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Understanding and Dealing with Deception in Legal Negotiation

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I. INTRODUCTION

The unpredictable impact of deception¹ on legal negotiations raises critical problems for both practitioners and theorists. Practitioners find that a single act of deception sometimes demolishes a negotiation, thereby inflating the transactional costs to both parties.² At other times, however, a series of deceptions seems benign in their impact. For theorists, the failure to explain satisfactorily the circumstances under which deception causes a negotiation to fail threatens the legitimacy of legal negotiation as

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1. By "deception," I mean all kinds of misleading verbal and non-verbal statements and cues including what Irving Goffman called "barefaced lies," ones "for which there can be unquestionable evidence that the teller knew he lied and willfully did so." I. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959). Attempting a precise definition of deception is problematic. Philosophers do not define deception uniformly. Grotius argued that a false statement to a thief was not "lying" because no duty was owed. S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 15 (1978). John Stuart Mill argued that lying to "barbarians" and children was permissible under a utilitarian morality. ON LIBERTY A. CASTELL ed. 1947). Sissela Bok defines a lie as "an intentionally deceptive message in the form of a *statement*." (emphasis in original) She employs "deception" to include even unintended gestures, disguise and silence. S. BOK, *supra*, at 15. Studies have found that as individuals mature, their concept of lying changes. One study found that young children (five to nine years of age) tend to equate any factually untrue statement, including guesses, with lies. Roughly 90% of the children in this study believed exaggeration to be a lie, but only 50% of the adults. Peterson, Peterson, & Seeto, *Developmental Changes in Ideas About Lying*, 54 *CHILD DEV.* 1529 (1983). A recent academic writer has dispensed with a formal definition of deception but analyzes language in terms of efficiency, that is, the degree to which language optimizes the goals of the negotiation. He writes, "the truth of a statement depends on the degree to which the statement supports the purpose of the activity of which the statement was a part." Peters, *The Use of Lies in Negotiation*, 48 *OHIO ST. L.J.* 1, 4, 13-20 (1987).

2. "The settlement of disputes in court is not only costly in terms of money, time and emotions but the administration of justice would soon collapse from overload if the great majority of disputes were not settled prior to court action." S. THURMAN & E. CHEATHAM, *CASES AND MATERIALS ON THE LEGAL PROFESSION* 250 (1970).

an academic discipline.³ Negotiation theorists have offered no theory that distinguishes on a conceptual level harmful deception from the functionally benign, nor have they advised practitioners how to recognize and deal effectively with such deception.⁴ This Article offers both a theory to academics and some practical guidance to practitioners.

A. Origin of the Article

Several years ago, when I first taught Legal Negotiation, I observed as the semester progressed that my students became increasingly more cooperative and truthful with each other in carrying out the sequence of assigned simulated negotiations. After the semester ended, a student informed me that he and his fellow students had agreed among themselves in increasing numbers each week to share their negotiation "secret facts"⁵ in conscious disregard of the course instructions. They did so to reduce the emotional stress they had experienced when they lied to their opponents about their secret facts.

3. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 42 (1985) states "the absence of a comprehensive theory of negotiation strategies currently jeopardizes the legitimacy of negotiation as an academic discipline . . . instead legal negotiation theorists espouse directly conflicting advice." *Id.*

4. Legal negotiating has only recently been the object of academic study. Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J., 905-6 [hereinafter Menkel-Meadow, *Legal Negotiations*]. Few theories have been offered to enable us to better understand the complexity of legal negotiation. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 762 (1984) [hereinafter Menkel-Meadow, *Toward Another View*]. Much of what has been written about deception deals only with its ethical aspects. See, e.g. L. KANOWITZ, *ALTERNATIVE DISPUTE RESOLUTION* 68-75 (1986); R. HAYDOCK, *NEGOTIATION PRACTICE* 195-213 (1984). Haydock writes:

Ethical considerations on lying in negotiations present a quandary for lawyers. Considered opinions about the propriety of lying during negotiations range from the position that a lawyer should never resort to lies, to the position that certain situations may justify lies, to the position that a lawyer must lie in some circumstances to protect client interests. *Id.* at 205.

The following articles are essentially normative in addressing the ethical issues of deception. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982); Hazard, Jr., *The Lawyer's Obligation To Be Trustworthy When Dealing With Opposing Parties*, 33 S.C.L. REV. 181 (1981); Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411 (1988); White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 1980 AM. B. FOUND. RES. J. 926 (1980); Comment, *The Proposed Model Rules of Professional Responsibility: Disclosure of Clients' Fraud in Negotiation*, 16 U.C. DAVIS L. REV. 419 (1983); Note, *Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 J. L. REFORM 503 (1985).

The failure of legal scholarship to address the needs of practitioners has been often noted. See, e.g. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327 (1987).

5. For readers unfamiliar with clinical teaching, simulated negotiation problems typically consist of a written scenario available to both parties plus one set of "secret facts" for each party. The secret facts may limit that party's range of settlement or negotiation strategy or otherwise place conditions on what that party may do.

DEALING WITH DECEPTION

I was not only chagrined to learn that I had been the last to be let in on this student secret but concerned that I had unwittingly taught a negotiation model that bore little resemblance to the real world where "secret facts" rarely come conveniently packaged for sharing and, when they do, might well entail malpractice when shared.⁶ The following semester, to dissuade my students from sharing their "secret facts," I instituted a "scoreboard" which ranked each student competitively according to his or her cumulative negotiation success. The scoreboard fundamentally changed the dynamics of the class. The students no longer deceived me by secretly sharing their information, but instead began to deceive each other to improve their competitive standing on the scoreboard.⁷ Sometimes, but not always, the deceptions they perpetrated on each other led to acrimonious negotiation breakdowns.

Over the next several semesters, I tried to figure out what sorts of deception led to negotiation breakdowns and what did not. I eventually realized that the dynamic between a certain kind of deception and a certain type of negotiator seemed to explain a disproportionate number of these breakdowns. As explained in more detail later in this Article, I found that deception about *how* one was negotiating (i.e., deceiving cooperation while actually competing) was highly disruptive, especially against students who strongly identified with a cooperative mode of negotiating. I found that when students understood this dynamic, they were better able to deal with deception and less likely to get entangled in angry disputes over incidents of deception.⁸

B. Ethics

This Article has little to say about deception from the perspective of normative ethics. There are several reasons for this. Several writers, most notably Eleanor Holmes Norton and Murray L. Schwartz, have already written at length about the ethics of deception in a negotiation

6. Sharing a client's "secret information" could amount to a breach of contract with the client, a breach of trust, malpractice or a breach of professional responsibility. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1981).

7. I think the scoreboard creates an educationally appropriate level of classroom competition, similar to the level students will encounter in practice. Although the scoreboard is prominently posted in the classroom, grades are not dependent upon scoreboard success. Tying course grades to negotiation success would, in my opinion, create an excessively competitive atmosphere that would be educationally dysfunctional. I agree with Professor Menkel-Meadow, who, among others, has criticized the practice of tying student grades to their negotiation success on the grounds that the practice over-emphasizes the competitive and adversarial aspects of negotiation. Menkel-Meadow, *Legal Negotiations*, *supra* note 4.

8. An operative premise of this Article is that to understand a process, such as deception, is to gain a measure of control over it. When students and practitioners understand how the game of deception functions, they are free to play or not. P. WATZLAWICK, J. WEAKLAND & R. FISCH, CHANGE: PRINCIPLES OF PROBLEM FORMATION AND PROBLEM RESOLUTION 100 (1974) [hereinafter P. WATZLAWICK].

context.⁹ Given that negotiation theory is still in its early stages of development, separating the descriptive from the prescriptive may enhance our understanding of the negotiation process.¹⁰ In my teaching experience, I have found that students ignore ethical norms during the heat of a negotiation.¹¹ The approach taken here might be best described as "functionalist," an analytical approach that focuses on how conduct impedes a process in attaining its goals.¹² The fundamental goal of the negotiation process is typically the exchange of promises that will improve each negotiator's current position. I assume this goal to be ethically desirable.¹³ From a functionalist perspective, deceptive conduct becomes problematic only when it disrupts the process of a negotiation in reaching or carrying out that goal.¹⁴

I acknowledge that a functionalist approach appears ethically weak because it condones non-disruptive deception. Most of us have been taught at our mother's knee, if not at Immanuel Kant's, that lying is an intrinsically immoral act. A perspective that condones even some

9. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978). Professor Eleanor Holmes Norton has recently explored the inadequacy of ethics to respond to deceptive negotiation tactics. Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989).

10. Menkel-Meadow, *Legal Negotiation*, *supra* note 4, at 928.

11. In a similar vein, Professor Howard Raiffa writes:

Most of the subjects in our experiments [students participating in simulated negotiations] had had some education in normative ethics. They had at least read excerpts from the writings of Plato, Aristotle, Augustine, Aquinas, Hume, Kant, Bentham, Mill and others concerning normative principles of right and wrong. But knowing the distinctions between teleological (result-oriented) and deontological (duty-oriented) frameworks or between monistic and pluralistic frameworks of normative ethics may not help a subject to decide as the City representative negotiating with AMPO whether, in the case of Daniels, to lie or be quietly misleading or to be open and honest. Normative ethical frameworks are not designed to yield definitive decision procedures, and we should not expect answers from these philosophical teachings and reflections. H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 344 (1982).

