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Deception, Self-Deception, and Mythology: The Law of Salmon in the Pacific Northwest

William H. Rodgers, Jr.*

I. INTRODUCTION

This story is a tale about lies, sometimes called deceptions, prevarications, fibs, falsehoods, mendacity, tall tales, fabrications, masquerades, counterfeits, and treachery.¹ I will not pause to argue the proposition that we live in a world of lies—good lies, bad lies, indifferent lies.² There is an impressive literature on lies—*The March of Folly*,³ *The Natural History of Stupidity*,⁴ *Extraordinary Popular Delusions and the Madness of Crowds*.⁵ There are periodicals that specialize in lies, including the impressive *Lies of Our Times (Loot)*⁶ that collects the best lies published in newspapers around the globe. The editors of this journal do not run short of novel and striking material.

This paper will present a Puritan Model of the Law of Lies, which is a prominent (but by no means only) model observable in U.S. law. We will then turn to the underpinnings in evolutionary theory of deception and self-deception. We will next apply these concepts to the worlds of salmon law and policymaking, which are marked conspicuously by evidences of deceit. Some conclusions will be offered on how deceit and self-deception are addressed in the law.

* Professor of Law, University of Washington. This paper was the basis for the Fourth Annual Archie Hefner Memorial Lecture given at McGeorge Law School in October, 1994. Appreciation is expressed to the law faculties of McGeorge and of the Vanderbilt School of Law who commented on the paper at an earlier workshop.

1. ROGET'S INTERNATIONAL THESAURUS §§ 614.10, 614.11 (5th ed. 1992).
2. See, e.g., Matt Kelley, *Clinton Orders Krikava Freed 4 Days Early*, OMAHA WORLD HERALD, Nov. 24, 1994, at 1 (reporting on the commutation of the prison sentence of a bankrupt hog farmer who lied to raise money to feed his starving animals).
3. BARBARA W. TUCHMAN, *THE MARCH OF FOLLY, FROM TROY TO VIETNAM* (1984).
4. PAUL TABORI, *THE NATURAL HISTORY OF STUPIDITY* (1993).
5. CHARLES MACKAY, *EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* (New York, Harmony Books 1980) (1841).
6. See JUDI BARI, *TIMBER WARS* 16-17 (1994) (describing an underground newspaper published by some Pacific Lumber employees, entitled "Timberlyin" as distinguished from the company paper, "Timberline").

II. THE PURITAN MODEL OF THE LAW OF LIES

With certain exceptions that offer interesting variations of their own,⁷ U.S. law assails human predilections to lean towards the fib with a universal prescription: tell-the-truth-Governments, especially, insist upon a steady diet of truth even while they have difficulty meeting their own stringent standards of accurate communication. My illustration of this proposition will be drawn from deeper recesses of the Atomic Energy Act, which insists in section 186 that applicants for nuclear power plant licenses refrain from any "material false statement" in the course of the lengthy and complex licensing process.⁸ Here is the fertile kernel of a bedrock policy: "If you lie, you lose."

The case that will serve as backdrop is a decision some years ago in which I had a small part, *Virginia Electric & Power Company v. United States Nuclear Regulatory Commission*,⁹ which upheld a modest civil penalty (\$32,500) for seven material false statements made in the course of the licensing process for the North Anna Power Station in Louisa County, Virginia. The basic problem involved the discovery of a fault in the containment excavations for units three and four after hundreds of millions of dollars had been invested in the plant. This was one of the most thoroughly litigated lie cases in U.S. jurisprudence, and I revisit it here strictly for the purpose of canvassing the roster of legal possibilities generated by a simple prohibition against any "material false statement." Thus, let's consider for the moment whether it is possible to communicate a "material false statement" by the following stratagems:

- (1) By expression of an opinion? "The site is apparently free of faulting and structural anomalies. . . . Based on the results of our geologic studies, it is our opinion that there is no geological feature of the site or surrounding area which adversely affects the intended use of the site."¹⁰
- (2) By the failure to file expert reports? As anyone who has set foot in the real world readily knows, sometimes these fellows hired as experts

7. Compare Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989) (examining critically the theories that recommend abandoning originalism in statutory construction and replacing it with candor in assessing the social effects of a statute and identifying dangers of candor) with Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 78 (1993) (suggesting a self-deception interpretation in which "venality competes not so much with stupidity as with honest, even good faith behavior that only in hindsight seems incredible").

