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ARTICLES

NEGOTIATING LESSONS FROM IRAN: SYNTHESIZING LANGDELL & MACCRATE

H. Lee Hetherington*

I. Introduction

The case method, more than any single innovation, has provided the organizing principle for American legal education during much of the twentieth century.\(^1\) Thanks to Christopher Columbus Langdell, Dean of the Harvard Law School in the late nineteenth century, generations of law students have studied the law by reading and dissecting appellate court decisions.\(^2\) Consequently, they have walked a common path of professional development that has enabled them to become proficient at the essential skills of legal analysis and reasoning. Many of the brightest of these case law disciples have gone on to distinguished careers as law professors, thus ensuring the continued vitality of Langdell’s legacy. Indeed, as these words are written, another 40,000 first-year law students at the nation’s 176 accredited law schools\(^3\) are pouring over *Palsgraf v. Long Island Railroad*\(^4\) and *Hadley v. Baxendale*\(^5\) to complete their rite of law school passage before taking their place in the law offices and courtrooms of America.

* Professor of Law, Mississippi College School of Law. I wish to acknowledge and thank Mike Frascogna, senior partner in the Jackson, Mississippi law firm Frascogna, Courtney, Wright, Biedenhorn & Smith, for helping to develop many of the concepts incorporated in this article. Special thanks to my research assistant, Catherine Scallan, for her valuable input and contributions.

2. Id.
At the time of Langdell's invention, legal training was accomplished through a preceptor system whereby students apprenticed as law clerks in the offices of experienced attorneys. Aside from the task of finding an attorney willing to serve as a mentor, the only barrier to the profession was the bar examination. Even as late as the 1920s, only about one-third of law students were educated in law schools. Transition to the case method was not complete until the post-World War II period. The adoption of the case method signaled departure from decentralized practice-based training to a more formal, academic approach associated with accredited full-time law schools. Today, with very few exceptions, ABA-accredited law schools serve as the exclusive gatekeepers of the profession.

This dichotomy between academically oriented education and apprentice training as preparation for membership in an increasingly pragmatic calling has led to the emergence of separate cultures within the legal profession. Over the years, legal educators and practicing attorneys have defined their professional values, attitudes and roles within the context of their respective peer groups. Predictably, the views and expectations of the practicing bar relative to the education, training and professional development of America's lawyers do not always coincide with the views held by the nation's 8000 full-time law professors. At best, lawyers and law professors have articulated their differences in a spirit of mutual concern and cooperation. At worst, these differing perspectives have led to an unhealthy rift between them, fueled by misperceptions and, in extreme situations, mutual contempt.

Law schools continue to be the target of criticism from members of the practicing bar who complain that legal educators do not prepare students adequately for the practice of law. The commonly held perception is

6. MacCrate Report, supra note 1, at 103-04 (explaining that, by the end of the colonial era, apprenticeships were mandatory in urban areas).
7. Id. at 112 (explaining that in 1927, 32 states did not have formal requirements for pre-law studies and 11 others only required a high school diploma).
8. Id. (noting that after the war, ABA-approved law schools consolidated their approach).
9. See id. at 3 (stating that Langdell's approach “views the study of law as an academic science”).
10. See id. at 108.
11. Id. at 3-8 (recognizing that law schools and the practicing bar function in different worlds and therefore have different missions).
that law schools are increasingly irrelevant and out of touch with the environment of law practice. One of the chief complaints is that law schools fail to develop such skills as factual investigation, interviewing, client counselling, negotiation, and trial practice.

Many in the legal education community respond to those complaints by explaining that the primary mission of law school is to help students develop analytic, research and writing skills as they develop an understanding and appreciation for the theoretical foundations of the law. Given limited resources and an increasingly complex legal system, educators maintain that lawyers unrealistically expect law schools to turn out full-fledged lawyers capable of earning their keep from their first day as practicing attorneys. Most professors oppose adopting a curriculum that would effectively turn law schools into skill-oriented trade schools or sophisticated three-year bar review courses.