12. Norton, *supra* note 9, at 525.

13. Negotiation is (at least) presumptively ethical because it is universally accepted and pervasively practiced in some form throughout the world. Norton, *supra* note 9, at 505. Except in unusual instances, parties enter a negotiation voluntarily and do so because they believe that it is in their best interests. HAYDOCK, *supra* note 4, at 17. When an actual dispute has arisen, the parties presumptively have an alternative to negotiation through the court process. Weaker parties may be better off negotiating. The commonly held assumption that formal adjudication procedures provide the weaker parties in a dispute more protection is challenged in Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process*, 34 J. LEGAL EDUC. 268, 271-73 (1984).

14. A settlement is more just when the negotiators are fully informed. Deception is dysfunctional in reaching this goal to the degree deception leaves the negotiators less than fully informed on issues relevant to the negotiation subject matter. Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 133 (1985); Peters, *supra* note 1, at 37-41. A negotiation typically entails the exchange of promises regarding future conduct. A deception that dissuades a party from willingly carrying out its promises is dysfunctional.

deception must appear to some readers as morally suspect. Part II of this paper therefore attempts a fresh understanding of negotiation deception by examining the role of deception in the natural world of butterflies, birds, and dogs. The notion I wish to put forward is that negotiation and deception are fundamental to all life, and that at least some of the difficulty human negotiators encounter with deception is a product of their maladaptive formal education. I do not intend to prove the moral neutrality of deception, but only to suggest that deception is not the fruit of human wickedness but a rational response to competition.¹⁵ Part III then introduces the notion of contextual deception as a uniquely human mode of deception, a mode with an extraordinary capacity to disrupt a negotiation. Excerpts from several negotiation dialogues that illustrate contextual deception are analyzed in the Appendices. Finally, Part IV suggests how negotiators can learn to respond more effectively to incidents of contextual deception. Part IV also describes how contextual deception differs in its impact upon various negotiators depending upon certain identifiable personality characteristics. Part IV closes by suggesting how embarrassment and shame may be useful guides in helping negotiators distinguish between benign deception and harmful contextual deception.

II. DECEPTION IN THE NATURAL WORLD

Many creatures engage in deception, typically to escape predators. One simple example of this deception is camouflage. Virtually all fish are dark on top and light underneath so that predators approaching from below, where fish are most vulnerable, will confuse the light underside with the water's surface.¹⁶ Insects may appear to be an inedible leaf or twig to fool a predator bird.¹⁷ A more complex and instructive example of deceptive camouflage is presented by three different families of butterflies known as "mimetics" because they mime each other in appearance.¹⁸

15. The dangers of constructing moral systems from nature have been amply documented by Stephen Jay Gould. See GOULD, *THE Mismeasure of Man* (1981) (debunking "scientific" justifications for racism and sexism); GOULD, *Wonderful Life: The Burgess Shale and the Nature of History* (1989) (showing how Darwin's theory of natural selection was made to demonstrate the existence of God and the perfectibility of mankind) [hereinafter GOULD, *Wonderful Life*]. The point I wish to make is that deception exists everywhere in nature and pre-exists humankind.

16. Land animals, such as deer, are dark on top and light underneath for much the same reason: when standing, the sun lightens the dark top while shading the light underside so that the animal tends to merge visually into the background. A. HARDY, *The Living Stream: Evolution and Man* 127-30 (1965).

17. *Id.* at 125-31.

18. *Id.* at 143-56. The California Academy of Sciences in San Francisco's Golden Gate Park features a lovely display of Batesian and Mullerian mimetic butterflies.

A. Mullerians and Batesians

Members of two of these mimetic families have a distinctly noxious taste such that predator birds, having once tasted any one member, avoid members of both families. These two families, known among lepidopterists as "Mullerians," cooperate in collectively warning birds by their common appearance. Birds only need to recognize the appearance of one family to avoid what are in fact two different families of noxious-tasting butterflies. As a result of their cooperative appearance, fewer Mullerians are sacrificed in educating each new generation of hungry birds.¹⁹

The third mimetic butterfly family is not noxious to predator birds but is quite tasty. However, should a predator bird taste a noxious Mullerian first, it will thereafter avoid members of this tasty third family because it has been deceived by their appearance, believing that they are noxious Mullerians. Members of this family of deceivers, known as "Batesian" mimetics, can be said to use deception in competing with the Mullerians and predator birds in negotiating their (Batesian) survival.²⁰

1. *The Source of the Deception.* Of course this cooperative truth-telling and competitive deception is quite innocent and free of moral impropriety because the Mullerians and Batesians are not conscious of their appearance or its effect on predator birds. Butterflies (we presume) lack the intentionality that we ordinarily identify as necessary for moral choice. However, the more significant observation is that neither Mullerians nor Batesians have any control -- intended or unintended -- over their distinctive appearance. The creative power that shapes their mimicry resides in the selective eating habits of the predator birds.²¹ Once the birds recognize the appearance common to both Mullerians and Batesians, they pursue only those Mullerians (to their disgust) or Batesians (to their pleasure) that deviate from the protective norm set by the majority of Mullerians and Batesians.

The end result of the selective eating habits of the birds is that those deceptive Batesians (and truthful Mullerians) that most resemble their collective norm survive to reproduce another generation of mimetics.

19. *Id.* at 144-46.

20. The deceptive Batesian mimetic might be "compared to an unscrupulous tradesman who copies the advertisement of a successful firm, whereas Mullerian mimicry is like a combination between firms who adopt a common advertisement to share expenses." Hardy, *supra* note 16, at 145-46.

21. Hardy, *supra* note 16, at 148-50, 152. Writing from the perspective of behaviorism psychology, B. F. Skinner observed, "Whatever we do, and hence however we perceive it, the fact remains that it is the environment which acts upon the perceiving person, not the perceiving person who acts upon the environment." B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 179 (1971).

Deceptive Batesians have their deceptive appearance forced upon them, so to speak, by birds that unwittingly cull out those Batesians who fail to deceive well.²² Were the birds capable of attributing blame, they would have only themselves to blame for Batesian deception. The natural world suggests that human negotiators who "bite" at the deception of "Batesian" negotiators may have a hand in shaping the very deception about which they complain.

2. *Mullerian Cooperation and Batesian Competition.* On the one hand, Mullerians seem to cooperate not only among themselves but between themselves and predator birds. It is in the cooperative best interests of both birds and Mullerians that the Mullerians be totally candid in accurately advertising their noxious taste, for as a Mullerian's appearance deviates from the norm, it runs a greater risk of getting eaten to the detriment of both butterfly and bird. On the other hand, the relationship between tasty Batesians and birds seems to be one of competition. The Batesians are like small businesses seeking to retain an economic foothold amidst the forces of large bird-conglomerates who are out, literally, to eat them up. To survive, the Batesians must disguise their assets, so to speak, so that their predators are deceived into leaving them alone. From a purely causal perspective, the cooperative Mullerian context seems to reward honesty just as the competitive Batesian context rewards deception. Deception seems most useful to weak parties who need to protect their assets from stronger parties.²³

3. *The Relationship Between Mullerians and Batesians.* Initially it would appear that Mullerians and Batesians are in competition, for as the Batesians succeed in deceiving the birds, their numbers increase, making it increasingly less likely that birds will be fooled by their ruse. As the birds are rewarded for successfully catching Batesians, they are more likely to go after Mullerians, mistaking them for Batesians. Deceivers impair the credibility of non-deceivers.

Yet, an odd form of cooperation exists between Mullerians and Batesians. Were the Mullerians to disappear, deceptive Batesians would be at greater risk. Batesians can only deceive in the presence of a greater

22. Like mimetic butterflies, negotiators need not act consciously in order to deceive. When a thoughtless deceptive tactic works (e.g., a simple thoughtless exaggeration of a claim) the deceiving negotiator has learned by operant conditioning to repeat the tactic given a similar situation. The deceived negotiator has, in failing to recognize the deception, participated in shaping the very deception about which he may later complain. Kennedy, *Reinforcement Frequency, Task Characteristics and Interval of Awareness Assessment as Factors in Verbal Conditioning Without Awareness*, 88 J. EXPERIMENTAL PSYCHOLOGY 103 (1971).

23. Strong parties can afford to tell the truth; parties with no assets have no reason to deceive.

number of non-deceptive Mullerians. The very survival of Batesians depends upon the continued well-being of the honest Mullerians, a well-being the Batesians undercut by their deception.

The Mullerian need for Batesians is less obvious. Like honest cooperators everywhere, the Mullerians must wish that deceptive Batesians would take their business elsewhere. Unfortunately, life is never that simple. Batesians do "cooperate," albeit unintentionally, in keeping their numbers low, because as Batesian numbers increase, both Batesians and Mullerians are at greater risk. The greater the incidence of deception, the less its power to deceive. Were Batesians to somehow disappear catastrophically, then some other creature would eventually evolve to fill the niche presently played by the Batesians, perhaps presenting a far greater threat than the perfidious Batesians.²⁴ Manageable, relatively innocuous deception may protect Mullerians from worse situations.²⁵ Might manageable deception among negotiators serve a similar function? Were such deception to disappear overnight, might negotiators become naive and vulnerable to some catastrophic deception?²⁶

B. *The Origin of Deception*

Batesian butterflies are not alone in having their camouflaged appearance created by the action of their predators. The origin of natural deceptive camouflage and deceptive behavior is found in every case in the hunting pattern of the predator who rewards the successful deceivers by permitting them to survive and propagate. Deception does not require conscious choice or moral judgment. The origin of deception, then, is not found in the fall of man as conscious beings, but in nature herself. It is a

24. Only Batesian and Mullerian females are mimetic. If Batesian males were mimetic, then Mullerian females might unwittingly mate with them (producing no offspring): a far greater threat to Mullerian survival than that caused by the present loss of the uncamouflaged males. Hardy, *supra* note 16, at 148-49.