8. 42 U.S.C.A. § 2236 (West 1973).

9. 571 F.2d 1289 (4th Cir. 1978) (per curiam), *aff'g In re: Virginia Elec. & Power Co. (North Anna Power Station, Units 1 and 2)*, 4 N.R.C. 480 (1976) (Nuclear Regulatory Commission). Earlier decisions within the agency are reported at 3 N.R.C. 347 (1976) (Atomic Safety and Licensing Appeal Board) and 2 N.R.C. 498 (1975) (Atomic Safety and Licensing Board).

10. 3 N.R.C. at 369.

choose language (“I sure am glad I am not living near North Anna”) that might be best left unsaid in a sensitive legal forum.¹¹

(3) By filing of a regional tectonic map of “known structural features” that leaves out the *postulated* fault that runs through the site?¹²

(4) By filing of statements believed to be true; but known to be false by a lower-level employee?¹³

(5) By filing of statements believed to be true and prepared by expert consultants with impeccable reputations?¹⁴

(6) By telling of the truth? This issue is not infrequently raised by what might be called the two-audience problem. That is to say, an expert can understand all this gobbledygook about synclines, chlorite seams, folds, and faults, but the ordinary citizen might put a quite different interpretation on the same information. In the North Anna case, the Commission opted for a “reasonable expert” standard of accuracy rather than the “reasonable person.”¹⁵ In the NEPA context, on the other hand, the readability cases at least open the debate on the question of whether an accurate conveyance of technical information to a public audience amounts to a special form of technocratic deceit.

(7) By leaving out too much explanatory detail? At North Anna, the statement that “the faulting of rock at the site is neither known nor is it suspected” might have been true when written, but does it remain true when the further details are added that the geotechnical consultants strongly suspected faulting at the site and seriously entertained the possibility before dismissing it?¹⁶ The statement, after all, says faulting “is” not suspected, not faulting “was” not suspected. This question of the degree of detail necessary to transform deceit into truth is wonderfully indeterminate. Once again, NEPA offers some nice examples of truncated speech that spills over into the domain of falsehood. Consider, for example, the shortest EIS in history—a carefully chosen 101 words describing the Palmetto Bend project in Jackson County, Texas.¹⁷ Or consider a hypothetical EIS description of the Grand Canyon: “Canyon with

11. *Cf. id.* at 387-88.

12. *Cf. id.* at 382-84.

13. *Cf. id.* at 377-81.

14. *Cf. id.* at 377.

15. *Cf.* 3 N.R.C. at 360 (“[E]ven were it possible to extract from the regulations some obligation upon utilities to cast their applications and supporting documentation in nontechnical language, it would by no means performe follow that a failure to satisfy that obligation could give rise, of itself, to a violation of the prescription against material false statements in Section 186”).

16. *Cf. id.* at 379-80.

17. See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW & SOCIETY 615 (1992) (the statement was written by the Bureau of Reclamation).

river, little vegetation.”¹⁸ This doesn’t quite capture the essence of the thing, but is it a falsehood?

(8) By adding too much explanatory detail? This is the problem of all words and no message. The issue arises in the NEPA readability context where the expert from Harvard responds to a query on meaning with: “Give me about fifteen minutes and I’ll figure it out.”¹⁹ Or: It’s not something I’d take to the bathroom for casual reading.²⁰

No one has better addressed the problem of too much noise in the communication network than Bill McKibben,²¹ whose methodology consisted of watching over 1000 hours of television that came across the enormous Fairfax, Virginia cable system during a 24-hour period on May 3, 1990. (Videotape made it possible to stretch out this memorable experience). What did he learn? Things like this:

