

A Tale of Three Hoaxes: When Literature Offends the Law

Molly Guptill Manning*

INTRODUCTION

“Tell all the truth but tell it slant[,] [s]uccess in Circuit lies,” begins one of Emily Dickinson’s famous poems.¹ Although this advice may be apt in certain circumstances, recent litigation has shown that authors of memoirs or other nonfiction would be better off avoiding it. Over the course of several centuries, the publication of “true” stories peppered with embellishments and falsities has come to form the troublesome tradition of the great literary hoax. Many esteemed authors have participated in this surreptitious and vexatious realm of writing. In fact, “[s]ome of the most respected names in literature have indulged in the sport: Defoe, Shelly [sic], Sir James Barrie,” Edgar Allen Poe and many others.² In the last century, so many authors masterminded hoaxes that it would be difficult to quantify how many there have been. Perhaps unsuspecting readers are being subjected to an undetected one at this very moment?

Literary hoaxes have taken many different appearances, and their ability to continue to evade early detection by publishing houses, readers and reviewers adds to their mischievousness and the intrigue surrounding them. Typically, hoax literature provides a compelling narrative that lures readers into valuing the words being read because they are supposed to be true. Consequently, once the hoax is revealed for what it is, readers often experience strong feelings of disappointment, anger and embarrassment for having been tricked; some are even amused for having been played the fool. Countless times, the book industry has been brought under fire for not catching a hoax before a book is released for public consumption and allowed to ravage unsuspecting readers. Despite cries for reform, few changes have been made and publishing companies have increasingly been hailed into court for resolution of disputes arising from these literary capers. In fact, over the last century, hoaxes have spawned congressional hearings, lawsuits and even criminal prosecution, yet they show no sign of slowing and, if anything, have only grown

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1. EMILY DICKINSON, *Poem 1129*, in *COMPLETE POEMS OF EMILY DICKINSON* 506, 506 (Thomas H. Johnson, ed., 1961).

2. *Hoaxes Recurrent in All Literature*, *N.Y. TIMES*, Nov. 15, 1953, at 44.

more prevalent.

This article examines the tradition of the literary hoax, and then focuses on three unique examples that resulted in court intervention. Part I provides a brief history of literary hoaxes and samples the many guises they have taken over the years. Parts II, III and IV provide detailed accounts of the hoaxes perpetrated by Arthur Train, Clifford Irving and James Frey, respectively, and explore how Train got away with his mischief, Irving ended up behind bars, and Frey and his publisher became entangled in a class action lawsuit and a multimillion dollar judgment. Part V attempts to reconcile the differing outcomes for Train, Irving and Frey. As there is a dearth of case law clarifying what acts might result in civil liability, an examination of past hoaxes and their resulting litigation lends some lucidity as to what acts might result in imprisonment, monetary damages and public acquittal for one's literary sins.

I. HERE WE GO AGAIN!

The literary hoax has plagued readers for probably as long as words were recorded in writing. One of the earliest was said to have occurred during the first century, when Philo Biblos invented sources for his history of Phoenicia.³ Since then, hoaxes have taken many forms over the years—from embellished memoirs to entirely invented tomes of “nonfiction”—with perhaps the only constant being the public's gullibility in trusting that books are what they purport to be. After all, when a book is labeled as a work of nonfiction, few readers then question whether the book is actually a true story.

A review of past hoaxes reveals that not only have they gone largely unpunished, but the reputations of their creators remained untarnished—these authors continued to command the respect of their readers and writing peers. For example, in 1849, Edgar Allen Poe published “Von Kempelen and His Discovery,” which purportedly explained how to make gold.⁴ Daniel Defoe, who is “credited with being the father of the English novel, wrote several hoaxes,” including *Colonel Jack*, which told the “true” story of a “journey across equatorial Africa.”⁵ Percy Bysshe Shelley published *The Posthumous Fragments of Margaret Nicholson*, a book said to contain poems “written by a mad washerwoman who had thrown a knife at King George III.”⁶ Poe, Defoe and Shelley remain esteemed names in classic literature, yet they participated in what has increasingly become literature's most controversial pastime. Perhaps their escape from society's wrath was because their hoaxes were unlikely to cause harm—Poe did not attribute his fake gold recipe to a real person (so as to defame him or her when the recipe did not yield bullion), it is doubtful anyone suffered an injury by attempting to copy Colonel Jack's cross-country African trip and Shelley's poetry did not cause a

3. John Darnton, *Literary Hoaxes out of the Past*, N.Y. TIMES, Feb. 13, 1972, at 56.

4. *Hoaxes Recurrent in All Literature*, *supra* note 2, at 44.

5. *Id.*

6. *Id.*

spike in attempted murders.

However, not all hoaxes were written as good-natured fun. Jonathan Swift, author of *Gulliver's Travels* and a host of other beloved stories and writings, hatched one particularly nefarious hoax.⁷ In January 1708, he orchestrated a plan to discredit a popular astrologer, John Partridge, whose outspoken religious views irked Swift. Swift's carefully constructed plan began with the publication of *Predictions*, a pamphlet printed under the pseudonym, Isaac Bickerstaff. In this prescient writing, Bickerstaff declared that Partridge, "the Almanack-Maker . . . will infallibly die upon the 29th of March [1708, at] about eleven at Night, of a raging Fever: Therefore I advise him to . . . settle his Affairs in Time."⁸ As news spread of this shocking claim, thousands of copies of *Predictions* were sold, and unauthorized editions were churned out by profiteering publishers.⁹ When Partridge heard that his demise had been predicted, he wrote an essay belittling Bickerstaff—"His whole Design was nothing but Deceit, The End of March will plainly show the Cheat."¹⁰ Partridge's participation delighted Swift, for it "only made the hoax the better" and helped keep the joke alive.¹¹ After the appointed date, Bickerstaff published *The Accomplishment of the First of Mr. Bickerstaff's Predictions*, which stated that, on March 29, as rumors spread that Partridge was "past [h]op[e]," Bickerstaff decided to visit Partridge, the latter of whom confided that he was a "poor ignorant Fellow," who filled his almanac with sensational "[d]eceits" so that it would sell well and he could keep his wife comfortable.¹² Bickerstaff's claims were believed far and wide. In fact, Swift's hoax was so convincing that when Partridge—who had not actually perished—tried to convince others that he still lived, his contemporaries "would have none of him."¹³ While Swift's prank may have amused those who knew it was a hoax, it ruined Partridge, who was "discredited as a professional astrologer, doctor, and was as an almanac-maker truly 'dead' . . ."¹⁴ Swift was never punished for his misdeeds.¹⁵

A far more innocent hoax took the form of Joan Lowell's publication of *Cradle of the Deep* in 1929. In this book, Lowell told the story of how she spent her childhood aboard her father's four-masted ship, as it sailed the high seas and

7. See generally JONATHAN SWIFT, THE BASIC WRITINGS OF JONATHAN SWIFT (Claude Rawson ed., 2002).

8. JONATHAN SWIFT, *Predictions for the Year 1708*, in THE BASIC WRITINGS OF JONATHAN SWIFT, *supra* note 7, at 670 (emphasis omitted).

9. George P. Mayhew, *Swift's Bickerstaff Hoax as an April Fools' Joke*, in 61 MODERN PHILOLOGY 270, 273 (1964).

10. *Id.* at 275.

11. *Id.* at 274–75.

12. JONATHAN SWIFT, *The Accomplishment of the First of Mr. Bickerstaff's Predictions. Being an Account of the Death of Mr. Partridge, the Almanack-Maker, Upon the 29th Inst.*, in THE BASIC WRITINGS OF JONATHAN SWIFT, *supra* note 7, at 675–76.

13. Darnton, *supra* note 3, at 56.

14. Mayhew, *supra* note 9, at 280.

15. *Id.* at 279. Not only did Swift escape punishment, but Swift was encouraged by several accomplices—including Richard Steele, Nicholas Rowe and possibly William Congreve—to keep his hoax alive; his example also inspired imitators. *Id.*

entered exotic ports of call. The book provided a fascinating glimpse of a unique way of life, filled with drama as the ship faced scurvy, disease and the threat of shipwreck. The denouement of the book featured a scene in which fire broke out and slowly incinerated the entire vessel, forcing Lowell to flee her home and swim miles to safety with a litter of kittens clinging to her back. The book was a hit; the Book-of-the-Month Club recommended it to its members, and even major newspapers such as the *New York Times* praised the book as a “jolly yarn . . . told with dash and ardor.”¹⁶ The reality, however, was that Lowell spent her entire childhood in Berkeley, California. Although *Cradle of the Deep* fooled many reviewers and readers, a group of nautical experts ultimately plundered Lowell of her lark by showing that the book was riddled with inaccuracies and a misunderstanding of basic seafaring concepts.¹⁷ While Lowell avoided any personal liability for her hoax, litigation followed in the book’s wake; a libel action was filed by the Book-of-the-Month Club based upon an incident in which a prominent figure in the book industry ridiculed the Club for recommending *Cradle of the Deep* to its members.¹⁸

Over the past few decades, hoaxes of all varieties have appeared. The 1960s brought Mike McGrady’s *Naked Came the Stranger*, a book purportedly about a demure Long Island housewife whose cheating husband drove her to have countless sexual encounters with different men. McGrady was a “prizewinning reporter for Newsday” who wanted to make a statement about society’s appetite for prurient books, which he considered valueless.¹⁹ To prove his point, McGrady conscripted twenty-five writers who would each provide a chapter that was purposefully poorly written.²⁰ The final product was a book “heavy on soft-porn nonsense and light on good writing.”²¹ The publisher spent a fortune advertising the book before it became available in August 1969, but first McGrady “came clean” to his publishing company (out of concern of being sued for fraud) and revealed the book was a hoax—it was not written by “Penelope Ashe,” as the book stated. The publisher only loved the book more. To go along with the hoax, McGrady asked his sister-in-law, Billie Young, to pretend to be Ashe at book

16. *A Sea-Going Lass Whose Nurse Was a Sailmaker*, N.Y. TIMES, Mar. 10, 1929, § 4 (Book Review), at 4.

17. Lowell’s “flawed epic . . . maddened a handful of salt-water scholiasts to a livid degree,” causing them to call “upon Heaven, Homer and Herman Melville to witness that she didn’t know her ship’s lee scuppers from a marlinspike, and otherwise suggested that her genial reminiscences . . . were awash with terminological inexactitudes.” Charles Poore, *Book of the Times*, N.Y. TIMES, Apr. 17, 1952, at 27.

18. *See Book-of-the-Month Club Sues Dutton Head*, N.Y. TIMES, May 11, 1929, at 14. The outcome of the libel suit was not publicly revealed; however, the Book-of-the-Month Club issued a refund to its 65,000 subscribers once Lowell’s book was revealed to be a hoax. *See Darnton*, *supra* note 3, at 56.

19. Margalit Fox, *Mike McGrady, Known for a Literary Hoax, Dies at 78*, N.Y. TIMES, May 15, 2012, at B12.

20. MELISSA KATSOULIS, LITERARY HOAXES: AN EYE-OPENING HISTORY OF FAMOUS FRAUDS 304–05 (2009). According to Katsoulis, “some contributors initially had their attempts returned by their demanding editor on the basis that they weren’t bad enough. . . .” *Id.* at 305.

21. *Id.*

signings and media events.²² In the end, McGrady revealed the truth to the public in the hopes of retaining his credibility as an “intellectual prankste[r]” instead of a “get-rich-quick con-artis[t].”²³ The hoax-aspect of the book seemed only to delight the public, and no litigation was commenced over McGrady’s prank.