As to the issue of service to the profession, both groups agree that an obligation exists. Unfortunately, this is often where consensus ends. Practicing attorneys, operating in the pressurized world of client-driven demands, tend to eschew scholarly articles in favor of current development overviews and hands-on skills training which have immediate application to their livelihoods. Law professors, on the other hand, tend to measure service to the profession in terms of more analytic scholarly articles which help give shape and form to evolving legal issues.

Besides the divergence in orientation and personal interests, a pecuniary engine drives the disparity in viewpoints. Lawyers are rewarded on the basis of bottom line results for their clients. Therefore, the ability to negotiate an advantageous deal or to pick and persuade a jury become highly valued skills which merit more emphasis than courses such as Law of the Sea or Prisoners' Rights. In direct contrast, the institutional reward system in American law schools continues to value scholarship over

14. Id. (reporting Judge Edwards' view that the rise in these "abstract theories" has caused law schools to lose sight of their primary goal—to prepare future attorneys for practice).

15. See MacCrate Report, supra note 1, at 138-40 (listing these skills as "Fundamental Lawyering Skills").

16. See id. at 4 (explaining how the views of law school professors on the goals of legal education differ from practicing attorneys' expectations of legal education).

17. Id. at 4 (arguing that it is unreasonable to expect law schools to bear full responsibility for turning out "full-fledged lawyers").

18. Id. at 120.

19. See id. at 5.
While law school deans are careful to extol the virtues of excellent teaching, professors are paid, promoted and tenured on the basis of their scholarly productivity. Teaching assignments often depend on actual and promised scholarly output. Skills training is labor intensive and inferior to Constitutional Law or Intellectual Property in terms of research and analytic appeal. Thus, skills training generates little enthusiasm for the typical law professor intent on developing a national reputation in a substantive specialty. This explains the relegation of skills training to clinical specialists, adjunct instructors and the practicing bar.

For years, the real or perceived rift between legal educators and the practicing bar has prompted debate within the American Bar Association. In 1989, the ABA created The Task Force on Law Schools and the Profession. The blue ribbon study group, chaired by Robert MacCrate, comprised a distinguished panel of legal educators, deans and practicing attorneys. The MacCrate Commission, as it became known, undertook a comprehensive study of the legal profession. The Commission first sought to determine objectively whether, in fact, the purported gap between legal education and the practicing bar existed. More importantly, it sought to make recommendations as to how the various segments of the legal profession could contribute most effectively to the education and training of the nation's future lawyers.

The MacCrate Commission released its findings and recommendations in July, 1992. In addition to providing a definitive survey of the legal profession, the Commission's report centered on a comprehensive statement of Fundamental Lawyering Skills and Professional Values. The report is a publication of the American Bar Association Section of Legal Education and Admissions to the Bar. The Statement of Fundamental Lawyering Skills and Professional Values is also available in a 105-page free-standing edition through the American Bar Association. Implicit in the report's findings is an overriding collective obligation to law students, colleagues, clients, and the public to end the culture of complaint and confrontation that seems to plague the legal profession. The Statement of Skills and Values, as well as the full text of the report, is recommended to anyone interested in the work of lawyers and the structure of the legal profession. Irrespective of ex-