25. The effect of catastrophic changes in one species upon other species is chaotic and unpredictable. May, *Simple Mathematical Models with Very Complicated Dynamics*, 261 NATURE 459 (1976). See also, GOULD, WONDERFUL LIFE, *supra* note 15, at 305-8.

26. Governments in free societies lie to the public, but the public is not required to believe the lie. Proponents of utopian models of society, such as traditional Marxist models, claim to abolish deception. Watzlawick, *supra* note 8, at 47-61. Governments in totalitarian societies therefore never (officially) deceive. Their citizens are punished if they do not believe their lies. *Id.* at 68. The thought is not new. Plato's Athenian says:

[A]ssuming you have reasonably good laws, one of the best of them will be the law forbidding any young man to enquire which of them are right or wrong; but with one mouth and one voice they must all agree that the laws are all good, for they come from God; and any one who says the contrary is not to be listened to. PLATO, LAWS I (B. Jowett trans. 1901).

The extraordinary damage to the human psyche caused by this latter form of deception, in which the fact of deception must itself be denied, has been described with great poignancy in A. KOESTLER, DARKNESS AT NOON (1941).

peculiarly arrogant form of human egocentricity to arrogate deception to human invention.²⁷ This is not to say that the world of human deception is no different from deception in the natural world. Human beings are conscious beings who can choose to deceive or not. However, much human conduct is simply habit or action taken with little or no conscious reflection. Deception is best understood, at least initially, in the same way that all non-human behavior is understood, as a causal response to the environment.²⁸ When the environment rewards an organism for certain behavior, that organism, whether it is a bird, a white rat, or a human being, is more likely to repeat that behavior than not. Under conditions of competition, nature typically rewards and thereby encourages deception in people as well as in butterflies and birds.

C. Bridging Natural and Human Deception

A bridge between the worlds of natural and human deception is formed by intelligent animals that share some of the characteristics of both worlds, such as the domesticated dog. In a once commonly performed laboratory experiment, a dog is strapped down to a laboratory cot so that its movements are restrained. The dog is then shown different stimuli, such as a circle and an ellipse. Through simple operant conditioning, the dog learns to differentiate between the two shapes. For example, the dog may be rewarded with food if it barks when shown the circle but electrically shocked if it barks when shown the ellipse. Once the dog has learned to differentiate between the shapes, the experimenter makes the dog's task more difficult by progressively flattening the circle and rounding the ellipse. As the difference between the two shapes lessens (that is, as their distinctive shapes are camouflaged), the dog begins to exhibit signs of stress. At the point when the dog can no longer

27. The belief that we humans invented lying and deception is deeply ingrained in the Christian ethic. Elaine Pagels explores how the medieval church established the orthodoxy that mankind brought pain, oppression and death — as well as deception — upon itself through free choice in E. PAGELS, *ADAM, EVE AND THE SERPENT* 127-50 (1988).

28. Behaviorism psychology understands human behavior as entirely causal. Its best known proponent, B. F. Skinner, states "As a science of behavior adopts the strategy of physics and biology, the autonomous agent to which behavior has traditionally been attributed is replaced by the environment — the environment in which the species evolved and in which the behavior of the individual is shaped and maintained." B. F. SKINNER, *supra* note 21, at 175. Indeed, from the perspective of traditional psychology, the existence of one's volitional choice to deceive is extremely problematic as traditional psychology understands all behavior as caused, not freely chosen. See HOWARD & CONWAY, *Can There Be an Empirical Science of Volitional Action?*, 41 AM. PSYCHOLOGIST 1241 (1986).

differentiate between the two shapes, it may engage in bizarre behavior such as biting, refusing food, defecating, or becoming comatose.²⁹

What explains the dog's bizarre behavior? The traditional psychological explanation is that the dog's capacity to discriminate has broken down.³⁰ Yet, the example of the birds confronting mimetic butterflies, as well as the lives of ordinary dogs under natural conditions, suggest this explanation is unsound. When birds and dogs confront ambiguous information under natural conditions, their capacity to discriminate does not break down -- they simply make guesses. The dog's bizarre behavior has to do with a deception of context. The neurotic dog's "problem" is not that it has been deceived about a shape, but that it has been deceived about a context -- a deception the dog experiences as much more traumatic than deception *within* a context. The next Part describes what is meant by contextual deception.

III. CONTEXTUAL DECEPTION

A context is a system for interpreting the meaning of stimuli or information.³¹ Simple creatures, such as butterflies and birds, interpret information in only one way, by the contextual system that is hard-wired into their brains.³² They are incapable of learning new contexts. More complex creatures, such as dogs, dolphins, chimpanzees, and people, can learn different ways or contexts within which to interpret the meaning of information.³³ Dogs, for example, naturally learn the context of "play" in which certain gestures that might be threatening in a "fight" context are

29. This experiment was originally conducted by Ivan Pavlov and replicated by other experimenters with different animals and different settings. See SARGENT & STAFFORD, BASIC TEACHINGS OF THE GREAT PSYCHOLOGISTS 206-7 (1965). See also Watzlawick, *supra* note 8, at 216.

30. G. BATESON, MIND AND NATURE: A NECESSARY UNITY 118-21 (1979). Pavlov and later investigators equated the breakdown in discrimination as equivalent to a neurosis. SARGENT & STAFFORD, *supra* note 29, at 207.

31. D. HOFSTADTER, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 161-64 (1980); M. MINSKY, THE SOCIETY OF MIND 207-8 (1986).

32. "Without context, words and actions have no meaning at all. This is true not only of human communication in words but also of all communication whatsoever, of all mental process, of all mind, including that which tells the sea anemone how to grow and the amoeba what he should do next." BATESON, *supra* note 30, at 15.

33. *Id.* at 122-23. Bateson's dolphins learned to create new contexts. They were rewarded *not* for repeating a learned behavior (learning *within* a context) but for performing a behavior they had never before performed (learning a new context). To do this, the dolphins had to learn that what was sought by the human experimenters was a "mistake context" (that is, the failure to repeat a previously learned behavior) -- an extremely sophisticated cognition.

interpreted as non-threatening.³⁴ In natural settings, dogs exhibit a third context we might call "exploration." Watching a dog run along freely in the countryside is to see the context of exploration at work. Dogs sniff, investigate, and get surprised. They are deceived into thinking that a fallen tree limb is a snake and that every rustle in the leaves is a rabbit to be chased. Dogs in natural settings suffer no anxiety and exhibit no bizarre behavior when they are deceived by ambiguous, camouflaged information because they have a context available that permits mistakes.³⁵

In the laboratory, the dog learns an "unnatural" context, one that we might call a "discrimination required/no mistake" context. Through an artificial system of rewards and shocks administered to the dog under severe duress as it lies strapped to a laboratory cot, the dog learns to anticipate making a mistake-free discrimination and to avoid making a guess. When discrimination is impossible because the shapes are identical the dog's reaction is violent because it has been deceived by a context. As noted in more detail later in this Article, being deceived *about* a context is qualitatively worse than being deceived *within* a context.³⁶

The above-described laboratory experiment would never work with butterflies or birds because they lack the necessary intelligence to learn a new context. A butterfly or bird cannot be taught a context that demands positive discrimination and forbids guesses.³⁷ The experiment works with dogs because they are capable of learning (some) new contexts. It works even better with human beings who are capable of learning a multitude of contexts, a capability that is, I suggest, at the root of their difficulty with contextual deception.³⁸

34. "[E]ven a dog distinguishes between being stumbled over and being kicked." O. W. HOLMES, *THE COMMON LAW* 3 (1938). "In ordinary parlance, 'play' is not the name of an act or action; it is the name of a *frame* for action." Bateson, *supra* note 30, at 139 [emphasis in original].

35. "[E]xploration is self-validating, whether the outcome is pleasant or unpleasant for the explorer. If you try to teach a rat to not-explore by having him poke his nose into boxes containing electric shock, he will . . . go on doing this, presumably needing to know which boxes are safe and which unsafe. In this sense, exploration is always a success." Bateson, *supra* note 30, at 139.

36. *Id.* at 119-20.

37. Simple creatures have only a single hard-wired system for interpreting information - a system that is transmitted by their genes. However, the perceived distinction between "genetic learning" through natural selection and ordinary adaptive learning is not as great as once thought. Through natural selection, organisms establish new contextual interpretive systems in adapting more effectively to a changed environment. J. MONOD, *CHANCE AND NECESSITY* 152-53 (1973).

38. Humans may share this capacity to deceive about contexts with chimpanzees. A low-ranking male chimp may act as if he were injured around a higher ranking male to avoid an attack or he may casually wander off in the general direction of a female to whom he has secretly given sexual cues to avoid the interference of higher ranking males. In both cases, the low-ranking male is faking the context of "cooperation" while engaging in "competition." F. DE WAAL, *CHIMPANZEE POLITICS: POWER AND SEX AMONG APES* 47-50 (1989).