David Rorvik’s 1978 publication of *In His Image: The Cloning of a Man*, however, caused Congressional panic. In his book, Rorvik “claim[ed] to be a central figure in the creation of the first exact genetic copy of a human being”²⁴ His publishers had no idea whether the book was true or false, stating even in the forward that “they do not know if the book is true.”²⁵ For his part, Rorvik kept his hoax a secret for as long as possible. On the eve of the book’s publication, he insisted that the book was true, and even rhetorically stated to the press, “Put yourself in [my] position. Would you dare risk writing such a story [if it were not true]? In effect, you’re jeopardizing your entire career.”²⁶ The book became “a bestseller—on the nonfiction list—in the United States and in England”;²⁷ however, its success was short lived. Soon after the book was published, a scientist cited in it, J.D. Bromhall, filed a federal lawsuit against Rorvik seeking \$7 million in damages based on charges that Rorvik’s book was a “fraud and hoax and that [Bromhall’s] reputation ha[d] been injured by its unauthorized use of his name.”²⁸ Trial testimony established that if Rorvik’s publishers had consulted with experts, they would have learned that the book was untrue.²⁹ Bromhall’s case ultimately settled for an unspecified sum and an apology by the book’s publisher.³⁰ That was not the end of the matter, however. The book also sparked a heated public debate that spilled into Congress, as Representative Paul Rogers, who chaired a subcommittee investigating the book’s implications, held a hearing in May 1978.³¹ Although Rorvik failed to appear before Congress, many scientists testified at the hearing, stating that a human clone was not scientifically feasible at the time.³² In the end, Congress proposed that “publishers draft an industry code of ethics to discourage such publications.”³³ However, no significant change to the publishing industry resulted.

Around the same time as the publication of Rorvik’s book, Jay Anson published *The Amityville Horror*, telling the “‘true story’ of a haunted house on Long Island”;

22. Fox, *supra* note 19, at B12.

23. KATSOLIS, *supra* note 20, at 307.

24. Michael Crichton, *Cloning Around*, N.Y. TIMES, Apr. 23, 1978, § 7 (Book Review), at 7.

25. *Id.*

26. GINA KOLATA, CLONE: THE ROAD TO DOLLY AND THE PATH AHEAD 102 (1998) (internal quotation marks omitted).

27. *Id.* at 104.

28. Richard Haight, *Follow-Up on the News, Cloning*, N.Y. TIMES, Jan. 14, 1979, at 33 (internal quotation marks omitted); *see also* Bromhall v. Rorvik, 478 F. Supp. 361 (E.D. Pa., 1979).

29. *Cloning-Book Suit is Settled*, N.Y. TIMES, Apr. 8, 1982, at C24.

30. *Id.*

31. KOLATA, *supra* note 26, at 102.

32. *Id.* at 102–04.

33. Richard L. Hudson, *Blurring the Line: Is It Fiction or Fact? With Some Books, It’s Hard to Tell Nowadays*, WALL ST. J., Nov. 15, 1978, at 1.

the book quickly became a bestseller.³⁴ Certain facts lent credence to its story: Amityville was an actual town, there was a home located at the address provided in the book, and a grisly multiple-murder had actually occurred in the home.³⁵ However, the book's description of the abode—as possessed with demons and utterly haunted—was false. Billed as a “true story,” the home became a tourist attraction, and pranksters stole “souvenirs” from the property.³⁶ The endless unwanted attention heaped on the homeowners ultimately caused them to sue Anson's publisher, Prentice Hall, for \$1.1 million. They argued that the publisher's failure to check the authenticity of Anson's “true story” had resulted in an “invasion of privacy.”³⁷ The homeowners complained that Anson and Prentice Hall had “got[ten] away with murder,” and noted, “You can write a book—completely untrue from beginning to end—and get away with it. If you're going to put on the cover that it's a true story, then you should check into it. No one at Prentice-Hall checked a single fact.”³⁸

The cases mentioned above are just a few examples in a long history. In more recent years, a troubling number of hoaxes have been unveiled. To name a few, in 2008, Margaret Jones's critically acclaimed memoir, *Love and Consequences*, was published, telling the story of “her life as a half-white, half-Native American girl growing up in South-Central Los Angeles as a foster child among gang-bangers, running drugs for the Bloods.”³⁹ A week after it was published, the book was revealed to be a fake—Jones was a pseudonym for Margaret Seltzer, and Seltzer was “all white and grew up in the well-to-do Sherman Oaks section of Los Angeles . . . with her biological family.”⁴⁰ There was also the scandal behind the popular novelist, J.T. LeRoy, who claimed to have gone from a “young truck-stop prostitute” to a drug-addicted homeless person before he was rescued by a couple, treated by a psychologist, and transformed into a successful writer.⁴¹ In 2006, however, it became clear that the book was written by Laura Albert—a female—who was sued for fraudulent inducement and breach of contract in 2007 by a film

34. Judy Klemesrud, *Behind the Best Sellers*, N.Y. TIMES, Jan. 22, 1978, § 7 (Book Review), at 28.

35. Hudson, *supra* note 33, at 1.

36. *Id.*

37. *Cammaroto v. Anson*, 416 N.Y.S.2d 824, 824 (App. Div. 1979).

38. Hudson, *supra* note 33, at 1 (internal quotation marks omitted). The outcome of the lawsuit is not entirely clear. Although the New York Supreme Court had denied Prentice-Hall's motion to dismiss the homeowners' complaint, the New York State Appellate Division reversed on appeal and remanded with instructions for the lower court to hold a hearing on “whether service on the publisher was made more than one year after the book was offered for sale to the public” so as to bar the action under the one-year statute of limitations. *Cammaroto*, 416 N.Y.S.2d at 824. There are no other published orders for the matter.

39. Motoko Rich, *Gang Memoir, Turning Page, Is Pure Fiction*, N.Y. TIMES, Mar. 4, 2008, at A1.

40. *Id.*

41. Warren St. John, *The Unmasking of JT Leroy: In Public, He's a She*, N.Y. TIMES, Jan. 9, 2006, at E1.

company after selling movie adaptation rights.⁴² The film company won a considerable money judgment.⁴³ In 2008, Herman Rosenblat was set to release his book telling the story of how he “met his wife while he was a child imprisoned in a Nazi concentration camp and she, disguised as a Christian farm girl, tossed apples over the camp’s fence to him”; they “met again on a blind date 12 years after the end of war in Coney Island and married.”⁴⁴ Rosenblat and his wife appeared on the Oprah Winfrey show, and Rosenblat’s publisher, Berkley Books, anticipated strong sales; however, when Rosenblat admitted that his story was fiction, his book deal was canceled before the book’s release.⁴⁵

As these examples show, the great tradition of the literary hoax has been a long and varied one. A review of the history of this cheeky tradition reveals that most of the participating authors were never penalized or hailed into a courtroom to answer for their shenanigans. Yet, there has been a noticeable trend towards commencing litigation to bring authors and publishers before the scales of Lady Justice, to answer allegations of fraud and even criminal charges. Arthur Train, David Rorvik, Jay Anson, Clifford Irving, James Frey and Laura Albert were all sued because of their hoaxes. Under what circumstances do hoaxes run afoul of the law and subject authors and publishers to civil or criminal penalties? An examination of three hoaxes and the lawsuits and criminal proceedings commenced over them provides an essential background in coming to an answer to this question.

II. ARTHUR TRAIN—LAWYER, WRITER, HOAXER

One of the cleverest hoaxes in the history of the game is Arthur Train’s ingenious publication of *The Autobiography of Ephraim Tutt*. Train was a Harvard-educated attorney; he worked as an assistant district attorney in New York County for several years and tried his hand at private practice thereafter. At heart, however, he was a writer, not a lawyer. From 1905 until his death in 1945, Train wrote over forty books, published hundreds of short stories in popular magazines, and three of his best-selling novels were made into movies.⁴⁶ While he wrote about

42. See *Antidote Int’l Films, Inc. v. Bloomsbury Publ’g, PLC*, 496 F. Supp. 2d 362 (S.D.N.Y. July 31, 2007); see also Alan Feuer, *Judge Orders Author to Pay Film Company \$350,000 in Legal Fees*, N.Y. TIMES, Aug. 1, 2007, at B5; Motoko Rich, *A Family Tree of Literary Fakery*, N.Y. TIMES, Mar. 8, 2008, at B7. Among the evidence submitted against Albert were tax forms and a contract—both of which were signed by Albert as “JT LeRoy.” Feuer, *supra*, at B5.

43. See *Antidote Int’l Films*, 496 F. Supp. 2d 362. Specifically, judgment was entered holding Albert and another entity, Underdogs, Inc., jointly and severally liable for \$110,000 in compensatory damages, \$6,500 in punitive damages, \$279,175 for payment of the plaintiff’s attorneys’ fees, and \$70,325 for payment of the plaintiff’s expenses. *Id.* When Albert moved for reconsideration of the final judgment entered against her, the district court denied her motion, but granted a motion by the film company for prejudgment interest. See *Antidote Int’l Films v. Bloomsbury Publ’g, PLC*, No. 06-Civ-6114, 2007 U.S. Dist. LEXIS 69750 (S.D.N.Y. Sept. 17, 2007).

44. Joseph Berger & Motoko Rich, *False Memoir of Holocaust Is Canceled By Publisher*, N.Y. TIMES, Dec. 29, 2008, at A12.

45. *Id.*

46. MOLLY GUPTILL MANNING, *THE MYTH OF EPHRAIM TUTT* 28–29 (2012) (discussing Train’s

a myriad of topics, Train's most significant contribution to American literature and culture was his creation of a character—Ephraim Tutt—which transformed how Americans felt about attorneys and the profession of law.⁴⁷

Ephraim Tutt was a public-spirited attorney who would take the case of any deserving client who came his way. Tutt would represent people whom other lawyers declined to serve—perhaps because the person was indigent, or held unpopular beliefs with which other attorneys feared being associated.⁴⁸ He could not tolerate the possibility of an innocent person going to jail, nor could he idly watch as the mechanical application of legal rules rendered an injustice.⁴⁹ Tutt worked to avenge underdogs, compensate the cheated, punish wrongdoers, and even the scales of justice to ensure a fair verdict for all.⁵⁰ He was the type of lawyer the public dreamed of, and the kind that lawyers dreamt of being. Train's stories about the legal practice of Ephraim Tutt were beloved by laypeople because of Tutt's humanity and by lawyers because of Tutt's incredibly novel legal strategies.⁵¹

From 1919 to 1943, Tutt appeared in over a dozen books and several dozen short stories published in magazines such as *The Saturday Evening Post*, all of which were authored by Arthur Train.⁵² Throughout this period, there was never a doubt that Ephraim Tutt was Train's greatest *fictitious* creation. In fact, nary an incident occurred during this time period that suggests that any readers were confused over Tutt's status as a mythical being. However, in the early 1940s, Arthur Train's health was on the decline. As a mere human, Train would surely die. As Tutt was a fiction, he could enjoy immortality. Understanding this, and feeling that Tutt deserved a fuller treatment than the usual short stories reporting on the old barrister's legal adventures, Train devoted himself to the task of writing a

movies); *id.* at app. (listing Train's books).

47. *See generally id.*

48. One of Tutt's famous cases was that of Ivan Zalinski, who was accused of murder. When the prosecutor attempted to taint Zalinski's jury trial by suggesting that Zalinski was a Communist and the father of "illegitimate" children, Tutt gave a stirring summation, addressing the prosecutor's misconduct and urging the jurors to disregard the improper comments so justice could prevail. He stated:

The law . . . is supposed to be impartial, to give every man an equal chance. . . . What chance has this poverty stricken defendant against the power of the State?

. . . .