“[A] controversial Milwaukee alderman” says that unless a hundred-million-dollar minority jobs program is created soon, “revolutionary violence will be committed against the city of Milwaukee.” Newly released hostage Frank Reed declares from his hospital balcony that he is looking forward to a three-pound Maine lobster. A man named Delvin Miller has been harness racing for eight decades, not including a stretch in World War II where he trained mules to deliver medicine in Burma for General “Vinegar Joe” Stilwell. The members of singing group Wilson Phillips remark that people tell them their name makes them sound like a law firm or a type of screwdriver. Fairfax County residents are encouraged to burlap-band their trees for gypsy-moth detection and control. “The reason I’ll always make a big deal about three-quarters sleeves is that you always used to have to push up your sleeves,” says an announcer on the J.C. Penney Channel. Hamstrings work in opposition to quadriceps, according to an exercise instructor on the Lifetime Channel, who adds, “the abductor muscles are too tight in most of the population.” More CEOs of Fortune 500 companies were born under Taurus than any

18. See *California v. Bergland*, 483 F. Supp. 465, 486 n.22 (E.D. Cal. 1980), *aff’d sub nom.* *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

19. See Michael Axline & John Bonine, *Plain Talk: Making NEPA Work*, 25 LAND & WATER L. REV. 61, 72 n.60 (1990).

20. *Id.* at 72 n.64; see also Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271, 308 (1992) (discussing a leading California SEPA case where it was contended that decisional documents on a proposal to build a toxic waste incinerator in a farmworker community should be translated into Spanish).

21. BILL MCKIBBEN, *THE AGE OF MISSING INFORMATION* (1992).

other sign; also, age-based sizing for children's clothing is out-of-date because children are larger than they were when the sizing was devised.²²

Thoreau's name came up twice on television on May 3, 1990:

Once, he was an answer on *Tic Tac Dough* in the category, "Bearded Men," and later that evening, in the back of a limousine, a man toasted his fiancée with champagne and said, "You know how we've always talked about finding our Walden Pond, our own little utopia? Well, here it is. This is Falcon Crest."²³

Thus far, we have presented a Puritan Model of the Law of Lies, which insists that the truth be told, and we have seen how, in application, this simple moral instruction is encrusted by complexity in a world of opinions, nondisclosures, omissions, proxies, agents, varieties of audience, brevities, and proxities. We turn next to evolutionary theory in an attempt to get a firmer grasp on the ideas of deception and self-deception.

III. EVOLUTIONARY THEORY: DECEPTION AND SELF-DECEPTION

A. Deception

For purposes of this discussion, deception is defined as communication that misrepresents the intentions or capacities of the actor. It is seen everywhere in nature,²⁴ not as some rare and pathological lapse, but as an integral part of the successful life. Some species regularly use false warning signals, in the form of bluffs, bluster, and feints. There are distraction displays, typified by the mother bird that feigns a broken wing to lead predators away from the nest. There is luring behavior where predators dress themselves up as prey to attract the unsuspecting. Some species of angler fish have lures that look like a dangling worm built into their anatomy. There is camouflage behavior. There are startle displays. There are "playing dead" methods.

Some of the more interesting acts of deception occur within a single species when the lie offers a temporary advantage. Vervet monkeys have been observed giving false warning signals in order to get an unmolested crack at a choice food

22. *Id.* at 6-7.

23. *Id.* at 10.

24. *E.g.*, DONALD R. GRIFFIN, *Deception and Manipulation*, in *ANIMAL MINDS* 195-210 (1992) ("Deception and Manipulation"); *cf.* DOUGLAS H. CHADWICK, *THE FATE OF THE ELEPHANT* 15 (1992) ("Judy, an Asian female [elephant] in her twenties living at Marine World, used to bunch up her chain and stand on it, then act as if she couldn't reach the meal of hay heaped near her. When a keeper moved in to push the hay pile closer, she would step off the chain, surge ahead, and whack the person with her trunk. She hurt three people with this trick before she was better trained.")

supply. The primatologist Frans de Waal has captured on tape a similar strategy of deception among captive chimpanzees.²⁵

Two reasons are invoked to explain acts of deception among nonhumans, and both of them have provocative implications for the practice of truth-telling among members of our own species. The first is that the biological costs of deceit are customarily low. It is easy to tell a lie; it can be done with a word, an expression, a mere change in body language. A feint can become an act of second nature, a fib can rush forth without rehearsal. This lie-telling business requires no long journeys, heavy caloric intake, or years of careful study. Among strangers at least, lies can flow as easily as a smile. People who do not understand this should refrain from shopping in distant markets under the belief that they will be protected by the Puritan Model of the Law of Lies.

