, Suit Alleges*, CHICAGO SUN-TIMES, Apr. 17, 1996, at News-1.

¹⁰⁸ Toland, *supra* note 105.

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ See JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW, 3d ed., 482-682 (West 2003). From a criminal law perspective, justification of Frey's deceit would absolve the author on the ground that his lying was caused by circumstances beyond his control and thus necessary to avoid a greater

James Frey's rejection of the Twelve Step methodology is all encompassing. He posits a simple argument for a better alternative, summarized as follows:

Addiction is not a disease. Not even close. Diseases are destructive Medical conditions that human beings do not control....

If a drunk is a drunk, but doesn't want to be a drunk anymore, it is not a genetic disease. Addiction is a decision. An individual wants something, whatever that something is, and makes a decision to get it....

It is a decision. Each and every time. A decision. String enough of those decisions together and you set a course and you set a standard of living. Addict or human.¹¹²

From this starting point, Frey reasons that the Twelve Steps are irrelevant and unnecessary, and he decides to forego substances by sheer force of will. As he does so, Frey intimates that people who persist in following the traditional road to recovery are misguided, even foolish. Throughout his purported memoir, Frey adheres to his personal formula and lashes out at anyone who presents a contrary perspective.

In two memorable scenes, the author eviscerates traditional portrayals of addiction. In the first episode, a former celebrity speaks at the rehabilitation facility during one of the daily meetings that Frey alternately ignores or mocks.

I don't like this man. I don't like what he has to say or how he's saying it. I don't believe him and his Rock Star status isn't enough to make me buy the shit he's trying to sell....

The life of the Addict is always the same. There is no excitement, no glamour, no fun....To make light of it, brag about it, or revel in the mock glory of it is not in any way, shape or form related to its truth, and that is all that matters,

harm. Excusing Frey, on the other hand, would not condone his actions, but would merely spare him liability on the basis of a lack of capacity, perhaps intoxication or insanity.

¹¹² *AMLP*, *supra* note 2, at 291-92.

the truth. That this man is standing in front of me and everyone else in this room lying to us is heresy.¹¹³

In the second instance, Frey and some of the other patients watch a made-for-television movie about a drug addict's recovery.

If I could, I would hunt down the Creators of this utter bullshit fantasy fairy-tale piece of crap and I would lock them in a room and feed them drugs until they were profoundly and chronically Addicted to them....

I'd ask them how they were going to present addiction to the Public in the future. I'd ask them if they were going to romanticize it, glorify it, make light of it or portray it in a way that is wholly inaccurate.¹¹⁴

At the conclusion of each vignette, Frey reiterates his duty to the truth and denounces others' delusions and deceit.

V. CONCLUSION

Psychologist M. Scott Peck, author of *People of the Lie*, posits that lying is based upon malignant narcissism, a steadfast adherence to one's preferred beliefs despite overwhelming proof of a contrary reality.

Malignant narcissism is characterized by an unsubmitted will. All adults who are mentally healthy submit themselves one way or another to something higher than themselves, be it God or truth or love or some other ideal.... They believe in what is true rather than what they would like to be true.¹¹⁵

¹¹³ *Id.* at 177-78.

¹¹⁴ *Id.* at 241.

¹¹⁵ M. SCOTT PECK, M.D., *PEOPLE OF THE LIE: THE HOPE FOR HEALING HUMAN EVIL* 78 (Simon & Schuster) (1983).

Peck's analysis of lying brings us full circle to the concept of truthiness. In the final section of this Note, I argue that Frey's truthiness poses a very real danger to readers of *AML*, though not a risk that the law can properly remedy.

Elie Wiesel has said of the Holocaust that "any survivor has more to say than all the historians combined."¹¹⁶ The same premise applies to the realm of addiction and recovery. Like any incomprehensible suffering, there is always hope that an insider can shed some light - some truth - on the mysteries of substance abuse and dependency. This is the crux of the danger posed by James Frey's *A Million Little Pieces*. As a work of fiction, Frey's story has limited force. But, presented as truth, his message acquires immense power.¹¹⁷

The true victims of Frey's lies are not the masses of readers outraged by the success of his ruse, but the recovering alcoholics and addicts who believed in the truth of *AML*. Frey's embittered criticism of the Twelve Steps, combined with his self-congratulatory success in the years since he gave up alcohol and drugs, seems likely, and perhaps intended, to persuade others to follow in his footsteps. Because Frey purports to present an insider's view of alcoholism, addiction, and crime, he writes with the full force of experiential knowledge. For every individual battling substance or other abuse, and for all those influenced by others' addictions, Frey pretends to offer a glimpse of truth and understanding. Frey's rejection of all traditional concepts - genetic factors, chemical dependency, ongoing support networks - nearly guarantees that readers inspired by *AML* will do the same.

It is these people - recovering addicts who decline AA meetings, abstaining alcoholics who tempt themselves with a full glass of liquor - who risk the most severe injuries. And if the falsity of *AML* proximately causes relapse, the harm will not be limited to the alcoholics and addicts themselves: it will radiate outward, touching the lives of spouses, children, parents, friends, and innocent bystanders. Although the greater harms wrought by the deceit

¹¹⁶ *Guttenplan, supra* note 24.

¹¹⁷ The history of literary censorship suggests that even calling a fictional work a "memoir" increases its potential power. Consider, for example, the controversy surrounding the 1963 publication of *John Cleland's Memoirs of a Woman of Pleasure*, first published in the mid-1700s as *The Life and Adventures of Fanny Hill*. See also *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Massachusetts, 383 U.S. 413 (1966) (holding that *Memoirs* was not obscene under the test articulated in *Roth v. United States*, 354 U.S. 476 (1957)).

of *AMLP* cannot be remedied, hopefully the first-ever refund issued due to factual inaccuracies in a memoir will increase scrutiny of memoirists and their publishers.¹¹⁸

¹¹⁸ The law has attempted to extend the equitable prohibition of profit-by-wrongdoing to reach the fruits of criminal notoriety. In 1977, New York enacted a “Son of Sam” statute, so named for serial killer David Berkowitz, whom news reports alleged had entered into a lucrative book deal. The purpose of Son of Sam laws is to preclude criminals from profiting by selling the stories of their crimes, particularly where victims remain uncompensated. Several states followed New York’s approach, although the laws were rarely applied.

Since the Supreme Court struck down New York’s statute in *Simon & Schuster v. New York Crime Victims’ Board*, the law has not developed a constitutional means of proscribing profits arising from books about true criminal acts. 502 U.S. 105 (1991). The concept, however, of disgorging a criminal’s economic benefits to compensate those injured by crimes nevertheless supports a remedy in the James Frey case. Rather than providing treble damages to purchasers of *AMLP*, the law could ideally enable those individuals most injured by reliance to obtain civil remedies via mechanisms similar to the Son of Sam statutes.