. . . [S]ubstantial justice might be done if the law were fairly administered and the poison gas of prejudice were not allowed—nay often invited—to creep into a case. This, gentlemen, has not been given a trial by law, but trial by prejudice. It is not the sort of trial guaranteed to American citizens under the Bill of Rights.

ARTHUR TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* 221–30 (1945) [hereinafter *TRAIN, YANKEE LAWYER*]. In the course of delivering this speech, Tutt was held in contempt and the judge ordered that he be arrested, but this personal sacrifice was negligible to Tutt since his client was innocent and he felt duty-bound to secure an acquittal. *Id.*

49. MANNING, *supra* note 46, at 60–61.

50. *Id.* at 22–24, 64–67.

51. *See generally id.* at 94–107, 129–39.

52. ARTHUR TRAIN, *MY DAY IN COURT* 507–09 (1939) [hereinafter *TRAIN, MY DAY IN COURT*].

full biography of Ephraim Tutt, recording intimate details of the character's life and showing how he developed into the praiseworthy lawyer that all had come to admire and respect.⁵³ In order to make the story feel real, Train modeled many of Tutt's experiences on his own. Both went to Harvard for their undergraduate and law school studies; both worked in the New York County District Attorney's Office; and both felt the legal system was flawed so long as "law" and "justice" would sometimes fall out of alignment.⁵⁴ To further a feeling of authenticity to Tutt's experiences, Train had Tutt interact with several well-known personalities, from Calvin Coolidge to the infamous Tammany legend, "Boss" Croker.⁵⁵ Further, as any human would have parents, Train scoured his family photograph albums to select some for Tutt—ultimately including in the finished book images of Tutt's mother and father, as well as some of Tutt as a youngster, college student and seasoned attorney.⁵⁶

After completing the book, Train looked upon the finished pages with disappointment, for the cover page—which read: "Yankee Lawyer: The Autobiography of Ephraim Tutt, by Arthur Train"—plundered the book of the feeling that it was Tutt's intimate and confidential tale of his existence.⁵⁷ So long as the book stated it was written by "Arthur Train," it would not give Tutt the sense of "life" that Train wished to bestow upon him. Thus, he decided that the cover of the book and title page should provide only the book's title (without identifying the author), and Train copyrighted the book in Ephraim Tutt's name.⁵⁸ Further, in order to explain how it was that Tutt came to write his own autobiography, Arthur Train obligingly wrote an introduction to the book, explaining that he had urged his old friend, Tutt, to write his reminiscences while he was still in full control of his faculties.⁵⁹

When the book was published in 1943, it created a maelstrom of confusion. Suddenly, those who had read Tutt stories for decades were unsure whether Tutt's

53. MANNING, *supra* note 46, at 43–70.

54. Compare TRAIN, MY DAY IN COURT, *supra* note 52, at 6, 11, 488–89 (providing a detailed history of Arthur Train's life) with TRAIN, YANKEE LAWYER, *supra* note 48, at 15, 85–86.

55. TRAIN, YANKEE LAWYER, *supra* note 48, at 7, 84–85.

56. *Id.*; see also ARTHUR TRAIN, MR. TUTT FINDS A WAY 3–4 (1945) [hereinafter TRAIN, MR. TUTT FINDS A WAY] (explaining that he had "hunted high and low for appropriate period photographs showing an apocryphal father and mother, and an 'Ephraim Tutt' himself at various ages").

57. See TRAIN, MR. TUTT FINDS A WAY, *supra* note 56, at 5. Train noted that his "original plan had been to call the book *The Autobiography of Ephraim Tutt*, by Arthur Train, but when the title page came off the press, it was obvious that this would destroy any illusion of reality; the book would be 'just another Tutt story.'" *Id.*

58. See *id.*

59. TRAIN, YANKEE LAWYER, *supra* note 48, at xi–xiii. In his introduction, Train began by noting that "Ephraim Tutt needs no introduction to the general public," but Train could not "with any grace refuse [Tutt's] request to contribute a brief foreword to these reminiscences undertaken largely because of [Train's] own importunity." *Id.* at xi. According to Train, Tutt was hesitant to publish his own memoir, but when Train stated that if Tutt "did not personally undertake the task, [he] should be seriously inclined to attempt it myself," Tutt exclaimed, "May God forbid," and that settled the matter. *Id.* Train explained that the conversation he had with Tutt was "the sole reason . . . why so retiring and, I might add, so gay an old fellow as my learned friend consented to put pen to paper." *Id.*

autobiography established that he was a real person. Book reviews published in newspapers across the United States generally supported the view that the book was nonfiction. The *New York Times* declared that the book “couldn’t be a work of fiction,” “real people . . . walk through its pages,” and “old daguerreotypes of Ephraim Tutt’s mother and father” were included in the book.⁶⁰ The *Washington Post* declared: “EPHRAIM TUTT, that counselor-at-law famous wherever the *Saturday Evening Post* is read, whose professional doings have been recorded until he is almost a saga, has written a book about himself at last.”⁶¹ The review published in the *American Bar Association Journal* marveled that “Tutt lives, and breathes, and has his being amongst us right now.”⁶² The *Yale Law Journal*’s review of *Yankee Lawyer* began by noting that, “[t]o review the book of a friend is inevitably a delicate and oftentimes a dangerous task. There should be no traffic between author and critic, otherwise the latter may be accused of reading into its pages something that is not there.”⁶³ The “review” was written by Arthur Train—the actual author of the book being reviewed.

While these perplexing reviews seemed to fuel Train’s hoax, the public neared hysteria in deciphering whether Tutt actually existed. One woman wrote to Train’s (and Tutt’s) publishing company, Charles Scribner’s Sons, demanding: “Who, in Heaven’s name, wrote *Yankee Lawyer*?”⁶⁴ A man from Ohio, who identified himself as a “conscientious follower of Arthur Train’s ‘Ephraim Tutt’ stories,” wrote to Train’s publisher that “my dictionary defines an autobiography as ‘the story of one’s life written by oneself,’” and, therefore, he “assumed that Ephraim Tutt *must* be real.”⁶⁵ Even a federal district court judge wrote to Charles Scribner’s Sons, seeking clarification after local booksellers provided conflicting information on whether the book was nonfiction and he was called upon to decide whether the book was true: “[i]f men who are students of logic are confused,” he stated, “won’t you please give me the answer?”⁶⁶ As the book was published during World War

60. John Chamberlain, *Books of the Times*, N.Y. TIMES, Sept. 2, 1943, at 17.

61. Albert Larnard, *The Law & the Profits*, WASH. POST, Sept. 26, 1943, at L4.

62. Reginald Heber Smith, *Books for Lawyers*, 30 A.B.A. J. 630 (1944) (reviewing *Yankee Lawyer*) (emphasis omitted).

63. Arthur Train, *Yankee Lawyer: The Autobiography of Ephraim Tutt*, 52 YALE L. J. 945, 945 (1943) (reviewing *Yankee Lawyer*). After the *Yale Law Journal* published its review, the *Harvard Law Review* published a piece in which it endeavored to address the authorship of *Yankee Lawyer*. After describing the book as “unusual,” a footnote was included acknowledging Train’s review in the *Yale Law Journal* and noting: “Mr. Train, in a published review of the present book, now disclaims authorship of Mr. Tutt’s being.” J.M. Maguire, *Book Reviews*, 57 HARV. L. REV. 258, 258 n.2 (1944) (reviewing *Yankee Lawyer*).

64. Letter from Clara Lichtenstein to Charles Scribner’s Sons (Dec. 3, 1943) (on file with Charles Scribner’s Sons Box, No. C0101, Manuscripts Div., Dep’t of Rare Books & Special Collections, Princeton Univ. Library).

65. Letter from L.C. Wolcott to Charles Scribner’s Sons (Jan. 24, 1944) (on file with Charles Scribner’s Sons Box, No. C0101, Manuscripts Div., Dep’t of Rare Books & Special Collections, Princeton Univ. Library).

66. Letter from Judge Archie Cohen to Scribner & Sons (Dec. 9, 1943) (on file with Charles Scribner’s Sons Box, No. C0101, Manuscripts Div., Dep’t of Rare Books & Special Collections, Princeton Univ. Library).

II, it traveled the world with American servicemen and spread its confusion worldwide. One letter from a lieutenant in the Navy remarked that “[t]he identity of Mr. Tutt has been the subject of discussion among the officers of the Squadron for several days with more basis for argument than the ‘Baker Street Irregulars’ have for the actual existence of Sherlock Holmes.”⁶⁷

For months, the hoax baffled the public, causing confusion to reach a feverish pitch. At long last, Train decided to finally come clean. In February 1944, he published an article in *The Saturday Evening Post* entitled “Should I Apologize?” In the article, Train defended his actions, explaining his desire to provide a character as worthy as Tutt with a realistic-feeling account of his fictitious life. Train explained that the hoopla that had ensued since *Yankee Lawyer*’s publication made him feel in good company with Pygmalion and Frankenstein—the one created a sculpture loved so dearly it came to life; the other created a homicidal monster he was unable to control.⁶⁸ Maintaining his innocence, Train barely eked out an apology, and after providing a full explanation of his behavior, he likely thought he had appeased the public and put an end to the whole matter.

However, one attorney who read Train’s article in *The Post* discovered for the first time that Ephraim Tutt’s autobiography was a fiction. He was not amused by Train’s hoax, and, being a public-minded attorney, he felt that Train, editor Maxwell Perkins and Charles Scribner’s Sons should be held accountable for their misdeeds in writing, publishing, and marketing *Yankee Lawyer* under the guise of nonfiction. Thus, in March 1944, Lewis Linet caused a summons and complaint to be served on the author, editor and publishing company responsible for *Yankee Lawyer*.⁶⁹ The complaint charged Train, Perkins and Charles Scribner’s Sons with fraud, and provided an elaborate description of all of the tricks employed by Train to make the book appear to be a true story—from the inclusion of photographs of Tutt’s alleged family members, to Tutt’s interaction with real people (Train included), and Train’s ridiculous introduction to the book in which he claimed that he had persuaded Tutt to write an autobiography. As to Perkins and Scribner’s, the complaint faulted them for knowingly allowing a work of fiction to give every appearance of being nonfiction.⁷⁰ In support, the complaint quoted the dust jacket created and printed by Perkins and Charles Scribner’s and Sons, which boldly began: “Ephraim Tutt is undoubtedly the best known lawyer now alive.”⁷¹ By way of relief, Linet sought a refund—in whole or in part—for the purchase price of the

67. Letter from C.F. Orofino to Charles Scribner’s Sons (Feb. 6, 1945) (on file with Charles Scribner’s Sons Box, No. C0101, Manuscripts Div., Dep’t of Rare Books & Special Collections, Princeton Univ. Library).

68. Arthur Train, *Should I Apologize?*, SATURDAY EVENING POST, Feb. 26, 1944, at 9–10, 54–55.

69. See Complaint, Linet v. Train, No. 7108-1944 (N.Y. Sup. Ct. Mar. 13, 1944).

70. It cannot be said that Perkins and Train were all that fretful over the success of the hoax. For example, in an October 1943 letter to Train, Perkins gamely noted that *Yankee Lawyer* appeared on the *New York Times* best-selling fiction list, while it appeared on the *Tribune*’s nonfiction list. Letter from Maxwell Perkins to Arthur Train (Oct. 4, 1943) (on file with Charles Scribner’s Sons Box, No. C0101, Manuscripts Div., Dep’t of Rare Books & Special Collections, Princeton Univ. Library).