A. Environmental Cues to Context

Ordinarily, the environment itself cues people to the appropriate context for decoding information. When I hear a trilled "r" accompanied by bodily gestures characteristic of latin culture, I know to "decode" the sounds I hear as Spanish. When I enter a theater, environmental cues such as the stage and the seating tell me that the action to follow is "theater." The words "once upon a time" cue a child that what follows is merely a story. We can, of course, make mistakes about context. The language I hear may be Portuguese, not Spanish. Modern theater sometimes plays with context, having actors step out of the theater audience so that the theater context does not tell us for sure whether they are actors or not. Although becoming socialized within a culture entails the ability to quickly and accurately identify social contexts, we all occasionally misidentify contexts even within cultures we know very well. Most all of us have experienced the jitters while attending an unfamiliar social occasion because we fear we will misunderstand or be misunderstood.

Context can clarify an otherwise ambiguous conversation. Consider, for example, over-hearing this simple statement: "John shot two bucks."³⁹ The first necessary contextual decision is that the language is English and that the sentence should be understood according to the rules of the English language. Without any other contextual markers, the sentence might mean that John shot a gun and struck two deer or that John gambled away two dollars. Context would ordinarily be provided by our knowledge of John (he is a renowned hunter), the speaker (she is only interested in gambling), the general subject matter of the conversation (they have been talking all morning about hunting) or perhaps the location (they are at a casino). In the same manner, negotiation styles or contexts serve as contextual markers that help us identify the probability that certain statements are intended as deceptive.

B. Negotiation Contexts

"Negotiation" is the name of a context and, as well, the name of a set of contexts. When two opposing attorneys meet on the courthouse steps just before trial, the environment cues them that what they say in the next few minutes should be interpreted as within the context "negotiation." Only a naive attorney would interpret the greetings, inquiries about parking problems, and other such topics as merely conversation within the context of polite social intercourse. Negotiation, however, is a complex

39. See MINSKY, *supra* note 31, at 208.

context containing within it several different contexts. The meaning of certain words or gestures in one of these contexts may differ from their meaning in another context. The context of a "courthouse steps" negotiation differs from the collegial "office" context of negotiating among one's peers within a law firm or law school faculty. The contextual interpretation of "deception" in one such context may differ from the contextual interpretation in another.⁴⁰ Environmental cues and the language employed guide us in the appropriate interpretation of deceptive language and conduct. In order to understand better how these deceptions are interpreted, we need to review briefly the three major contexts that constitute most negotiations.

Professor Thomas Gifford has recently offered a comprehensive typology of negotiation contexts.⁴¹ His typology identifies three explicit contexts: competition, cooperation and integration (often called "collaboration"). The first context, competition,⁴² is marked by high demands, limited disclosure of information, threats, apparent commitments to positions, and deception.⁴³ Asserted opening demands, bottom lines, constraints on authority to bargain, the identity of one's principal, and the seriousness of threats should all be taken as potentially deceptive.⁴⁴ For

40. For example, the differing contexts of "confidential" and "nonconfidential" apparently cue faculty to deceive differently on student letters of recommendation. When advised that a student's letter of recommendation to a graduate school would be confidential, faculty were found to write less favorable (more candid perhaps) letters than when advised that the letter would be nonconfidential and made available to the student (more deceptive perhaps). Ceci & Peters, *Letters of Reference: A Naturalistic Study of the Effects of Confidentiality*, 39 AM. PSYCHOLOGIST 29 (1984).

41. Gifford, *supra* note 3, at 45-48. Gifford calls "strategies" what I call "contexts." He distinguishes a negotiation strategy that describes a set of behaviors in response to a particular negotiation problem from a negotiation style that describes an individual negotiator's general disposition toward any negotiation. While accepting the usefulness of this distinction, I have observed that for many students, their strategy is subsumed into their style. See *infra* text accompanying notes 65, 69, and 74.

42. Gifford, *supra* note 3, at 48-52.

43. One might think that litigation or the threat of litigation would constrain deception in a competitive negotiation. As legal rules provide the party's substantive entitlements and thereby provide the bargaining chips for negotiation, negotiators presumably would not stray too far from the discoverable truth. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). However, observations of simulated negotiations of third-year law students and limited observations of practitioners indicate that they typically do not construct their negotiation strategies around a litigation model, that is, they do not negotiate as if the dispute were to be litigated. Condlin, *supra* note 14, at 65. Indeed, most disputes are settled by negotiation before they ever reach the filing stage of litigation. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 27 (1983). Nonetheless, the adversarial model of litigation appears to predispose legal negotiators to assume at least initially a competitive stance. Menkel-Meadow, *Toward Another View*, *supra* note 4, at 765-66.

44. The acceptable limits to deception appear to be set by local practice, except perhaps, at the extreme. Professor Norton states that permitting a plaintiff to wear a neck brace to a negotiation when the plaintiff has suffered no such injury is always "unethical and probably illegal," Norton, *supra* note 9, at 506-7, but notes that a negotiator who fails to deceive on his bottom line has turned the negotiation into a sale. *Id.* at 514.

example, a statement by one negotiator that "One million dollars is the least we will accept to settle this case" should, given a competitive context, be interpreted as a high demand and a probable deception. The opponent would undoubtedly err if he were to interpret this statement as a candid offer.

The characteristic pattern that identifies the second context, cooperation,⁴⁵ is the pattern of alternating and sequential concessions directed toward a compromise. Each party typically opens with offers that are less than what they expect at a final settlement. Given the above statement in a cooperative context, the opponent should interpret it as a signal inviting a counter-offer with the expectation that the opponent will then make a lesser demand. The speaker does not intend to deceive as he might in a competitive context,⁴⁶ but intends that the statement encourage a sequence of concessions in which he himself intends continued participation.⁴⁷ Plea bargaining between experienced prosecutors and defense counsel typically follows a cooperative context.

With the third context, integration,⁴⁸ the negotiators engage in problem solving to satisfy their common interests. Given the "one million dollar" statement, the opponent should interpret it as candid, and designed to help both negotiators resolve their common problem. The two negotiators may have, for example, two million dollars to resolve a certain problem. The speaker does not intend to deceive or to induce a counter-offer. Integration differs from cooperation in several respects. Cooperation typically presumes a zero-sum situation in which your gain is my loss. The pattern of sequential concessions is intended to reach a fair division of a fixed pie.⁴⁹ Integration typically presumes a non-zero sum situation, that is, a situation in which the pie can be made larger or in which the parties can abandon the original pie and, by working together, construct a new and tastier pie.

45. Gifford, *supra* note 41, at 52-54.

46. It is problematic when, if ever, a negotiator "intends" a deception in a competitive context if we assume that the negotiator presumes his opponent is not deceived.

47. Within a cooperative context, deception about preferences are typically permitted (how much money you want for the car) but not deception about external facts (whether the car's rings are worn out). Peters, *supra* note 1, at 38.

48. Gifford, *supra* note 3, at 54-57. The nomenclature for describing various types of negotiation is not settled. Integration is sometimes called collaboration, but is more often confused in literature with cooperation.

49. This "fair division" is more accurately called "splitting the difference" because the two negotiators typically reach a half-way point between their initial contending offers. The fairness of this process has often been criticized as unprincipled. Yet students, and — from my experience as an attorney — practitioners, often cannot settle a negotiation because they are unable to split the last dollar in a dispute. For a brief discussion and sources, see Menkel-Meadow, *Toward Another View*, *supra* note 4, at 921 n. 69.

C. Deception of Context

A major thesis of this paper is that the kind of deception that threatens a negotiation is a deception *about* a context and not a deception *within* a context. As long as each negotiator accurately identifies the negotiation strategy (that is, the negotiation context) of the other, and appropriately anticipates the kind of candidness and deception which that negotiation context entails, deception will not derail the negotiation. If, for example, both negotiators knowingly employ a competitive context, then each will interpret the other's statements as presumptively deceptive.⁵⁰ A negotiator who understands the negotiation context as competitive cannot rationally walk out of a competitive negotiation in a rage over a deception.⁵¹ Similarly, if both negotiators knowingly engage in an integratively-contexted negotiation, neither should ever intentionally deceive the other because it is not in their own self-interests to do so.⁵² However, negotiations are complex events and negotiators sometimes misread the context of a negotiation and consequently misinterpret the language of their opponents.⁵³ At other times, negotiators act irrationally by refusing to recognize a patently obvious context, a type of negotiation pathology explained in Part IV.

1. *Why We React More Strongly to Deception of Context.* Good reasons compel negotiators to react more strongly to deception about a context than to deception within a context. Deception about context is

50. The detection of a deception may cue the astute negotiator that his opponent is engaged in competitive negotiating. In revealing the opponent's competitive context, the opponent's false statement may convey more information to the astute negotiator than if the statement had been true (*i.e.*, knowing someone is lying may be more important than the truth of any individual statement). F. DRETSKE, *KNOWLEDGE AND THE FLOW OF INFORMATION* 44 (1981).