The systematic lie, to be sure, as distinguished from the occasional lie, the helpful lie, or the white lie, can exact a price in social relations. Truth-telling is an important commodity in ongoing relations, and it shades into reputation. In these contexts, small lies can work large damage, which can be attested to by many a fibbing spouse, deceitful colleague and lie-mongering public official.

Not only do lies frequently offer an easy way out, the very foundations of communications theory as involving the transmission of truth have been challenged in an "eloquent and influential" paper by Dawkins and Krebs. They argue against what they call "the classical ethological analysis of animal communication, which emphasizes cooperation between individual animals facilitated by transmission of accurate information about the sender's dispositions to behave in particular ways." Instead, Dawkins and Krebs "interpret communicative signals as means to manipulate others, rather than to inform them; from this perspective it seems likely that the information transmitted by communicative signals is often inaccurate, and serves to misinform the receiving animal."²⁶ Among humans, perhaps, the lawyers might be best prepared to embrace the suggestion that communication can be about persuasion as much as it is about truth-telling. Indeed, a speech designed to move others can sound very much like a speech designed to manipulate others.

This short foray into evolutionary theory shows that the Puritan Model of the Law of Lies runs uphill not only against empirical complexities underscored by the North Anna communications but also other forces (the ease of the lie, the tendency to manipulate) that can elevate the falsehood in human affairs. But law usually runs uphill against human nature. And if it is too difficult to maintain the Puritan Model, we can expect exceptions to appear and some constrained definitions of tolerated falsehood.

25. GRIFFIN, *supra* note 24, at 209.

26. *See id.* at 195 (discussing R. Dawkins & J.R. Krebs, *Animal Signals: Information or Manipulation?*, in *BEHAVIORAL ECOLOGY: AN EVOLUTIONARY APPROACH* (J.R. Krebs & N.B. Davies eds., 1978)); *see also* Michael T. McGuire, *Deception*, 27 *INT'L J. CONTEMP. SOC.* 75 (1990).

The next step to self-deception is a more serious matter. How does the law respond to situations where the lie is so impressive its sponsors believe it to be true?

B. Self-Deception

For our purposes, self-deception can be defined as a misrepresentation of reality to oneself. Immediately, one accustomed to evolutionary thinking is hard put to explain self-deception. The key theme in Darwinism is a powerful functionalism where every feature, trait, tendency, or habit is presumed to be serviceable to advance the overall goals of successful life and reproduction.²⁷ But where in this theory is there room for self-deception? Do the more gullible thrive and survive? Will the biggest fools inherit the earth? Is there some extraordinary payoff hidden within the disposition to readily believe what isn't so?

The evolutionary biologist, Robert Trivers, gives us the explanation. Self-deception, he explains, is a powerful force in the service of deception;²⁸ put another way, the best liars are true believers, which means they are not deceivers as normally defined by law because there is no intent to transmit inaccurate information to the audience. They tell the truth as they misperceive it. An example of self-deception at work is described in the Trivers-Newton article on the crash of Flight 90 where the misconceptions of the senior pilot in the cockpit came to dominate the accurate concerns of the junior.²⁹ The emergence of self-deception as a powerful force in human affairs can be viewed also as an example of maladaptation where the traits that are highly functional in environment A (brashness, confidence, an ability to act quickly and decisively) emerge in environment B as the dangerous seeds of self-deception.

Under the Puritan Model of the Law of Lies the deceiver is punished more harshly than the self-deceiver. The liar is a miscreant that must be rooted out, whereas those who lie to themselves and then to us are merely the misguided who should receive further instruction. In the North Anna case, the several opinions of administrative authorities and judges are overwhelmingly sympathetic to interpretations that suggest not a pattern of deceit, but only unfortunate lapses in institutional self-deception.³⁰

27. See William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas' Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25 (1993).

28. ROBERT TRIVERS, *Deceit and Self-Deception*, in SOCIAL EVOLUTION 415-16 (1985).

29. Robert Trivers & Huey P. Newton, *The Crash of Flight 90: Doomed by Self-Deception?*, SCI. DIG., Nov. 1982, at 66; see also Donald C. Langevoort, *Ego, Human Behavior and Law*, 81 U. VA. L. REV. 853 (1995); THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE (Jerome H. Barkow et al. eds., 1992).