71. *Id.* at 6 (quoting the *Yankee Lawyer* dust jacket) (internal quotation marks omitted).

book, as well as an injunction that would bar the defendants from “producing, printing, advertising, distributing offering for sale or selling the said book,” so long as it harmed the public by being described as an “autobiography” by “Tutt.”⁷²

The defendants hastily hired the legendary John W. Davis to represent them, and Davis soon filed a motion to dismiss the complaint, in part, with respect to the request for injunctive relief. (Davis did not move to dismiss the entire complaint because he had received a letter from Charles Scribner, noting that the case’s publicity was good for book sales; Scribner set \$3,000 as the maximum he was willing to pay for attorney’s fees on the case, and granted Davis free rein to proceed so long as he stayed within this cost bracket.⁷³) In the motion to dismiss, Davis argued that injunctive relief could not be awarded because whatever damages Linet experienced could be ameliorated by payment of a money judgment, and to the extent Linet sued on behalf of other purportedly injured readers, he lacked standing to do so.⁷⁴ Davis rather sarcastically noted: “It is significant that the plaintiff’s nomination remains unseconded by a single member of the great multitude whose protection he professes to seek and who, strangely enough, seem to remain blissfully unconscious of the grave and irreparable peril that awaits them within the covers of an innocent looking ‘autobiography’ now resting upon the shelves of the bookstores of the Country!”⁷⁵

Linet’s attorney soon responded to Davis’s motion. After recounting the countless ways the defendants strove to fool readers into believing that Tutt had written the book, Linet concluded that Train, Perkins and Scribner’s had “utilized every deceptive device and every false representation possible to make the book appear to be a genuine autobiography” of a “famous New York lawyer.”⁷⁶ Linet urged the court to look beyond Davis’ “sarcastic prowess,” and to notice that the defendants had actually “admitted that many persons have been deceived by the book and after reading it have, as they were supposed to do, believed that it was the autobiography of a living genuine attorney.”⁷⁷ Linet also noted that, because the case potentially involved a huge class of readers who incurred slight monetary damages, it was unlikely that many of those injured by the hoax would turn to litigation to right the wrong perpetrated against them. But, he argued, this “should not prevent equity from restraining these defendants from continuing to perpetuate a fraud upon the public.”⁷⁸

As the parties waited for a ruling, the public felt no small concern over the fate

72. Complaint, *supra* note 69, at 10.

73. Letter from Charles Scribner to John W. Davis (April 4, 1944) (on file with Charles Scribner’s Sons Box, No. C0101, Manuscripts Div., Dep’t of Rare Books & Special Collections, Princeton Univ. Library).

74. Memorandum in Support of Defendants’ Motion to Dismiss the Alleged Second Cause of Action Set Forth in the Complaint, *Linet v. Train*, No. 7108-1944 (N.Y. Sup. Ct. undated).

75. *Id.* at 8–9.

76. Memorandum in Opposition to Defendants’ Motion to Dismiss Second Cause of Action at 5, *Linet v. Train*, No. 7108-1944 (N.Y. Sup. Ct. undated).

77. *Id.* at 8 (emphasis omitted).

78. *Id.* at 9.

of their beloved Ephraim Tutt. The lawsuit was reported in newspapers across the country. The *New York Herald Tribune* announced that “Mr. Tutt Faces His First Battle In a Real Court,”⁷⁹ and the headline in the *New York Times* read: “Real Lawyer Goes to Court Here Charging Ephraim Tutt Is ‘Fraud.’”⁸⁰ The *Washington Post* named the case the “Suit of the Month,”⁸¹ *Time Magazine* reported that Tutt suddenly “had some real lawyer trouble to worry about,”⁸² and the *Hartford Courant* remarked that “[o]ne can only wish that the author would call upon Ephraim Tutt to handle the brief.”⁸³ At long last, the New York County Supreme Court granted Davis’ motion to dismiss Linet’s request for injunctive relief. The court ruled “no man could of his own volition constitute himself the champion of the public and demand relief on their behalf.”⁸⁴ The remainder of Linet’s case—for money damages—languished, with no further action taken with respect to it. In addition, Train’s death in December 1945 may have cast a pall over Linet’s desire to litigate the case.⁸⁵ In any event, the lawsuit officially remained pending, until a “stipulation of discontinuance” was filed in May 1947.⁸⁶

In the end, there is no record that Linet collected a single cent as a refund for his purchase of Tutt’s “fraudulent” autobiography. Not only that, but he was subjected to public ridicule as newspapers—many of which were guilty of publishing reviews identifying the book as nonfiction—published abusive stories about Linet and his lawsuit. The *Washington Post* feigned concern over copycat lawsuits, jocularly noting that Betty Smith might be sued if a customer “claimed he thought ‘A Tree Grows in Brooklyn’ was a publication on landscape gardening.”⁸⁷ The *Hartford Courant* remarked that “Mr. Linet would have to live a long way back in the sticks not to know that the Train hero, immortalized in at least nine novels published in this century, is a brilliant figment of the author’s creative imagination.”⁸⁸ *Time Magazine* commented on Linet’s lawsuit, stating that Linet had experienced “considerable pain” by reading *Yankee Lawyer* and he was “suing for \$3.50 worth of fraudulence.”⁸⁹ Although Linet was mocked by the media, readers who brought a similar lawsuit approximately fifty years later—as discussed in Part IV—were victorious. The difference between the two cases, and how the courts arrived at outcomes seemingly at odds with one another, is discussed in Part V.

79. *Mr. Tutt Faces His First Battle In a Real Court*, N.Y. HERALD TRIB., May 16, 1944, at 17.

80. *Real Lawyer Goes to Court Here Charging Ephraim Tutt is ‘Fraud,’* N.Y. TIMES, May 16, 1944, at 23.

81. H.I. Phillips, *The Once Over*, WASH. POST, Jul. 9, 1944, at B4.

82. *People*, TIME MAG., May 29, 1944, at 45.

83. William J. Clew, *That’s for Tutt’s Accusers!*, HARTFORD COURANT, Apr. 1, 1945, at D14.

84. TRAIN, MR. TUTT FINDS A WAY, *supra* note 56, at 230–31.

85. *Man Who Made Ephraim Tutt Live Is Dead*, CHI. DAILY TRIB., Dec. 23, 1945, at 10.

86. Stipulation of Discontinuance, *Linet v. Train*, No. 7108-1944 (N.Y. Sup. Ct. May 2, 1947).

87. H.I. Phillips, *The Once Over*, WASH. POST, Jul. 9, 1944, at B4.

88. *The Case Against Mr. Tutt*, HARTFORD COURANT, May 18, 1944, at 10.

89. *People*, *supra* note 82, at 45.

III. A CRIMINAL HOAX

During the final fifteen years of his life, Howard Hughes lived as a recluse, completely isolating himself from the happenings of the world. However, “[b]y adopting a solitary existence that some would term eccentric, Mr. Hughes ha[d] served to draw even more attention to himself.”⁹⁰ Described as a “billionaire, aviator, movie mogul, real-estate magnate, airline boss, gaming *supremo*, litigator, womanizer, and ecologist,” and credited with discovering actresses Jean Harlow and Jane Russell, rumored to have been the lover of Katherine Hepburn, Ava Gardiner, and Ginger Rogers—the public remained curious about the life and happenings of Howard Hughes.⁹¹ It is said that his public life came to a sudden halt after he experienced a nervous breakdown in the 1950s, but the media continued to speculate about the activities of this mysterious man.⁹²

On a Tuesday evening in December 1971, it seemed that Hughes’ shroud of secrecy was about to end.⁹³ The McGraw-Hill Publishing Company issued a press release declaring the sensational news that Hughes had been secretly collaborating with author Clifford Irving to publish an official autobiography of Hughes’ life. McGraw-Hill had already sold to *Life Magazine* the rights to print three 10,000 word excerpts from the book, and the media eagerly reported this unexpected announcement. By the following morning, news of the book was everywhere.⁹⁴ The media was provided an excerpt from the preface to the book—purportedly written by Hughes himself—explaining why he decided to write about his life:

I believe that more lies have been printed and told about me than about any living man—therefore it was my purpose to write a book which would set the record straight and restore the balance. I chose to work with Clifford Irving because of his sympathy, discernment, discretion, and as I learned, his integrity, as a human being.⁹⁵

As rumors of the book spread, so did denials on behalf of Hughes about the authenticity of the book. In response to relentless inquiries from an anxious media seeking confirmation as to whether the story was true, Richard Hannah, Hughes’ spokesman, informed the press that he had spoken to an “authoritative” source close to Hughes and he was confident that the newspapers could “make [Hughes’] denial as strong as [they] want[ed],” and added that “[t]here must be a hoax here somewhere.”⁹⁶ When McGraw-Hill was asked to comment on Hannah’s refutation

90. Rosemont Enter., Inc. v. McGraw-Hill Book Co., 380 N.Y.S.2d 839, 843 (Sup. Ct.1975).

91. STEPHEN FAY, LEWIS CHESTER & MAGNUS LINKLATER, HOAX: THE INSIDE STORY OF THE HOWARD HUGHES-CLIFFORD IRVING AFFAIR 3 (1972).

92. KATSOLIS, *supra* note 20, at 108.

93. FAY, CHESTER & LINKLATER, *supra* note 91, at 3.

94. For example, the *Wall Street Journal* reported: “Howard Hughes, perhaps the world’s best-known, least-seen man, has narrated his autobiography onto tapes and McGraw-Hill Book Co. will publish” it. *Howard Hughes’ Autobiography to Be out March 27, McGraw-Hill Says; Hoax Alleged*, WALL ST. J., Dec. 8, 1971, at 7 [hereinafter *Howard Hughes’ Autobiography to Be out March 27*].

95. *Id.*; see also Henry Raymont, *Howard Hughes’ Memoirs are Bought for Book and Serial in Life Magazine*, N.Y. TIMES, Dec. 8, 1971, at 65.

96. *Howard Hughes’ Autobiography to Be out March 27*, *supra* note 94, at 7.

of the autobiography, the publishing company's spokesperson responded: "I don't believe a word of that. This is incredible. We believe we have the autobiography of Howard Hughes."⁹⁷

A most perplexing series of events unfolded over the next few months as allegations that the book was a hoax were met by flat denials of it being anything but an accurate and truthful autobiography. On the one hand, the initial press release about Hughes' autobiography explained that Irving and Hughes had "almost 100 taping sessions together," during which Hughes relayed the facts of his life to Irving.⁹⁸ The *New York Times* reported that a "high executive at McGraw-Hill said privately that nobody at the company had actually laid eyes on Mr. Hughes and that the entire negotiations [for the book] were handled through Mr. Irving," and a spokesperson from *Life Magazine* remarked that he was unconcerned that Hughes' henchmen denied the autobiography's existence, noting: "It doesn't surprise us that they know nothing of this. Mr. Hughes was totally secretive about the project. We are absolutely certain of the authenticity of this autobiography"⁹⁹

Within one month of the announcement about the autobiography, Hughes decided to personally address the media—something he had not done for years—to denounce it. However, Hughes was only willing to have a telephone interview with seven reporters.¹⁰⁰ This measure did not appease many skeptics. Excerpts of the interview were published in leading newspapers, including the *New York Times*, which showed that when Hughes was asked the all-important question of whether he knew Irving, Hughes replied: "I only wish I were still in the movie business, because I don't remember any script as wild or as stretching the imagination as this yarn has turned out to be."¹⁰¹ When the reporter pressed for a definitive answer to the question of whether Hughes knew Irving, Hughes replied: "I don't know him. I never saw him. I have never heard of him until a matter of days ago when this thing first came to my attention."¹⁰²

After the Hughes interview, the press asked McGraw-Hill and *Life* for their comments. They responded jointly: "It is alleged that Howard Hughes made a telephone call . . . repudiating this material and the man who worked on it with him, Clifford Irving. We cannot accept this."¹⁰³ In taking this position, McGraw-Hill and *Life* cited a wealth of documentary proof that established Hughes had worked with Irving to create the autobiography. Specifically, they described a ten-page letter from Howard Hughes to Harold McGraw granting McGraw-Hill and *Life* the right to announce the autobiography and publish it, stated they possessed checks endorsed by Hughes as payment for his autobiography, and noted they had

97. *Id.* (internal quotation marks omitted).