51. Unless, of course, the walk-out is a competitive tactic!

52. Socrates taught that virtue is knowledge. "Socrates believed all the virtues to be forms of knowledge, so that to know justice entails being just; for once we have learnt geometry and architecture we are geometers and architects." ARISTOTLE, *EUDEMIAN ETHICS*, Book 1, Ch. 5, 1216b 7. Only when people understand what they are doing are they free to act rationally. "We suggest that among socio-economic theories, Marxian theory, for example, failed at least partly because certain ruling class members, when they became aware of the theory, saw that it was in their interest to disobey it." N. HOWARD, *PARADOXES OF RATIONALITY: THEORY OF METAGAMES AND POLITICAL BEHAVIOR* 64 (1971). Hence, an understanding of the theory of deceptive contexts assists a negotiator in a ("rationally") integrative negotiation context in acting rationally. An "integrative" negotiator is honest in an integrative context because she knows that honesty is rational within that context. Gordon, *Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 J. LAW REFORM 503, 506 (1985). When such rational behavior is socially reinforced, it becomes "moral behavior." Gewirtz, *Mechanisms of Social Learning: Some Roles of Simulations and Behavior in Early Human Development*, in *HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH* (1969).

53. Packer, *The Structure of Moral Action: A Hermeneutic Study of Moral Conflict*, in *CONTRIBUTIONS TO HUMAN DEVELOPMENT* (1985).

potentially much more harmful than deception within a context. To be deceived about a context is to misinterpret every piece of information within that context. Consider the feeling of discovering that a person whom we thought to be a friend (that is, a person within a "friend context") has, from the very beginning, been a false friend. This sudden realization means that we have misunderstood everything this person has said to us. We have been deceived not once but numerous times. We may feel painfully humiliated. The difference between deception within a context and deception about a context is the difference between merely falling short and betrayal, between Peter and Judas.⁵⁴

2. *Embarrassment and Shame.* We intuitively express the difference between deception within a context and deception about a context with the social concepts of embarrassment and shame.⁵⁵ Embarrassment is always context dependent.⁵⁶ What is embarrassing in one context (belching in the faculty dining room, a deception in an integrative negotiation context) may not be embarrassing somewhere else (belching at home in front of one's long suffering family, a deception in a competitive negotiation context).⁵⁷ Embarrassment is a negotiator's typical reaction to being caught in an inadvertent deception within a context that does not permit deception, such as a deception within an integrative context. Someone is embarrassed because he has not acted consistently with the context he wishes to project.⁵⁸ The deceiver's embarrassment (flushed face, stammering) signals his opponent that he did not mean to deceive (that is, that he momentarily and inadvertently slipped from his role as an integrative negotiator). Sometimes negotiators are embarrassed when they discover they have been deceived because the deception indicates that they have not been the astute, sophisticated negotiators they thought themselves to be.

3. *Shame.* In contrast to embarrassment, shame typically entails intentional deception *about* a context. Shame is not being the person one

54. *Matthew 26 & 27.* Peter, in his acute embarrassment, wept. Judas, in his shame, hung himself. The sense of betrayal is strongly suggested by the Losing Team members in the context deception set forth in Appendix 1.

55. Babcock, *Embarrassment: Window on the Self*, 18 J. THEORY SOC. BEHAV. 461 (1988).

56. Stated differently, we feel embarrassed about misconduct *within* a context.

57. Babcock, *supra* note 55, at 462.

58. He has issued a message (a message of deception) that is inconsistent with the persona (*i.e.*, context) he wishes to convey about himself. We sometimes experience this sense of embarrassment as a sudden sense of disorientation. We say typically "I was just not myself!" Packer's subjects who engaged in deception displayed very little embarrassment perhaps because they wished to convey a persona capable of deception. See Packer, *supra* note 53.

DEALING WITH DECEPTION

claims to be in some fundamental way. Shame entails the violation of some general principle of civil conduct. To be a false friend and betray another is shameful.⁵⁹

IV. CLINICAL TEACHING ABOUT DECEPTION

A. *The Danger Point in Negotiating*

The first step in teaching students how to handle deception is to alert them to the danger point in negotiating, that is, the point at which contexts change during a negotiation. As Professor Gifford points out,⁶⁰ negotiators frequently use more than one strategy (more than one context) in a single negotiation. A common contextual sequence in a zero-sum negotiation, for example, is from competition to cooperation. The negotiators compete until they become exhausted and call a truce. They then proceed cooperatively, making sequential, reciprocal concessions. The most dangerous point in such a negotiation, the point when context deception is most likely to occur, is the transition point between contexts. After an hour of competitive bashing, negotiator A makes a gesture of conciliation consistent with his decision to change the negotiation context to cooperation. Negotiator B interprets this gesture as just another competitive gimmick. She pretends to go along with what she perceives as his continuing competitive game plan and then zaps him with a deception. Upon his discovery of the deception, he is outraged. She perceives his outrage as just one more competitive tactic. The viability of the negotiation is now imperiled.

59. Babcock writes:

In sum, both shame and embarrassment play an important role in maintaining personal identity. The difference lies in the fact that shame is focused around the desire to live up to what are taken to be shared objective standards of what it is to be a worthy person and encourages one to work towards that ideal, whereas embarrassment is focused around the desire to live up to a personal and perhaps idiosyncratic standards, i.e., to act in accordance with one's own conception of self, instead of just reacting to the immediate demands of the situation. Babcock, *supra* note 55, at 470.

She observes that Aristotle in his discussion of voluntary and involuntary actions (NICHOMACHEAN ETHICS, BOOK III) distinguishes ignorance of major premises that produce immoral acts and deserve reproach from ignorance of particulars that produce only involuntary acts that are subject to pardon. Babcock finds these distinctions consistent with shame and embarrassment. I would add they are also consistent with ignorance of context (major premises) and ignorance of content (particulars). *Id.* at 468. Packer observes that Losing Team members broke off playing with Winning Team members because "they see the Winning Team as *unworthy* of further play." Packer, *supra* note 53, at 52 (emphasis in original). As the game ended, a Losing Team member remarked to a Winning Team member, "I'm ashamed (of you)." The pertinent dialogue is set forth in Appendix 2, *infra*.

60. Gifford, *supra* note 41, at 57-58.

B. Negotiation Personality Preferences

The second step in helping students handle deception is for them to learn their own negotiation strategy preferences. Two simple paper-and-pencil instruments can help students identify their preferences. The first is the Thomas-Kilmann Conflict Management of Differences Exercise (MODE), a thirty-question, forced-choice, pencil-and-paper instrument that a student can complete and self-score in ten minutes.⁶¹ The MODE graphs the student's responses along two poles, competition (concern for one's own interests) and accommodation (concern for the other's interests), generating five different negotiation styles: Competition, Accommodation, Avoidance, Cooperation, and Collaboration (*i.e.*, Integration). Over the past five years, about one-third of the students in my Legal Negotiation course have scored themselves as competitors, and the remaining two-thirds as cooperators, accommodators, avoiders,⁶² or collaborators.⁶³

The second instrument is the Myers-Briggs Type Indicator (MBTI), a ninety-question, forced-choice, pencil-and-paper questionnaire that a student can self-administer and score in about twenty-five minutes.⁶⁴ Among its four scales, the MBTI provides a "thinking/feeling" scale that sorts subjects who prefer impersonal logic and analysis ("thinkers") from those who prefer the application of values and the consideration of personal relationships ("feelers"). Thinkers, as indicated on the MBTI, correlate significantly with competitors on the MODE, and feelers correlate with cooperators.⁶⁵ Generally speaking, students who prefer responding to problems with impersonal logic are more likely to be comfortable with competition (and presumably deception) and those who prefer responding with considerations of values and the maintenance of personal relations are more likely to be comfortable with cooperation and

61. K. THOMAS & R. KILMANN, THOMAS-KILMANN CONFLICT MODE INSTRUMENT (1974).

62. Collaborators reflect a high score on both accommodation and competition; cooperators a medium score on both; and avoiders a low score on both. Because "avoider" sounds unnecessarily pejorative, I use the term "diplomat" in my class.

63. Professor Gerald Williams, based on his empirical study of 2,000 practicing attorneys in Denver and Phoenix, concludes that about one-fourth of these attorneys are "competitive." G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15-19 (1983).

64. The Myers-Briggs Type Indicator Form G Self-Scorable Edition (B) is available from Consulting Psychologists Press, Inc., Palo Alto, CA. See, I. BRIGGS MYERS & M. MCCAULLEY, MANUAL: A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR (1985).

65. Mills, Robey & Smith, *Conflict-Handling and Personality Dimensions of Project-Management Personnel*, 57 PSYCHOLOGICAL REP. 1135 (1985). The subjects were 199 project management personnel. S. HARTWELL, R. PACE & R. HUTAK, WOMEN NEGOTIATING: ASSERTIVENESS AND RELATEDNESS (1991). The subjects were 34 undergraduate students and 34 law students. In both studies the Pearson Correlate between the "thinking" and "competition" scales ran about .30, $p < .05$.

candidness. Students who score consistently across both instruments as either competitive-thinkers or as cooperative-feelers tend to represent quite consistent negotiation styles -- what I call "dedicated" styles.