30. See *Virginia Elec. & Power Co. v. United States Nuclear Regulatory Comm'n*, 571 F.2d 1289, 1291-92 (4th Cir. 1978) (per curiam) (holding that a \$32,500 fine is not an abuse of discretion in view of lack of intent to deceive the Commission); *id.* at 1291 (finding it appropriate for the Nuclear Regulatory

IV. DECEPTION, SELF-DECEPTION, AND SALMON

We will bring our story back to the salmon by asking the question: in what environments can deception and self-deception be expected to thrive? Obvious candidates are environments of high uncertainty, low predictability, and deep mystery (controlled by chaotic and indeterminate factors). These are worlds where communication of information is at a premium. When humans don't know what is really so, the truth can easily become what we say is so or what others say is so or what we hope is so.

Do salmon live in a world of high uncertainty and low predictability? ³¹ Of course. Some species travel to places unknown—halfway around the globe, 1100 miles up the Columbia River. Do they behave unpredictably? Frequently. Some coastal streams of Washington that have never been planted with hatchery fish have been populated by “strays.” Returnees shut off from their native streams by the eruption of Mount St. Helens simply went elsewhere.

Is there evidence of deception in the regulatory world of the salmon fishery? Obviously. My favorite entries in the deception derby are the federal regulations that require “observers” on certain vessels to monitor behavior and keep track of the catch. At work here of course is the Puritan Model of the Law of Lies, except that the authorities have concluded: you will always lie to me about your catch so I will put among you a truth-teller who will report to me the accurate information. Suffice it to say that official truth-tellers in a world of liars must work in an uncomfortable social environment.

But it is the self-deception that emerges conspicuously in these complex fishing interactions that are chaotic and indeterminate. Conveniently, the decline of the salmon can be assigned credibly to any number of causes, which results in a perfect circle of recrimination. The history of the salmon fishery is a history of assigning blame for reductions on other animate and inanimate forces. When the fishwheels were banned on the Columbia in the 1930s, the canners assigned responsibility for the loss of the fish to the irrigators;³² the sports fishing people point to the Indians and the sea lions, the Indians look to the dam-builders and the ocean trawlers, the ocean fishers condemn the Japanese or hatchery people. The

Commission not to penalize the license applicant for the opinion of a consultant that was “sincerely held” and “based on investigations that were neither inadequately nor negligently conducted,” but asserting that the Commission would not absolve an applicant “who furnished the agency an opinion that was not genuinely held, or who disguised a material false statement as an opinion”).

31. For excellent introductions to a vast literature, see Michael C. Blumm, *Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program*, 14 ENVTL. L. 277 (1984); Dale D. Goble, *Introduction to the Symposium on Legal Structures for Managing the Pacific Northwest Salmon and Steelhead: The Biological and Historical Context*, 22 IDAHO L. REV. 417 (1986); Charles F. Wilkinson & Daniel Keith Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Trans-boundary Common Property Resource*, 32 KAN. L. REV. 17 (1983).

32. See IVAN J. DONALDSON & FREDERICK K. CRAMER, *FISHWHEELS OF THE COLUMBIA* 111-12 (1971).

fact that responsibility for the decline of the salmon is extravagantly shared among the players adds only seeds of plausibility to the accounts of self-deception that inflate the roles of others while simultaneously conflating one's own. Frequently, these self-deceptions have become legal policy, in the form of campaigns to banish the fishwheels, shut down the Indians, and exterminate the sea lions.

V. CONCLUSION

We will conclude with some distinctions between the laws of deception and self-deception. For the most part, our deceptions are governed by the Puritan Model of the Law of Lies, which treats falsehood as something to be forbidden, penalized, condemned, and sanctioned. Given the universality of the phenomenon of the lie, the Puritan Model is beset by problems of enforcement and undergoes inevitable fissioning in distinguishing small lies from big ones or harmless fibs from damaging ones, but these are the traditional workings of law.

By contrast, there is no Puritan Model of the Law of Self-Deception, which occurs at the level of preference, of ideology, of belief, of dogma, of revealed truth, of truncated empiricism. At this level, deception is not forbidden by law. It becomes enshrined in the law. It is enacted, approved, and endorsed. Thus, we come face-to-face with the ultimate irony: the little lies to others are felonies, the big lies to ourselves are policy.