98. Raymont, *supra* note 95, at 65.

99. *Id.* (internal quotation marks omitted).

100. Gladwin Hill, *Howard Hughes Tells of His Life in a 3,000-Mile Phone Interview Arranged to Assail 'Autobiography'*, N.Y. TIMES, Jan. 10, 1972, at 1, 22.

101. Vernon Scott, *Statements by Hughes and Two Publishers in Autobiography Controversy*, N.Y. TIMES, Jan. 10, 1972, at 23.

102. *Id.*

103. *Id.*

many other “handwritten or signed documents, including letters, the personally edited manuscript, and contracts.”¹⁰⁴ In fact, McGraw-Hill submitted these handwritten documents to a “respected handwriting analysis firm,” so that these documents could be compared with “official documents used in the State of Nevada” for Hughes’ businesses there. The handwriting analysis company “verified that all of the documents, those from Nevada and those in the possession of McGraw-Hill and *Life*, were written or signed by the same man.”¹⁰⁵ Meanwhile, a longtime aide to Hughes, Noah Dietrich, informed the press that he had listened to “numerous recorded segments of the telephone interview” between Hughes and reporters, and Dietrich declared: “That was Howard Hughes’s voice—there’s no question about it.”¹⁰⁶ Although Hughes had denied any participation in writing the autobiography during that interview, Dietrich also stated that he thought the “autobiography” was authentic.¹⁰⁷ Dietrich postulated that Hughes—who was “often injudicious in conversation”—may have said things during his interviews with Irving that he later regretted, and that he likely had a change of heart about publishing the autobiography and was thus renouncing it.¹⁰⁸

Meanwhile, Rosemont Enterprises, Inc.—which was created at Hughes’ behest in 1965¹⁰⁹—commenced emergency litigation to prevent the publication of Irving’s manuscript so long as it purported to be an authentic autobiography, for Rosemont had entered a contract with Hughes by which Rosemont held the rights to Hughes’ life story.¹¹⁰ In January 1972, the New York State Supreme Court was asked to hold a hearing at which witnesses could be produced to prove that Irving’s book was a hoax. Simultaneously, Irving filed an affidavit giving “a detailed account of the times and places he said he met with the billionaire . . . while working on the book.”¹¹¹ Speculation ran wild, as the public and the media debated who had written the autobiography and who was lying about it. Just as it seemed that the parties would face a showdown in court, Irving’s position began to crumble. Two days after a court hearing was requested, rumors spread that Irving and his attorney were preparing a defense based upon a “theory that the novelist had been a victim of a hoax by a ‘gang of six to eight people.’”¹¹² Meanwhile, an investigation of the

104. *Id.*

105. *Id.*

106. Gladwin Hill, *Former Aide Believes Voice Was Hughes’s and ‘Autobiography’ Is Authentic*, N.Y. TIMES, Jan. 12, 1972, at 30 (internal quotation marks omitted).

107. *Id.*

108. *Id.* (internal quotation marks omitted).

109. Douglas Robinson, *Hughes Aides Ask a Hearing to Show ‘Hoax,’* N.Y. TIMES, Jan. 20, 1972, at 24. This was not Rosemont’s first litigation seeking to prohibit the publication of biographical information pertaining to Howard Hughes. See, e.g., *Rosemont Enter., Inc. v. Random House*, 366 F.2d 303 (2d Cir. 1966) (involving an appeal in a lawsuit brought by Rosemont against Random House, based upon the latter’s publication of the book *Howard Hughes—A Biography by John Keats* in 1966); see also *Rosemont Enter., Inc. v. Random House, Inc.*, 261 F. Supp. 601 (S.D.N.Y. 1966) (providing additional background on the lawsuit).

110. *Rosemont Enter., Inc. v. Irving*, 375 N.Y.S.2d 864, 865 (App. Div., 1975).

111. Robinson, *supra* note 109, at 24.

112. Douglas Robinson, *Author is Said to Theorize He was Duped on Hughes*, N.Y. TIMES, Jan.

checks from McGraw-Hill to Hughes revealed that a woman named “Helga Hughes” had deposited them in a Swiss bank account opened in the name of Howard Hughes.¹¹³ Soon, the matter was an international affair, as the FBI and Zurich police joined in an investigation of this mysterious bank account.¹¹⁴

Irving’s defense further weakened once he received word that the United States Attorney’s Office was offering to “fly Frau Schaffner, the Swiss Credit cashier who dealt with ‘Helga Hughes,’ to New York and see if she could identify” whether Irving’s wife, Edith, had posed as Helga Hughes.¹¹⁵ Although days earlier, Edith had good naturedly greeted reporters by declaring, “Hello, I’m Helga Hughes,” Irving ceased to treat it as a joking matter.¹¹⁶ Sensing that the authorities were closing in on him, Irving confessed to the New York District Attorney’s Office that his wife had opened this bank account, posing as “Helga Hughes,” and that she had withdrawn the money—nearly \$650,000—from that account.¹¹⁷ However, Irving maintained that Howard Hughes “had requested that the bank account be opened by [Irving’s wife and that Mr. Hughes had supplied [a] false Swiss passport that [Irving’s wife] had used for identification.”¹¹⁸ Almost contemporaneously, pursuant to a joint investigation by the United States Attorney’s Office and the New York County District Attorney’s Office, over one hundred subpoenas were issued to secure witnesses at grand jury proceedings to determine whether state or federal law had been violated—Irving being one of the many subpoenaed.¹¹⁹

As Irving’s web of lies slowly unraveled, the litigation commenced by Rosemont Enterprises to enjoin Irving from publishing the “autobiography” came to a swift close, as the injunction was granted and Irving was barred from publishing his manuscript, including the publication of excerpts by magazines.¹²⁰ In February 1972, Irving’s manuscript “and other documents” were impounded by court order.¹²¹ Rosemont went on to obtain an injunction preventing the publication of *any* work—not just the manuscript already written—by Irving

22, 1972, at 1.

113. *Id.*

114. In addition to the *Rosemont* case, litigation was ultimately brought to resolve the tax consequences of the hoax. In 1972, the Hughes Tool Company requested that the Internal Revenue Service commence an investigation of the checks McGraw-Hill paid to Hughes—which totaled \$650,000 and were endorsed by Hughes—as Hughes denied receiving any proceeds from McGraw-Hill or ever depositing checks into the Swiss bank account to which they were traced. See Wallace Turner, *Hughes Aide Asks U.S. Tax Inquiry*, N.Y. TIMES, Jan. 18, 1972, at 28. In the end, the Irvings appealed their tax litigation up to the United States Court of Appeals for the Second Circuit, with the result being a decision in favor of the Internal Revenue Service. See *Irving v. Gray*, 479 F.2d 20 (2d Cir. 1973).

115. FAY, CHESTER & LINKLATER, *supra* note 91, at 208.

116. *Id.* at 185.

117. *Id.*; see also Douglas Robinson, *Irving Discloses His Wife is ‘Helga Hughes,’* N.Y. TIMES, Jan. 29, 1972, at 1.

118. Robinson, *supra* note 117, at 1.

119. FAY, CHESTER & LINKLATER, *supra* note 91, at 205; Douglas Robinson, *A U.S.-State Inquiry Announced Here*, N.Y. TIMES, Feb. 1, 1972, at 1.

120. *Rosemont Enter., Inc. v. Irving*, 375 N.Y.S.2d 864, 865 (App. Div. 1975).

121. *Id.*

purporting to be an authorized account of Howard Hughes' life story.¹²² *Life Magazine* promptly announced the cancellation of its plans to publish any portion of the deceitful tome, and formally declared the manuscript to be a hoax masterminded by Irving.¹²³ Around this time, it was discovered that Irving's manuscript was "almost exactly like the manuscript based on the recollections of Noah Dietrich," which perhaps explained how Dietrich was fooled into believing that Hughes had collaborated with Irving, for Dietrich likely recognized the "dazzling inside anecdotes" Irving cited.¹²⁴

As it became clear that Irving's book was a hoax, things quickly became legally complicated for Edith Irving; in February 1972, Switzerland demanded her immediate extradition, an arrest warrant was issued, and Edith surrendered to the authorities in New York on February 16, 1972.¹²⁵ At this juncture, counsel for the Irvings turned his attention to negotiating with the United States Attorney's Office and the New York County District Attorney's Office to agree upon terms by which they—the Irvings, as well as Irving's "researcher," Richard Suskind—would plead guilty.¹²⁶ As the whole debacle remained a favorite news item for the public, any information about the affair was prominently featured in newspapers and magazines. In fact, in February 1972, the cover of *Time Magazine* was devoted to a portrait of Irving with the words "Con Man of the Year" splashed across the glossy page.¹²⁷

Indictments were returned in March 1972. For their state court criminal proceedings, the three defendants were charged with twelve counts of second-degree criminal possession of a forged instrument based upon each and every forged check and document involved in the scheme. They were also charged with second-degree grand larceny, for stealing checks in the amount of \$750,000 from McGraw-Hill, and third-degree conspiracy.¹²⁸ Irving and Suskind were also charged with two counts of second-degree perjury, for submitting false affidavits.¹²⁹ Meanwhile, in federal court, Clifford and Edith Irving were charged with mail fraud.¹³⁰ Days later, the Irvings appeared before a federal judge in the United States District Court for the Southern District of New York, where they pleaded guilty.¹³¹ When Irving was asked to identify the conduct in which he engaged that made him guilty of the charge, he stated: "I conspired to convince the

122. *Id.* at 865–66.

123. Peter Kihss, *Life Finds Irving's Manuscript a 'Hoax,'* N.Y. TIMES, Feb. 12, 1972, at 1.

124. Wallace Turner, *Portions of Irving's Books Like Hughes Aide's Story,* N.Y. TIMES, Feb. 13, 1972, at 1; *see also* FAY, CHESTER & LINKLATER *supra* note 91, at 244.

125. FAY, CHESTER & LINKLATER, *supra* note 91, at 273.

126. *Id.* at 273–74.

127. TIME MAG., Feb. 21, 1972, at cover.

128. FAY, CHESTER & LINKLATER, *supra* note 91, at 275.

129. *Id.*; *see also* Lawrence van Gelder, *2 Irvings Indicted with Researcher by New York Jury,* N.Y. TIMES, Mar. 10, 1972, at 1.