Dedicated cooperators are natural Mullerians. Their reaction to a predatory world is to join forces with all other like-minded cooperators. Just as one Mullerian family allies itself with a second Mullerian family in their mimetic appearance, dedicated "Mullerian" negotiators attempt to ally themselves with their negotiation opposition. (Note that Mullerian butterflies may cooperate together against predator birds but compete against each other for food and shelter. However, in "choosing" a common appearance, the Mullerian butterflies have attenuated any competitive advantage a distinct appearance might have afforded them in competing against each other.) Mullerian negotiators seek to construct a trusting relationship with their opponents to contend against forces beyond the immediate negotiation. As recounted in Part I,⁶⁶ dedicated cooperators convinced the rest of the students in my first Legal Negotiation course to cooperate in competition against me. I wanted them to compete (when appropriate) and they did not want to. It is interesting to note that what appeared as cooperation among the students appeared as collusion to me. The introduction of the "scoreboard" served as a sufficient incentive to mobilize the competitors against this collusion.⁶⁷

Students who are dedicated Batesian competitors see their best chance of success as taking advantage of dedicated Mullerian cooperative largesse. When a dedicated cooperator offers a concession toward building trust, the dedicated competitor takes it and asks for more. In the words of the dedicated competitor quoted in Appendix 3, "We think that since he was this soft, we should reach for a little more."⁶⁸ Dedicated competitors call this reaching "healthy competition" and dedicated cooperators call it "unconscionable greed."⁶⁹

66. See note 6 and accompanying text, *supra*.

67. Readers conversant with Robert Axelrod's work may recognize here a familiar scenario. Axelrod describes how cooperation "broke out" between front-line Allied and Axis soldiers during World War I to the dismay of their commanding generals. Spontaneously, each side began piecemeal not to fight at certain hours and locations in tit-for-tat fashion until fighting ceased along whole sections of the line. The commanding generals disrupted this fragile and spontaneous armistice by insisting that their soldiers fight or face court martial. Like myself in class, the generals interpreted the armistice not as benign cooperation but as collusion. R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984). See also Hofstadter, *Metamagical Themas: Computer Tournaments of the Prisoner's Dilemma Suggest How Cooperation Evolves*, *SCI. AM.*, May, 1983, at 16.

68. See Appendix 3, *infra*.

69. Some research has found that competitors always compete but that cooperators only cooperate with fellow cooperators. As a result, competitors tend to see the negotiation world homogeneously in which everyone competes; cooperators see the same world heterogeneously in which competitors compete and cooperators cooperate. Kelley & Stahelski, *Social Interaction Basis of Cooperators' and Competitors' Beliefs About Others*, 16 *J. PERSONALITY AND SOC. PSYCHOLOGY* 66, 69, 74 (1970). My own teaching experience suggests otherwise, at least among dedicated negotiators: Dedicated cooperators nearly

My teaching experience suggests that while dedicated competitors easily adapt to cooperation or collaboration, (though they find it less fun),⁷⁰ dedicated accommodators and cooperators do not easily adapt to competition.⁷¹ In every class I have taught, there has been a group of dedicated cooperators who agonize through simulated, zero-sum competitive negotiations. They often become angry at the deception employed by their competitive opponents who, like Packer's competitive Winning Team members, are amused at what they view as the sanctimonious whining of the naive.⁷² Although dedicated cooperators never, in my experience, enjoy competition or deception, some eventually learn to recognize competition and to adapt their strategy accordingly.⁷³

The major problem dedicated cooperators encounter is learning to read context rather than content.⁷⁴ By reading context, I mean the ability to recognize the negotiation situation as competitive, cooperative, or integrative from cues apart from what the opponent says. Generally

always resist competition but dedicated competitors will cooperate or collaborate if it is shown to be in their best interests. Perhaps only in the classroom are competitors given the opportunity to see the limitations of monotonic competition and therefore change their style.

70. Note the revealing comment in Appendix 2, *infra*, of the one Winning Team member in Packer's study, that his team had all of the "fun people."

71. The conduct of the members of the "winning" and "losing" teams described by Packer (Appendices 1 and 2, *infra*) are consistent with what I mean by "dedicated competitors" and "dedicated cooperators," respectively.

72. Packer, *supra* note 53, at 117. Note the revealing comment of one Losing Team member in Appendix 2, *infra*, that "We had all of the moral people on our side."

73. One study comparing undergraduate and law school men and women students found that law school socialized women students but not men into becoming more assertive negotiators and therefore more likely as cooperators to adapt to competition. S. HARTWELL, R. PACE & R. HUTAK, *supra* note 65.

74. Western people generally and North Americans in particular are more likely than people from other cultures to attribute conduct to character rather than to context (*i.e.*, the situation, the circumstances). They are more likely than non-Westerners to believe that a person deceives, for example, because of his character than because of the circumstances within which he finds himself. J. FREEDMAN, D. SEARS & J. M. CARLSMITH, *SOCIAL PSYCHOLOGY* 170-72 (4th ed. 1981). This tendency to attribute conduct to character has been demonstrated in numerous experiments to lead to an incorrect attribution, that is, that the subject errs in attributing the conduct to character rather than to the situation. Even when told, for example, that a speaker has read a controversial speech because she was paid to do so, Western observers are more likely than others to attribute the controversial views expressed as reflecting the actual beliefs of the speaker. *Id.* at 153-55. This error is so prevalent that it is known among social scientists as "the fundamental error of attribution." *Id.* at 153. Many students — and, I suspect, practitioners — fall victim to this "fundamental error of attribution" in concluding that a negotiator who is truthful in a cooperative context will also be truthful in a competitive context because they believe he has a "truthful disposition." An individual's propensity to deceive can better be predicted by circumstances (context) than by disposition. Such dispositional beliefs, once formed, are difficult to change. Shewder & Broune, *Does the Concept of Person Vary Cross-Culturally?*, *CULTURAL CONCEPTS OF MENTAL HEALTH AND THERAPY* 97-137 (A.J. Marsella & C. White ed. 1982); Miller, *Culture and the Development of Everyday Social Explanation*, 46 *J. PERSONALITY & SOC. PSYCHOLOGY* 961 (1984).

DEALING WITH DECEPTION

speaking, all zero-sum⁷⁵ negotiations should be understood as potentially competitive. Dedicated cooperators wish even zero-sum negotiations to be only cooperative. They grasp at the first cooperative-appearing straw that blows their way. When an opposing competitive negotiator states that he is going to proceed cooperatively (like Packer's Winning Team Male #1),⁷⁶ the dedicated cooperator mistakenly believes this content (the statement of cooperation), rather than the context (a competitive zero-sum negotiation). Typically, competitive negotiators employ a cooperative strategy only in a zero-sum negotiation when they get desperate. Dedicated cooperators must learn to wait them out.

Dedicated competitors who negotiate with dedicated cooperators face a different task. Competitors run the risk of so enraging deceived cooperators that they will refuse to negotiate further, thereby increasing everyone's transaction costs. Once again, the problem is a misreading of context.⁷⁷ Just as the dedicated cooperator prefers cooperation and presumes others also do, the dedicated competitor prefers competition and presumes that others do as well. When a dedicated cooperator responds in anger to a competitor's deceptive tactic, the competitor reads the anger as merely a tactic within a competitive strategy.⁷⁸ Dedicated competitors also infuriate their opponents by treating all negotiations as if they were zero-sum. They often fail to take advantage of the extra profit available to both parties through collaboration in integrative negotiations.

Once either the deceived cooperator or the deceiving competitor understands what has happened, she needs to take corrective action. Assuming the competitor wants the negotiation to continue, she needs to apologize (act "embarrassed") and make a cooperative gesture.⁷⁹ She

75. A "zero-sum" negotiation -- sometimes referred to as "distributive bargaining" -- is one in which one party can gain only at the expense of the other. J. MURRAY, A. RAU, E. SHERMAN, *THE PROCESS OF DISPUTE RESOLUTION* 82 (1989). Some commentators contend that few real-world negotiations are ever truly "zero-sum" despite the conventional negotiation literature that assumes "zero-sum" negotiations to be the standard. Menkel-Meadow, *Toward Another View*, *supra* note 4, at 776.

76. See Appendix I, *infra*.

77. A competitor may not want to know that her opponent is in a cooperative strategy and therefore suppress knowing so unconsciously in order to continue her competitive tactics. P. ZIMBARDO, *PSYCHOLOGY AND LIFE* 482-84 (10th ed. 1979).

78. One attribute of emotional immaturity is the belief that others know how one thinks or feels. Negotiators who are immature are more likely to assume that when they assume a particular negotiation context (*e.g.*, integration), their opponent will know that. When their opponent, operating in a different context (*e.g.*, competition), deceives them, they are especially upset because they believe their opponent knew their intention to negotiate in a cooperative context.

79. Of course, the apparently outraged "cooperator" just might be a very clever competitor. Mimetic butterflies are everywhere and the cleverest bird sometimes gets fooled.

must understand that the outraged cooperator may have interpreted her competitive ploy as a shamefully immoral act.⁸⁰

The outraged cooperator has the more difficult task of convincing the competitor that the cooperator has reasonably interpreted the competitor's conduct as a contextual statement promising cooperation. The obvious problem is that the competitor will interpret the cooperator's outrage as merely a competitor's ploy. Hence, the cooperator has to make a very strong "context statement." That is, the cooperator has to do something that clearly signals that his outrage is about the deception of context and not about a deception within a context of competition. Because context cues come primarily from the environment surrounding the dialogue, the cooperator needs to change the environment dramatically. One way to change the environment is to refuse to continue negotiating.⁸¹ I believe that it is sometimes more effective to break the negotiation entirely and to stage a walk-out. I instruct students in my Legal Negotiation course who perceive themselves as dedicated cooperators to walk out at least once during the semester. Many who do engineer a walk-out report a sense of liberation.⁸²

I think that shaming tactics against deceptive competitors are rarely effective. Many negotiators are willing to accept embarrassment but not the odium of shame. The deceived cooperator might better treat the deception as merely a slip in role (e.g., "Look I thought we had reached a cooperative stage, but I hear your last statement as hard-ball. I cannot

80. Anger prevents people from thinking rationally. "Emotional arousal, such as extreme anger, may prevent the individual from pausing and performing a detailed analysis (and therefore make a primitive attribution of fault)." Rose & Ditecco, *An Attributional Analysis of Moral Judgments*, 31 J. SOC. ISSUES 91-109 (1975). The incapacity of negotiators who have made emotionally charged decisions to think rationally is discussed in Hartwell, *Mediation in Resolving Legal Disputes: Secret is Best*, J. OF CONTEMP. LEGAL ISSUES (in press) (1990).