130. FAY, CHESTER & LINKLATER, *supra* note 91, at 276; *see also* van Gelder, *supra* note 129, at 1.

131. FAY, CHESTER & LINKLATER, *supra* note 91, at 276–78.

McGraw-Hill Book Company that I was in communication with Mr. Howard Hughes when, in fact, I was not.”¹³² The Irvings and Suskind later appeared in state court, where they pleaded guilty to their state charges.¹³³ In June 1972, Edith Irving was sentenced to a two-month term of imprisonment; Suskind received a six-month sentence, and Clifford Irving was sentenced to two and one-half years of imprisonment.¹³⁴ Irving began serving his sentence in August 1972 and was released to a halfway house in January 1974.¹³⁵

The public’s intrigue with Clifford Irving and his hoax did not stop with his imprisonment—nor did Irving cease trying to get his manuscript published. The main obstacle in Irving’s path was the injunction that Rosemont secured in 1972. This injunction specifically provided that “the defendants . . . and all persons acting in concert or participation with them, be and they hereby are enjoined and restrained from publishing . . . in whole or in part, the manuscript of a purported autobiography of Howard R. Hughes prepared . . . in whole or in part, by Clifford Irving . . . and from representing . . . the aforesaid matter as an authorized biography or autobiography . . . of Howard R. Hughes.”¹³⁶ Court proceedings between the parties recommenced in April 1975, when Irving’s counsel informed Rosemont that “preparations had begun to publish the manuscript in question as a fictionalized autobiography of Howard Hughes.”¹³⁷ Before gaining any court approval, on “June 9, 1975, counsel for Irving informed counsel for [Rosemont] that a Spanish language version of the manuscript had been published in Spain on that day.”¹³⁸

In a July 1975 order, Judge Andrew Tyler of the New York Supreme Court denied Rosemont’s motion to enlarge its prior injunction. The order explained that, in order to be granted a preliminary injunction under New York law, a party was required to first show a “‘clear right’ to the relief requested.”¹³⁹ In order to be granted relief, Rosemont had to show “the likelihood of its ultimate success on the merits of the underlying action, that irreparable harm will occur absent the granting

132. *Id.*

133. Lawrence van Gelder, *Irvings and Suskind Admit Hughes Hoax Conspiracy*, N.Y. TIMES, Mar. 14, 1972, at 1.

134. FAY, CHESTER & LINKLATER, *supra* note 91, at 274; James Clarity, *Mrs. Irving is Freed*, N.Y. TIMES, Aug. 19, 1972, at 10; Lawrence van Gelder, *Irving Sentenced to 2 1/2-Year Term*, N.Y. TIMES, June 17, 1972, at 1; *Mrs. Irving Asserts Swiss Break Pledge*, N.Y. TIMES, June 29, 1972, at 27. Edith’s guilty plea to conspiracy in the United States did not allow her to avoid extradition and incarceration in Switzerland. She ultimately served fourteen months of a two-year sentence in a Swiss prison for forgery. See Gary Hoenig, *Mrs. Irving and Two Freedoms*, N.Y. TIMES, May 5, 1974, at E7; Michael T. Kaufman, *Irving is Freed on Parole Here; Says He Owes ‘About a Million,’* N.Y. TIMES, Feb. 15, 1974, at 71 (noting that Edith was set to be freed from Swiss prison in May 1974).

135. See, e.g., Albin Krebs, *Clifford Irving’s Halfway Home*, N.Y. TIMES, Jan. 5, 1974, at 17.

136. Rosemont Enter., Inc. v. McGraw-Hill Book Co., 380 N.Y.S.2d 839, 841–42 (Sup. Ct. 1975) (internal quotation marks omitted).

137. *Id.* at 841.

138. *Id.*

139. *Id.* at 842 (citing *Park Terrace Caterers, Inc. v. McDonough*, 191 N.Y.S.2d 1001 (App. Div. 1959)).

of the preliminary injunction, and that a balancing of the equities in the case at bar mandates a grant of the injunctive relief sought.”¹⁴⁰ The court found that the imposition of an injunction barring Irving from publishing any account of Hughes’ life “would be to impose a prior restraint,” and it was a “well-settled principle of law that prior restraint is illegal censorship.”¹⁴¹ Citing to Supreme Court precedent, the decision explained that “it has been held that prior restraint may not issue even as against a publication alleged to be false or scandalous,”¹⁴² and, relying on New York case law, it was noted that “any censorship in advance of publication constitutes an unconstitutional and illegal prior restraint” that ran afoul of “the guarantees of freedom of speech and freedom of the press.”¹⁴³

The court concluded that Rosemont could not bar the publication of all works purporting to tell the life story of Howard Hughes. The decision cited a prior state court holding that “[a] public figure can have no exclusive rights to his own life story, and others need no consent or permission of the subject to write a biography of a celebrity.”¹⁴⁴ In applying this rule, the New York Supreme Court explained: “it should go without saying that a person need not get the consent of a celebrity to write a fictional piece about that person, even if the fictional work is in the form of an autobiography, so long as it is made clear that the creative work is fictional.”¹⁴⁵ The court concluded that Irving could not be barred from publishing a fictionalized account of Howard Hughes’ life, noting that Irving’s constitutional rights hung in the balance, while Rosemont’s sufferings were “confined to contractual rights and economic interests.”¹⁴⁶

On appeal, the New York Appellate Division affirmed the lower court’s ruling.¹⁴⁷ Relying in large part on the Supreme Court’s decision in *New York Times Co. v. Sullivan*, the Appellate Division found that Rosemont did not meet its “heavy burden” in seeking to impose a prior restraint, and that a remedy was available to Rosemont if the laws of libel were transgressed.¹⁴⁸ Despite this legal victory, Irving was largely unmoved, noting that he “knew of no plans for American publication,” and, in any event, the manuscript had been “assigned to his attorneys and ‘some businessmen’ in 1974, in consideration of more than \$400,000 in debts,” and he, therefore, had no financial interest in what came of his manuscript.¹⁴⁹

140. *Id.* at 842 (citing *Albini v. Solork Assoc.*, 326 N.Y.S.2d 150 (App. Div. 1971)).

141. *Id.* at 842 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)).

142. *Id.* at 843 (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967); *Near v. Minnesota*, 283 U.S. 697 (1931)).

143. *Id.* at 843 (quoting *Sunshine Book Co. v. McCaffrey*, 168 N.Y.S.2d 268, 273 (App. Div. 1957)) (internal quotation marks omitted).

144. *Id.* at 844 (quoting *Rosemont Enter. v. Random House*, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff’d*, 301 N.Y.S.2d 948 (App. Div. 1969)) (internal quotation marks omitted).

145. *Id.*

146. *Id.*

147. *Rosemont Enter., Inc. v. Irving*, 375 N.Y.S.2d 864 (App. Div. 1975).

148. *Id.* at 868.

149. Laurie Johnson, *Notes on People: Clifford Irving Takes Victory With a Shrug*, N.Y. TIMES, July 30, 1945, at 29.

In February 1974, when Irving completed serving his sentence and was freed on parole, he was asked whether he believed he would “ever be able to live down the escapade,” and he replied: “I hope so. I hope the world forgets. I’d hate to go to my grave remembered only as the man who did the Hughes hoax.”¹⁵⁰ Irving’s wish to be distanced from his hoax with the passage of time has thus far not been granted. In fact, in 2007, Hollywood demonstrated its continued interest in Irving’s literary mischief, as the movie *Hoax* was released by Miramax Films, with Richard Gere cast as Clifford Irving.¹⁵¹

IV. A MILLION LITTLE LIES

In 2003, Random House published James Frey’s courageous, honest and savage account of combating addiction and healing the damage he had done to himself with years of drug and alcohol consumption. The book included painstaking descriptions of Frey’s physical revulsion to undergoing rehabilitation—from vomiting stomach chunks to his overflowing rage and stubborn resistance to help—and readers became hooked on Frey’s brutally graphic prose explaining what he had gone through to achieve redemption. Written in matter-of-fact, blunt sentences, and organized so as to place the reader within Frey’s stream of consciousness, the book seemed to provide a forthright and genuine account. The fragility of Frey’s condition and his vulnerability were palpable to the reader.¹⁵² It quickly became a sensation, gracing bestseller lists—as nonfiction.¹⁵³

Over the next couple of years, Frey’s book continued to attract attention, and was generally praised for its incredible story. The paperback edition of the book, published in 2004, was riddled with favorable blurbs from well-respected newspapers and magazines. *Orlando Weekly* stated that it was a “[a] critical milestone in modern literature,” telling a “story that cuts to the nerve of addiction”; *Elle* praised Frey as “the voice of a generation”; and the *New York Post* pegged it “[o]ne of the most compelling books of the year.”¹⁵⁴ *The Oregonian* commended the book for its “stark, direct and graphic documentation of the rehabilitation process,” and noted that the “strength of the book comes from the truth of the experience.”¹⁵⁵ The raw details of Frey’s story seemed to touch reviewers and readers. In an early interview, when asked about why he included such gruesome details, Frey explained that “he wanted his book to lay bare the torment of recovery in all its excruciating detail.”¹⁵⁶ For over two years, Frey’s book was deemed

150. Kaufman, *supra* note 134, at 71 (internal quotation marks omitted).

151. A.O. Scott, *True Story of a Fake Story About Hughes (Really)*, N.Y. TIMES, Apr. 6, 2007, at E10.

152. See JAMES FREY, *A MILLION LITTLE PIECES* (Anchor Books 2003).

153. See, e.g., *Best Sellers*, N.Y. TIMES, May 18, 2003, at A38. Frey’s *A Million Little Pieces* ranked sixteenth place on the *New York Times*’ nonfiction bestseller list on May 18, 2003; it was the book’s first week to earn the distinction of being named a “best seller.”

154. See FREY, *supra* note 152, at i–ii (internal quotation marks omitted).

155. *Id.* (internal quotation marks omitted).

156. David Kamp, *Step 13: Write a Book*, N.Y. TIMES, June 8, 2003, at B21.

nonfiction, and few, if any, seriously questioned its veracity.¹⁵⁷ For the most part, the public and the press at least assumed that the book was what it was marketed to be: a true memoir.

Nearly two years after it was first published, the book attracted renewed attention when it was selected by perhaps the most influential book club on the planet: Oprah Winfrey's Book Club.¹⁵⁸ After Oprah endorsed *A Million Little Pieces*, Frey was invited to appear on her television program in 2005, and when he did, he told Oprah that, in order to "write a book that was honest, . . . [he had] to write about [himself] in very, very negative ways."¹⁵⁹ Throughout her interview with Frey, Oprah stressed how remarkable Frey's story was—gushing over how he had actually survived the incredible destruction and pain described in his book.¹⁶⁰ By all appearances, Frey seemed heroic for both enduring the road to sobriety and for writing so poignantly and truthfully about the lowest point in his life and his difficult ascent from it.

However, in late 2005, the website "The Smoking Gun" began to investigate whether Frey's book gave an entirely true account of his life's events. After securing various documents—ranging from police reports and court records, to interviews with people Frey had encountered—The Smoking Gun published a damning account in January 2006, detailing all of the anecdotes and stories in *A Million Little Pieces* that it believed were either utterly false or embellished to the point of obscurity.¹⁶¹ As the book was debunked of much of its story, readers felt they had been "had," and some—including Oprah—demanded answers.

Although the courts were ultimately called upon to resolve the matter, Frey was first put on trial for his literary sins by the public and the media. Unlike many other hoaxes, Frey's had survived for years before being recognized for what it

157. To name a few of the sources that seemed to question the truthfulness of *A Million Little Pieces* since its inception, *The Telegraph* remarked in May 2003 that the book was "an exercise in believing bullshit." See Nicholas Blincoe, *The William McGonagall of self-help*, DAILY TELEGRAPH, May 15, 2003, at 7, available at <http://www.telegraph.co.uk/culture/3594496/The-William-McGonagall-of-self-help-A-Million-Little-Pieces-by-James-Frey-382pp-John-Murray-1699-T-1499-plus-225-pandp-0870-1557222.html>. The *New York Times* explicitly noted in its review that "Frey is reported to have originally presented this material as a novel when he looked for a publisher," and commented that there was a "[l]ittle problem: This story is supposed to be all true." See Janet Maslin, *Cry and You Cry Alone? Not if You Write About It*, N.Y. TIMES, Apr. 21, 2003, at E9. The *New Yorker* referred to Frey as a "high-wattage, drug addled drama queen," and noted that "the cinematic quality of some of Frey's exploits makes you wonder whether the facts in this memoir have been enhanced." See Laura Miller, *The Thirteenth Step*, NEW YORKER, May 12, 2003, at 110.