81. The deceived cooperators in Packer's study tried just this tactic: "The Losing Team members folded their arms across their chests and refuse to continue." See Appendix I text accompanying note 96, *infra*.

82. Fisher and Ury offer a wholly different strategy for cooperators (and collaborators) to employ against competitors who resort to "dirty tricks" such as deception. They caution cooperators not to get angry as they may lose control of the negotiation. FISHER & URY, *GETTING TO YES* 126 (1981). They advise cooperators who have been deceived to express personal support for their opponent (so as to depersonalize the deception), express their desire that the dispute be settled fairly on the basis of principle, and then qualify their challenge to the deception (e.g., "Please correct me if I'm wrong, but I understood you to say . . ."). *Id.* at 122-26. William McCarthy criticizes this approach as unrealistic and perhaps directed at bolstering the confidence of unaggressive negotiators. McCarthy, *The Role of Power and Principle in "Getting to Yes,"* 1 NEGOTIATION J. 59 (1985). James J. White takes a different tack in criticizing Fisher & Ury's treatment of such "dirty tricks" as deception. White thinks that they treat deception simplistically leading to a self-righteous and undiscerning response. White, *The Pros and Cons of Getting to YES*, 34 J. LEGAL EDUC. 115 (1984).

negotiate with you if I don't know what you are doing. I need to call my office anyway, so let's take a break.")⁸³

Sometimes students think the ideal way to learn to negotiate is as mimetic butterflies and predator birds. They believe that if they could just learn to negotiate unemotionally they would be unbeatable. What they are describing are the psychopathic negotiating tactics of Stalin. We are all born with an affective processing system, a system that helps define our humanity. Emotions such as anger, outrage, and disgust are sometimes referred to as "moral emotions" because they are the initial, and probably necessary, response to socially unacceptable conduct.⁸⁴ Hence, the cooperator's outrage is the human and typically appropriate response to a deception of context. Our failure to express outrage appropriately serves as operant conditioning to encourage others to deceive us.⁸⁵

Some cooperators have been socialized into behaving in a manner similar to neurotic dogs. These students have lost the capacity to deal with ambiguity. It is as if they have learned a "discrimination required/no mistake" context in school. They demand answers where none are forthcoming.⁸⁶ I am concerned that one of the adverse effects of traditional legal education -- a concern expressed by some traditional legal educators -- is that it teaches students that mistakes are unacceptable. Like the poor dog strapped to a laboratory cot, some students learn in law school (if not earlier) a context in which only a correct answer is an acceptable answer.⁸⁷ When these students, particularly if they are dedicated cooperators, face a vigorous competitor, they cannot accept the

83. Of course, this recommendation requires the cooperator to deceive by failing to state his true feelings. Some dedicated cooperators believe that disguising their feelings is wrong and make no effort to modulate their anger. Sometimes it helps dedicated cooperators to understand that the perception of embarrassment and shame vary significantly between actors and observers. For example, I may feel embarrassed when a waiter spills soup on me (though I am totally not at fault) and the waiter may feel ashamed (though he did not intend the spill) but an observer may believe that the waiter is only embarrassed and I am neither embarrassed nor ashamed but angry. Babcock, *supra* note 55, at 462-63.

84. Packer, *supra* note 53, at 136.

85. The failure of the deceived student negotiator, as set forth in Appendix 3, *infra* to express his anger encouraged his opposition to continue its deception. The anthropologist Gregory Bateson referred to this kind of interaction in which the negative conduct of one party encourages the negative conduct of another as "schismogenesis," a quite elegant term for what is more commonly called a "vicious circle." BATESON, *supra* note 30, at 104-9.

86. Some family-system theorists refer to this demand as the "utopia syndrome." Watzlawick, *supra* note 8, at 47-61.

87. *E.g.*, Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 145 (1987), writes, "The ideal of legal expertise . . . is the general belief . . . shared by . . . most law professors . . . that any lawyer (or any incipient lawyer) *who is any good* will be able to provide the right answer to legal problems with relative quickness, with great precision, and (most importantly) without making mistakes." (emphasis in original)

fact that they will not know whether they are being deceived.⁸⁸ Like the neurotic dog, they have lost their natural capacity to make a guess.

V. CONCLUSION

The functionalist approach as taken in this Article to the ethics of deception may be more useful in shaping ethical conduct than more traditional normative approaches. The weakness with any normative approach in positively influencing conduct is that many students reject norms as contrary to their own best interests. While growing up, none of us ever really believed that we were being spanked for our own good. The immediate reaction of many students to an ethical norm that says they should not deceive during a negotiation is a suspicion that this norm will disadvantage their negotiation success. I cannot disagree with their assessment. Certainly, a negotiator who is totally incapable of deception operates at a sizable disadvantage.⁸⁹ Further, students perceive norms that permit some deceptions (e.g., "puffing opinions") but reject others (e.g., "distorting facts") as illogical compromises justified only by custom and practice.⁹⁰

Even when students accept normative ethics, their usefulness for negotiators is highly problematic. What counts as deception among some sections of the bar does not count as deception elsewhere. For example, in criminal law practice where much plea bargaining takes place quickly over the phone or in the courthouse hallway between practitioners who deal with each other every day, much less deception occurs than between civil practitioners who deal with each other only on occasion.⁹¹ For many of these civil practitioners, nothing is fixed until it is in writing. In addition, what counts as deception differs between localities. What may count as deception among practitioners in Modoc County, California, may

88. In the real world, negotiators may often not know they have been deceived, especially in non-iterated situations. Peters, *supra* note 1, at 44. Researchers have found that deception (*i.e.*, telling lies) is very difficult to detect. Cody & O'Hair, *Nonverbal Communications and Deception: Differences in Deception Cues Due to Gender and Communicator Dominance*, 50 COMM. MONOGRAPHS 175 (1983).

89. In class, I refer to this inability to deceive as the "Billy Budd Syndrome," from Herman Melville's famous novella. As readers may recall, honest Billy, falsely accused of mutiny, kills his accuser in frustration when he is unable to speak because of a stammer. See R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) and White, *What Can A Lawyer Learn From Literature*, 102 HARV. L. REV. 2014, 2038-42 (1989) for an engaging debate over the meaning of *Billy Budd* to the legal community.

90. I agree with Professor Peters that, except at the margins, trying to establish ethical norms that efficiently distinguish between acceptable "deception" and unacceptable "lies" is a hopeless task. See Peters, *supra* note 1, at 8-20, 37-40.

91. This distinction in candidness holds true in San Diego; it may not hold true elsewhere.

DEALING WITH DECEPTION

not count as deception in Los Angeles. Normative ethics cannot account easily for these differences in practice or locality.

In contrast, a functionalist approach focuses attention on the goals of the negotiation, on what the negotiators are trying to achieve. Students learn very quickly that certain deceptions in cooperative or collaborative negotiations are dysfunctional.⁹² They learn to be candid (within limits) in these situations because candidness works.⁹³ They also learn not to trust strangers in competitive situations however often the stranger may say "trust me." Like predator birds trying to decide whether the mimetic is Mullerian or Batesian, they learn to gauge how hungry they really are and where the next meal may be.

In my experience, students find the notion of shame a practical guide to negotiation deception. They are more likely to agree as to what constitutes shameful deception than they are unethical deception and more likely to refrain from conduct they believe to be shameful than conduct that they believe to be (merely) unethical.⁹⁴

APPENDIX 1

Packer's Study of Deception and Context. Packer observed students as they negotiated the well-known "Prisoner's Dilemma" game.⁹⁵ In Packer's version, the game is played between two teams of four students each.⁹⁶ The scoring system enables one team to gain an

92. Highly competitive students in my Legal Negotiation course do not score as well as cooperative and collaborative students in negotiating simulated cooperative or collaborative problems. Competitors more often fail to find the mutually profitable solutions cooperators and collaborators find. The students (and I) assume these simulations replicate real-life negotiations. The paucity of cooperative or collaborative negotiation problems available to clinicians has often been lamented. Menkel-Meadow, *Legal Negotiations*, *supra* note 4, at 931-36.

93. Candidness "within limits" because all negotiations contain some zero-sum aspects that provide incentives to deceive. Peters, *supra* note 1, at 30, 36, 40.

94. Many years ago, Jerome Frank deftly caught the difference between shame and mere legality in promoting social control: "Most men are less likely to offend social proprieties than to violate legal rules, less likely, for example, publicly to appear clad only in underwear than to commit theft." J. FRANK, *COURTS ON TRIAL* 12 (1950).