158. See Edward Wyatt, *Oprah's Book Club Reopening to Writers Who'll Sit and Chat*, N.Y. TIMES, Sept. 23, 2005, at A1. After Oprah Winfrey announced that Frey's *A Million Little Pieces* was a recommended read, the book returned to bestseller lists; it sat comfortably as the number one "paperback nonfiction" title on the *New York Times*' bestseller list in October 2005, and remained there for weeks. See, e.g., *Paperback Best Sellers*, N.Y. TIMES, Oct. 30, 2005, at G24; *Paperback Best Sellers*, N.Y. TIMES, Oct. 23, 2005, at F28; *Paperback Best Sellers*, N.Y. TIMES, Oct. 16, 2005, at G28.

159. *A Million Little Lies*, SMOKING GUN (Jan. 4, 2006) (internal quotation marks omitted), <http://www.thesmokinggun.com/documents/celebrity/million-little-lies>.

160. *Id.*

161. *Id.*

was. By the time it was revealed, millions of people had already read his book, and feelings of anger, frustration and sadness boiled over. As books can be seen as a reflection of society, the news that Frey's book was not entirely truthful sparked a heated debate over whether Americans still valued truth. Those who felt injured and hurt by Frey's deception feared that those who believed that the book was still valuable—despite the falsities within it—were suggesting that truth no longer mattered.¹⁶² Of great concern was that the publishing industry did not seem to grasp the crisis that many readers felt. In fact, Doubleday and Anchor Books—divisions of Random House—issued a statement instructing that a “[m]emoir is a personal history whose aim is to illuminate, by way of example, events and issues of broader social consequence,” and that it is, “[b]y definition, . . . highly personal.”¹⁶³ The statement continued by explaining that, “we decided ‘A Million Little Pieces’ was [Frey’s] story, told in his own way, and he represented to us that his version of events was true to his recollections.”¹⁶⁴ Apparently satisfied with this limited due diligence in fact checking, Doubleday and Anchor Books concluded that, “[r]ecent accusations against him notwithstanding, the power of the overall reading experience is such that the book remains a deeply inspiring and redemptive story for millions of readers.”¹⁶⁵

The publishing company's nonchalance about the debacle was perhaps exacerbated when Frey appeared on the “Larry King Live” show, and was asked to address the accusations that *A Million Little Pieces* was not entirely true. Lending further appearance that the truth did not matter, Oprah Winfrey famously called into the show to defend Frey, emphasizing that it was “the underlying message of redemption that resonated with her.”¹⁶⁶ However, days later, Oprah capitulated, apologizing for her earlier comment, as it had the effect of giving “the impression that the truth does not matter.”¹⁶⁷ Did America's appetite for entertainment somehow override the meaning of “truth,” causing it to become a relative term? James Frey contended that “having 5 percent or so of his book in dispute was comfortably within the realm of what's appropriate for a memoir.”¹⁶⁸ For some, this contention was horrific.

As Frey was tried by the media, the figure that emerged as the chief prosecutor was perhaps Oprah herself. Within weeks of *The Smoking Gun's* publication of

162. See, e.g., Virginia Heffernan, *Ms. Winfrey Takes a Guest to the Televised Woodshed*, N.Y. TIMES, Jan. 27, 2006, at A16.

163. Edward Wyatt, *When a Memoir and Facts Collide*, N.Y. TIMES, Jan. 11, 2006, at E1 (internal quotation marks omitted) (quoting the Doubleday and Anchor Books press release).

164. *Id.* (internal quotation marks omitted) (quoting the Doubleday and Anchor Books press release).

165. *Id.* (internal quotation marks omitted) (quoting the Doubleday and Anchor Books press release).

166. Edward Wyatt, *Treatment Description in Memoir Is Disputed*, N.Y. TIMES, Jan. 24, 2006, at E1 (internal quotation marks omitted).

167. Heffernan, *supra* note 162, at A16 (internal quotation marks omitted).

168. Michiko Kakutani, *Bending the Truth in a Million Little Ways*, N.Y. TIMES, Jan. 17, 2006, at A16 (internal quotation marks omitted).

the details showing that Frey's account of his experience was riddled with falsities, Oprah invited Frey back to her television show, where she questioned his motivations, disingenuousness, and how he could live with himself after boldly lying to the public. Frey—who appeared palpably uncomfortable—sat in the same place he had months earlier, only this time, he was interrogated, rather than praised. He confirmed that The Smoking Gun's report about *A Million Little Pieces* was “pretty accurate,” and reviewed some of the fictionalized claims he had made in his book.¹⁶⁹ Oprah, “[a]lternately appearing to fight back tears and displaying vivid anger at the author and his publisher,” told Frey that she felt “duped,” “[b]ut more importantly, [she felt] that [he] betrayed millions of readers.”¹⁷⁰ Frey explained that one of his “coping mechanisms” in dealing with his addiction and recovery was to envision himself as being greater than he actually was. Thus, his account of his experiences reflected this inflated image of himself—of being tough, tenacious and notorious.¹⁷¹ Not missing a beat, Oprah asked whether Frey clung to this grand vision of himself because that was how Frey wanted to be perceived, or if it would simply help boost book sales; Frey replied: “[p]robably both.”¹⁷²

Lawsuits against the guilty parties—Frey, his publisher and others involved in the portrayal of Frey's book as nonfiction—were filed across the United States and were consolidated into a single action in the United States District Court for the Southern District of New York.¹⁷³ Much like the lawsuit Lewis Linet had filed against Arthur Train in state court, the federal action against Frey generally involved claims “i) that the book contained material fabrications, and ii) that advertisements and marketing concerning the book were false and misleading inasmuch as the book was marketed as a work of nonfiction.”¹⁷⁴ Collectively, the plaintiffs sought relief under the theories of negligence, fraud and unjust enrichment.¹⁷⁵ The case swiftly progressed, and in January 2007, in moving for class certification as well as preliminary approval of a settlement, the plaintiffs relied upon Frey's admissions on live television to Oprah, as well as The Smoking Gun's exposé, to establish that Frey's “memoir” was fiction.¹⁷⁶ In May 2007, the class was conditionally certified, as including “All persons who purchased the book

169. Edward Wyatt, *Live on 'Oprah,' a Memoirist is Kicked Out of the Book Club*, N.Y. TIMES, Jan. 27, 2006, at A16.

170. *Id.* at A1 (internal quotation marks omitted).

171. *Id.*

172. *Id.* In describing his own hoax, Clifford Irving explained why he continued to maintain that his book on Howard Hughes was a true autobiography, even as the investigation into the hoax was closing in on him: “Everybody leads a fictional life . . . [y]ou make a commitment to an act that is self-destructive and you stick with it. . . . You get on a train and you can't get off because it's going so fast. If you jump off, you hurt yourself and look stupid.” Jeffrey Goldberg, *Liar, Liar*, NEW YORKER, Apr. 23, 2007, at 27 (internal quotation marks omitted).

173. *See generally In re “A Million Little Pieces” Litig.*, 435 F. Supp. 2d 1336 (J.P.M.L. 2006).

174. Transfer Order at 1, *In re “A Million Little Pieces” Litig.*, No. 06-md-1771 (S.D.N.Y. June 16, 2006).

175. *Id.*

176. Memorandum of Law at 1–2, *In re “A Million Little Pieces” Litig.*, No. 06-md-1771 (S.D.N.Y. Jan. 4, 2007).

A Million Little Pieces, in any format (including, but not limited to, in hardback, trade paperback, cassette, CD, or any other electronic media, on or before January 26, 2006.”¹⁷⁷ Shortly thereafter, the district court entered a final judgment, providing that the conditional class was “finally certified,” and granting final approval for the settlement agreement entered into by the parties.¹⁷⁸

In relevant part, the settlement provided a fund totaling \$2.35 million, which would be available to provide a full refund to all persons who purchased *A Million Little Pieces* before January 26, 2006—“the date of Frey’s widely-publicized appearance on ‘The Oprah Winfrey Show,’ during which Frey acknowledged that certain portions of the [b]ook were not entirely accurate.”¹⁷⁹ With respect to the concerns of false advertising and Random House’s representations that the book was nonfiction, the settlement provided that a disclaimer would be provided with all future printings of the book, “indicating that not all portions of the [b]ook are factually accurate.”¹⁸⁰

When one of the plaintiff’s attorneys was interviewed about the settlement and was asked if his client was satisfied with it, the attorney replied: “[a]ll [his client] was ever seeking was a refund of the book and clarification about whether it was fiction or nonfiction.”¹⁸¹ The settlement provided both forms of relief.

V. WHEN DOES A HOAX BECOME LEGALLY ACTIONABLE?

While a variety of literary shenanigans have been described in this Article—ranging from false accounts about real people to works of fiction cloaked as nonfiction—the question that must be asked is whether there is any room left for hoax literature in an increasingly litigious society. Should such stunts be punished in a court of law, or can these ploys be tolerated as part of a jocular tradition? Also, assuming that at least some hoaxes cross the proverbial line and should be discouraged, then how should they be? Should litigation be the preferred method of providing a remedy, or should public policymakers or private industry be asked to take action?

When a book lands itself in the center of a legal dispute, it is not deemed a “hoax,” but a “fraud.” However, defining the tort of “fraud” is no easy matter. Prosser and Keeton, legal heavyweights in the world of torts, have commented that the term “fraud” is “so vague that it requires definition in nearly every case.”¹⁸² The *Restatement (Second) of Torts* provides that a claim based upon a fraudulent

177. Order at 2, *In re “A Million Little Pieces” Litig.*, No. 06-md-1771 (S.D.N.Y. May 15, 2007).

178. Judgment at 2, *In re “A Million Little Pieces” Litig.*, No. 06-md-1771 (S.D.N.Y. Dec. 4, 2007).

179. Memorandum of Law at 4–5, *In re “A Million Little Pieces” Litig.*, No. 06-md-1771 (S.D.N.Y. Sept. 24, 2007); see also Motoko Rich, *Publisher and Author Settle Suit over Lies*, N.Y. TIMES, Sept. 7, 2006, at E1.

180. Memorandum of Law, *supra* note 179, at 4–5.

181. Rich, *supra* note 179, at E1.

182. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 727 (5th ed. 1984).

misrepresentation sounds when “[o]ne who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.”¹⁸³ Section 526 of the *Restatement (Second) of Torts* provides further clarity, explaining that a “misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.”¹⁸⁴ Further, section 531 explains that “[o]ne who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.”¹⁸⁵ These provisions suggest that if an author represents that a story—known by the author as fictitious—is nonfiction, knowing that readers might rely on this representation and purchase the book based upon a belief that it told a true story, the author may be held liable for damages.

While all hoaxes involve some level of deception—fooling readers is the hallmark of this tradition—the *Restatement* suggests that all hoaxes should not be treated the same before the law. Train, Irving and Frey all published (or tried to publish) books that purported to be something they were not. But, the three hoaxes are quite unlike one another. For instance, beginning with a comparison of Train’s hoax to Frey’s, on the one hand, both were sued for fraud and their publishers were faulted for advertising the books to be nonfiction. However, should a hoax such as Arthur Train’s be subject to civil liability when his hoax was premised upon an impossible event (the existence of Ephraim Tutt, a fictitious character)? Does the answer to this question change when considering that, during the decades leading up to his hoax, he created a body of work squarely characterizing Ephraim Tutt as a fictional being? Assuming the definition of “fraudulent misrepresentation” provided in the *Restatement (Second)* governs this question, the comments to section 531 strongly suggest that Train would not be held liable. Specifically, the comments to this section explain that “[i]f the maker [of the fraudulent misrepresentation] neither intends nor has reason to expect that the misrepresentation will reach a particular person or class of persons or that they will act or refrain from acting in reliance upon it, the fact that it does reach them and they do so act does not bring him within the rule stated in this Section.”¹⁸⁶

183. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

184. *Id.* § 526.

185. *Id.* § 531.

186. *Id.* § 531 cmt. b. Comment c to this section further explains that a “result is intended if the actor either acts with the desire to cause it or acts believing that there is a substantial certainty that the result will follow from his conduct.” *See id.* § 531 cmt. c. This would further support an argument that Train likely would not be held liable for making a fraudulent misrepresentation, since his behavior and

Train's explanation for why he published an "autobiography" of Ephraim Tutt showed a rather innocent motive: he thought the character was such a worthy one that Tutt deserved a fuller treatment than what he typically received in the serialized short stories that Train had previously written. Train was also quick to note that, in the course of his nearly twenty-five years of appearing in print, Tutt was never made to appear to be anything more than a creature of Train's making. Under these circumstances, using the broad definition of a "fraudulent misrepresentation" under the *Restatement*, it would seem that a claim could not—or perhaps should not—be successful, since Train's stalwart defense—that he did not intend to fool a soul and merely tried to infuse the book with a semblance of reality—would not support a finding that his "purpose" of creating Tutt's autobiography was to induce readers to buy the book because it told a true story.¹⁸⁷ Further, there was no basis to show that Train's "intended result" was to confuse the reading public. Train vehemently denied that he ever harbored any thought to confuse readers—in fact, he maintained that he was shocked that anyone should be fooled into thinking such a longstanding creature could be regarded as anything but a fiction. Thus, if the New York State Supreme Court had ruled upon the portion of Lewis Linet's lawsuit seeking money damages while applying the provisions of the *Restatement* cited above, the court would have likely denied it on the merits.

Although Train's hoax preceded the civil litigation regarding Irving's desire to publish his Howard Hughes manuscript, the precedent established in the *Rosemont* litigation further suggests that a hoax involving a biographical work about a public figure might not be enjoined so long as it was evident that the work was fiction. Specifically, the New York Supreme Court noted that a "public figure can have no exclusive rights to his own life story, and others need no consent or permission to write a biography of a celebrity."¹⁸⁸ This suggests that Train's publication of Tutt's life story is, in itself, an unremarkable event. But, even more importantly, the New York Supreme Court specified that "a person need not get the consent of a celebrity to write a fictional piece about that person, *even if the fictional work is in the form of an autobiography*, so long as it is made clear that the creative work is fictional."¹⁸⁹ Although this elaboration is arguably dicta and does not squarely address the publication of a hoax, it suggests that a lawsuit seeking equitable relief with respect to a hoax such as Train's—involving a fictional autobiography of a celebrity (albeit, a fictitious celebrity)—would likely be unsuccessful, since Train had spent decades writing about Tutt and establishing him as a fictitious character.

James Frey, on the other hand, wrote a "memoir" that was steeped in reality, but that exaggerated, dramatized and enlarged certain events in the narrative to make his story bolder and perhaps more marketable. While Tutt's long history as a

statements reflected that he did not have an intention to deceive anyone by publishing an "autobiography" of his famous fictitious character.

187. *See id.* § 525.

188. *See Rosemont Enter., Inc. v. McGraw-Hill Book Co.*, 380 N.Y.S.2d 839, 844 (Sup. Ct. 1975) (internal quotation marks omitted).

189. *Id.* (emphasis added).

fictional character provided Train's readers with a strong basis for knowing that Tutt was nothing more than a figment of Train's imagination, there was no similar public knowledge that Frey's tale of redemption was not based purely on reality. Most readers would not likely search for Frey's arrest records, or make an inquiry at the rehabilitation center he was thought to have attended, in order to verify whether the experiences Frey described in *A Million Little Pieces* were true ones. Thus, Frey's hoax seems much more likely to fall within the realm of a fraudulent misrepresentation, within the legal meaning of that term. For, as he admitted when he appeared on "The Oprah Winfrey Show" after his hoax was revealed, he knowingly exaggerated the truth and included false details in order to improve his story and book sales. As such, a reasonable argument could be made that Frey had "fraudulently ma[de] a misrepresentation of fact . . . for the purpose of inducing another to act . . . in reliance upon it"—in other words, by claiming his story was a true one, he induced readers to buy his book and even caused Oprah Winfrey to select it for her book club.¹⁹⁰ Perhaps it is for this reason that Frey, Random House and the other defendants named in the *In re "A Million Little Pieces" Litigation* class action suit elected to settle the lawsuit brought against them rather than proceed to a full-blown trial.

As for Clifford Irving, to the extent his hoax was one of the few to result in criminal prosecution, his hoax does not easily compare with Train's or Frey's. Forging documents, both in the United States and abroad, filing a false affidavit in a court of law, and masterminding a conspiracy to violate the law in order to publish an unauthorized autobiography was unprecedented and has not been repeated. However, the civil litigation that ensued respecting his desire to publish an account of Howard Hughes' life makes clear that, so long as a book provides some indication that it is a fictionalized account, an author may be able to publish a work about a celebrity without legal repercussions.¹⁹¹ However, the precedent established by *Rosemont Enterprises, Inc. v. McGraw-Hill Book Co.*, does not grant free license to an author to publish lies and damaging statements. As the lawsuit brought by J.D. Bromhall against David Rorvik—in which Bromhall sought damages for harm to his reputation based upon Rorvik's inclusion of Bromhall's name in the former's hoaxing book that claimed a human being had been cloned—demonstrates, an author may still be held liable for committing other torts.¹⁹² Surely, civil causes of action for libel, slander, defamation and violation of one's right to privacy might sound.¹⁹³

190. Perhaps the best proof that readers purchased *A Million Little Pieces* because it was a work of nonfiction—and not just because the book told a gripping story—is the fact that book sales plummeted as soon as it became apparent that the book was largely fictitious. In fact, within weeks of the revelation that *A Million Little Pieces* was not a true memoir, sales dropped to half of what they had been when it was believed to be true. See Edward Wyatt, *Frey Says Falsehoods Improved His Tale*, N.Y. TIMES, Feb. 2, 2006, at E1.

191. See *Rosemont Enter., Inc.*, 380 N.Y.S.2d at 844.

192. Haitch, *supra* note 28, at 33. See generally *Bromhall v. Rorvick*, 478 F. Supp. 361 (E.D. Pa. 1979).

193. See, e.g., *Cammaroto v. Anson*, 416 N.Y.S.2d 824, 824 (App. Div. 1979) (considering an

In assessing the possibility of civil and criminal liability, some consideration should be made as to what harm, if any, is actually caused by literary hoaxes. In 2011, when a class action lawsuit was brought against Greg Mortenson, coauthor of *Three Cups of Tea*, Ian Crouch of *The New Yorker* considered just this question. In that lawsuit, the plaintiff class members complained that they had “purchased *Three Cups of Tea*, and many of them, too, spent time reading it, all the while expecting to receive an inspiring tale of non-fiction.”¹⁹⁴ Admittedly, the idea that the plaintiff class sought damages from the harm caused by purchasing a book and reading it may initially seem preposterous. As Crouch noted, just because a dust jacket might assert that a book is life-changing, most readers will not “go stomping back to the bookstore when such transformations don’t take place”; however, he did concede that most readers “take seriously the distinction between fiction and nonfiction and would prefer to at least be made aware when a self-promoting nonfiction writer had taken liberties with the truth.”¹⁹⁵

But, should courts be the venue that injured parties rely upon for a remedy? To avoid litigation, Crouch suggested that book publishers could “move away from classifying memoirs as documents of perfect truth.”¹⁹⁶ One recent book, Jenny Lawson’s *Let’s Pretend This Never Happened*, states right on its cover that it is “(A Mostly True Memoir),” and her introduction begins by stating: “This book is totally true, except for the parts that aren’t.”¹⁹⁷ Surely, no court would find her liable for making a “fraudulent misrepresentation” by referring to her book as a “memoir,” when she so blatantly declares on the cover of her book that it is “mostly” true. Of course, most publishers will not resort to publishing a disclaimer on the cover of every memoir they publish.

Another solution to the literary hoax issue—and one that has been raised time and again—is that perhaps the onus should fall on publishers and they should be held to a higher standard of accountability in accurately labeling the books they publish as “fiction” or “nonfiction.” For example, after Joan Lowell’s *Cradle of the Deep* was fully stripped of its claim of being a true account, one critic passionately argued that if the publishing industry did nothing to address the dangerous precedent that Lowell’s book set, “lower literary standards” could become the norm.¹⁹⁸ He warned:

If today we have reached the point of progress where a literary hoax is condoned as

appeal from the trial court’s denial of a motion to dismiss a claim for invasion of privacy when Prentice-Hall, in publishing *The Amityville Horror*, failed to determine that the book was actually not a “true” story despite the book’s use of an actual address); see also *Bromhall*, 478 F. Supp. at 361 (involving a claim of harm to reputation flowing from a hoax).

194. Ian Crouch, *Lit Lawyers: The Fake-Memoir Business*, NEW YORKER (June 17, 2011) (internal quotation marks omitted), <http://www.newyorker.com/online/blogs/books/2011/06/lit-lawyers-the-fake-memoir-business-1.html>.

195. *Id.*

196. *Id.*

197. See JENNY LAWSON, LET’S PRETEND THIS NEVER HAPPENED (A MOSTLY TRUE MEMOIR) 1 (2012).

198. *Current Magazines*, N.Y. TIMES, June 16, 1929, at BR11.

good business; where publishers have no regard for the authenticity of a work, so long as it is successful; where the critical profession, organized through its publicity channels as never before, is also willing to disregard standards and quality of product, and to delude the reading public into a false demand; where deterioration has at last struck at the stronghold of spiritual integrity in the written word; then we have fallen on evil times in American literature. If charlatanism is to be more successful than honest writing, and win its way through advertising and publicity on which there is no check, the foundations of all literary effort are seriously threatened. All those who seek to express themselves, and who make their living by writing, will be ultimately affected by it. The Joan Lowell case is a signpost showing in no uncertain way the path we are to follow unless we change our course. It is high time we sat down and looked the scene over.¹⁹⁹

These concerns were expressed in 1929. In 2006, when the news came out that *A Million Little Pieces* was not a completely true memoir, Oprah famously explained that her staff had contacted Frey's publisher to ask if it "stood behind James's book as a work of non-fiction," and "they said absolutely," and when Frey's publisher was "also asked if [its] legal department had checked out the book . . . [it] said yes."²⁰⁰ In trying to find how Frey managed to pull the wool over his publisher's eyes, and succeed in getting his untrue memoir published as nonfiction anyhow, Frey's editor suggested that publishers could not "get inside another person's mind" and determine whether memoirs were actually true. In response, Oprah, just like the critic of Lowell's work in 1929, remarked that "that needs to change."²⁰¹ But, it has yet to do so.

VI. CONCLUSION

Given their rich and longstanding history, literary hoaxes will likely continue their mischief for years to come. For those hoaxes that intentionally deceive, injured readers may avail themselves of the courts to seek a remedy and to discourage future hoaxers from intentionally wreaking their havoc on unsuspecting readers. However, for those writers who seek only to cleverly write a work of fiction while cloaking it as nonfiction, the law generally supports a view that so long as readers have reasonable notice that the book is actually a work of fiction, a writer may escape liability. As for calling for greater accountability within the publishing industry, the cries for change have been voiced for decades to no avail. However, many publishers could save themselves from future liability by adopting safeguards, such as fact-checking works of nonfiction and investigating memoirs to the extent possible, in order to avoid the embarrassment and cost of being embroiled in a literary hoax.

199. *Id.*

200. *Excerpts from 'The Oprah Winfrey Show,'* N.Y. TIMES, (Jan. 27, 2006), <http://www.nytimes.com/ref/books/excerpts-oprah.html>.

201. *Id.*