95. The structure and ethics of the Prisoner's Dilemma are discussed in H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 344-45 (1982); For a history of the Dilemma, see Sommer, *The District Attorney's Dilemma: Experimental Games and the Real World of Plea Bargaining*, 37 *AM. PSYCHOLOGIST* 526 (1982).

96. The classic Prisoner's Dilemma was based on the dilemma of two suspects who have been taken into custody and isolated in separate cells. The district attorney already has enough evidence to convict both on a misdemeanor but needs the confession of either suspect to convict both on a serious felony. Each suspect can either confess or remain silent. If each suspect remains silent, then each will be convicted on the misdemeanor and serve six months in jail. If each confesses, then each will serve two years. But if one confesses and the other remains silent, then the one who confesses gets one year and the other will get four years. The prisoners are obviously both best off with cooperative silence. However, a prisoner who remains silent faces a dilemma: if his partner confesses, then he faces a maximum term; yet if he confesses and his partner remains silent, he has blown his chance for the minimum

advantage over the other team through calculated deception. The usual ruse is for one team to convince the other team to play "cooperatively" (in which both teams play blue cards and score at a moderate rate), though the first team has already secretly determined to play "competitively" (wherein the first team in playing a white card scores spectacularly if and only if the second team is duped into playing a "cooperative" blue card).

How the Game Proceeded. The players in Packer's study were all friends or acquaintances who attended the same college and lived near each other on campus. They played for token stakes only. They had all volunteered to play the game and had consented to video-taping.⁹⁷ The following transcribed dialogue begins with the reactions of several members of the "cooperative" losing team when they realize that the opposing "competitive" winning team has deceived them into believing that they, members of the winning team, were also going to play "cooperatively." Included within parentheses () are Packer's observations and within brackets [] my additions.

Losing Team Male #1: Hey, what's going on here? I mean this is . . . (He says this very quietly, almost to himself) . . . I don't *believe* it! (He looks up, mouth open. Laughter from the Winning Team. This time each of them plays a white card [that is, a competitive card].) I *don't believe* it! . . . Wait! Let the record show that I'm outraged. (He grabs the microphone which hangs over the table to say this. Laughter from members of the Winning Team.) Oh my God!

[Several minutes later] Staff person: Okay? Do you want to go another round? Ready?

Winning Team Male #1: I think we better negotiate before we get screwed.

Losing Team Male #1: Negotiate? Again? (His sense is "no way")
Shit on you guys.

Losing Team Female #1: (She makes a gesture, palms down, hands moved laterally -- a "cut" gesture -- to her teammates.)

Losing Team Male #1: I don't believe it.

Staff Person: The Winning Team wants to negotiate, does the Losing Team?

Losing Team Female #2: No more, no more.

term. No logical strategy resolves the dilemma. Packer, *supra* note 53, at 22-24.

Packer's version retains the basic theme of the original Prisoner's Dilemma but expands the two-person game to two teams of players, adds a scoring system combining individual decisions and team decisions and provides for cumulative scoring over a number of rounds. Most importantly, the two teams can each select a leader to negotiate strategy in full view of all of the team members so that the focus of interest is now the dialogue among the team members rather than the scoring decisions. *Id.* at 24-26.

97. *Id.* at 26.

DEALING WITH DECEPTION

Losing Team Female #1: We don't trust them anymore.

Losing Team Female #2: We're not playing anymore.

Packer observes: "The Losing Team now lay their cards down ... and refuse to continue to actively engage in the game ... They sit like this for the remainder of the round, with folded arms, and at the end of the round they again refuse to negotiate."⁹⁸

Interpreting the Reaction of the Losing Team Members. This excerpt captures the powerful feelings that typically accompany the discovery of a deception of context. The Losing Team members believed that the agreed-to negotiation context was "cooperation," a context which does not permit the kind of deception perpetrated by the Winning Team. What angers the Losing Team members is not just a deception of content (playing competitive white cards after promising to play cooperative blue cards), but the deception of context within which the false statements were made. The Winning Team had deceived the Losing Team not merely into believing that the Winning Team intended to play blue cards, but, more significantly, into believing that the Winning Team understood the negotiation process as cooperative. This excerpt only hints at the depth of the anger of the Losing Team which is caught more fully in reading Packer's study in its entirety.

Deception within a Competitive Context. In some instances, Teams made no specific agreement to cooperate. In these instances, the context was tacitly assumed to be competitive. When cheating occurred, Packer reported in one typical case that there was "some joking and teasing about this, but no one is genuinely upset; after all, they have arranged that the 'cheating' take place."⁹⁹

APPENDIX 2

After the Losing Team broke off the negotiation, as related in Appendix 1, the two teams appeared to patch up their differences and negotiated an agreement to continue. As part of the agreement, the Winning Team intentionally lost points so that the Losing Team could catch up. After eight rounds of cooperative moves, the Winning Team again began without warning to make competitive moves. This time the Losing Team retaliated with competitive moves so that neither team could

98. *Id.* at 50-52.

99. *Id.* at 37.

score. Once again, members of the Winning Team entreated Losing Team members to agree to cooperative moves.¹⁰⁰

Initially, the Losing Team refused the entreaty. In the dialogue that follows, a Winning Team negotiator offers a strategy to help the Losing Team catch up. He says, "Okay, see we just realized that, anyway, burning [*i.e.*, deception] doesn't do us any good.... We didn't realize that we would have more points there." Losing Team Male #1 is offended and responds in an astonished tone, "What do you mean, you didn't realize. You burnt us, when we had an agreement, and you didn't hold up your end of the bargain." Packer observes that the Winning Team misunderstands the upset reaction of the Losing Team. The Winning Team believes that the Losing Team is upset (merely) because the Losing Team lost points. Hence, from the Winning Team's point of view, a strategy that will help the Losing Team score points should heal the upset. Packer concludes that the Winning Team sees the impasse as a strategy question and the Losing Team sees it as a value question.¹⁰¹

After another series of cooperative moves, the Winning Team again returned to competitive moves just before the round came to an end. Once again, Losing Team Male #1 is flabbergasted, "I don't *believe* it." Losing Team Female #1 adds, "It's really, it's really cheap of you guys." Winning Team Male #1 responds most revealingly, "So what, it's only a game." His remark indicates to me that he understands the negotiation as a game with only one possible context, that of competition. Losing Team Female #1 responds, "It really was ... I'm, I'm ashamed (of you)." As the game ends, Losing Team Male #2 concludes, "We had all of the moral people on our side" to which Winning Team Male #1 responds, "And all the fun people on the other side."¹⁰² Losing Team members judge the Winning Team's deception of context as shameful, a judgment the Winning Team rejects.

APPENDIX 3

The Reaction of Anger. Among negotiators, especially naive negotiators like Packer's Losing Team members, context deception often engenders intense anger. Sometimes negotiators attempt to conceal the anger, as in the excerpt that follows. The participants here were two teams of three students each who negotiated a simulated problem in my Legal Negotiation course. The negotiation was conducted in front of a class of twenty-four students and was video-taped with the consent of the

100. *Id.* at 50-52.

101. *Id.* at 127-34.

102. *Id.* at 103-4.

DEALING WITH DECEPTION

participants. The negotiation had progressed about twenty minutes before it became obvious that the Winning Team had feigned cooperation to the Losing Team while deceiving them on several key facts. The instructor's observations are within parentheses (); a series of periods [...] indicates a pause.

Instructor: Let's stop here for a minute.

Winning Team Member #1: Let's not. I thought he (gesturing toward Losing Team Member #1) was doing fine. (Winning Team Member #1 laughs.)

Winning Team Member #2: We think that since he was this soft, we should reach for a little more. (Winning Team Member #2 laughs with Winning Team Member #1.)

Losing Team Member #1: (He says nothing and sits arms folded across his chest.)

Instructor to Losing Team Member #1: How do you read what just happened?

Losing Team Member #1: I just avoided it. I just did not listen to what they were saying.

Instructor: I understand that, but did you read his last comments to you as condescending?

Losing Team Member #1: Inside I was upset ... but I thought ... I'd just plod along ... and that he could not be that antagonistic ... I mean he could be, but I did not think he would.

Instructor: Did you feel it anywhere physically?

Losing Team Member #1: Sure, I was angry.

Instructor: Where did you feel your anger?

Losing Team Member #1: Well, I ... (his voice trails off and he is silent).

Instructor: (turning toward the class) Sometimes I feel anger here ... (putting his hand on his stomach).

Losing Team Member #1: (interrupting instructor) In this right hand! (He raises and shakes his right fist.)

Instructor: You feel anger in your hands.

Losing Team Member #1: No, no ... I was angry ... but I disregarded it.¹⁰³

Like the Losing Team members in Packer's study, these Losing Team members refused to negotiate further. The critical deceptions in both instances were deceptions of context, in which members of one negotiating team deceived members of the other negotiating team that they

103. From the author's class notes. This student, in my opinion, has been disabled like the laboratory dog from responding effectively to the deception. See text accompanying note 29, *supra*. I believe the moral and efficient response to context deception is anger. See Hartwell, *Psychology, Anger and Clinical Teaching* (on file with the author).

intended a context of cooperation while in fact intending a context of competition. In both instances the discovery of the deception created intense anger which, in the second case, the deceived player tried to hide.