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20. See generally John S. Elson, The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?, 39 J. LEGAL EDUC. 343 (1989).
21. Id.
22. See MacCrate Report, supra note 1, at 246-48 (including table).
23. Id. at xi.
24. Id. at v (listing Robert MacCrate as Chairperson, Professor Peter W. Martin and Associate Dean Peter A. Winograd as Vice Chairpersons, Professor J. Michael Norwood as Reporter, and the 22 Members).
25. Id. at xi. The Task Force updated empirical data found in a previous study and also undertook their own study to determine the necessary skills and values to become an attorney. Id. at xi-xii.
26. Id. at 123-24 (explaining the reasons for a Statement of Skills and Values).
27. Id. at 135-221. The report is a publication of the American Bar Association Section of Legal Education and Admissions to the Bar. The Statement of Fundamental Lawyering Skills and Professional Values is also available in a 105-page free-standing edition through the American Bar Association. Implicit in the report's findings is an overriding collective obligation to law students, colleagues, clients, and the public to end the culture of complaint and confrontation that seems to plague the legal profession. The Statement of Skills and Values, as well as the full text of the report, is recommended to anyone interested in the work of lawyers and the structure of the legal profession. Irrespective of ex-
Commission identified those essential elements and attributes shared by all lawyers, so that law schools and the practicing bar would better be able to allocate responsibility for development of these core skills and values.\textsuperscript{28} The primary impact of the MacCrate Report has been the nearly universal acceptance by disparate groups within the legal profession of the shared skills and values which provide the essence of an attorney's work.\textsuperscript{29}

One of the ten fundamental skills identified by the MacCrate Report is the ability to negotiate.\textsuperscript{30} The interaction and dialogue associated with this skill comprise a considerable portion of every lawyer's working day. It is the predominate skill in a transactional practice which focuses on contracts, licenses and agreements of every kind.\textsuperscript{31} In the realm of litigation, two-thirds of civil suits are resolved via negotiated settlement.\textsuperscript{32} Since trials are essentially the product of failed negotiations, litigators are

\textsuperscript{28} Id. at 138-41. The McCrate Commission articulated the following group of essential skills common to all lawyers: (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and alternative dispute resolution procedures; (9) organization and management of legal work; (10) recognizing and resolving ethical dilemmas. Id. In addition to the statement of common skills, the Commission identified four values common to the profession: (1) provision of competent representation; (2) striving to promote justice, fairness, and morality; (3) striving to improve the profession; (4) professional self-development. Id.

\textsuperscript{29} See, e.g., Cindy Collins, \textit{ABA Adopts MacCrate Report Guidelines}, 14 LAW. HIRING & TRAINING REP. 11 (1994) (reporting that "the American Bar Association's House of Delegates adopted 20 recommendations from the MacCrate Report in February"); David Dominguez, \textit{Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for All Students}, 44 J. LEGAL EDUC. 175, 177 (1994) (citing the MacCrate Report when noting that students recognize they all need schooling equally because no one can get a head start on a legal education); J. Clark Kelso, \textit{A Report on the California Appellate System}, 45 HASTINGS L.J. 433, 507 (1994) (citing the MacCrate Report in discussing the divergence between law schools and the bench and bar which has developed over the past 30 years).

\textsuperscript{30} MacCrate Report, \textit{supra} note 1, at 185-90 (outlining methods for effective preparation and conclusion of negotiations, counseling the client and implementing the client's decisions).

\textsuperscript{31} See id. at 189 (stating that "the skill of negotiation is a fundamental part of legal practice").

\textsuperscript{32} Marc Galanter & Mia Cahill, "\textit{Most Cases Settle}: Judicial Promotion and Regulation of Settlements", 46 STAN. L. REV. 1339, 1340 (1994) (discussing the trend over the past five decades for judges to promote settlement in litigation).
basically professional conflict resolution specialists, with their effectiveness depending on their negotiation skills.

Indeed, negotiation is the ubiquitous common denominator pervading every task and problem undertaken by attorneys. Yet, until recently, this essential skill received only cursory attention on law school course curricula. Aside from the erroneous perception that negotiation is not amenable to conventional teaching or that students somehow magically attain proficiency once they enter practice, many schools simply lack sufficient resources to teach this labor-intensive discipline adequately. One school of thought within legal education insists that nothing less than a fully staffed clinic with actual clients will suffice.33 The traditional alternative to the clinic is simulation.34 Although simulation is less expensive than a clinic, it requires the same labor-intensive oversight. In light of the acknowledged importance of negotiation skills, it is incumbent on legal educators to find innovative approaches to augment clinics and simulation-based courses in law school.

This article seeks to bridge the cultural biases of legal educators and the practicing bar by adding to the existing scholarship in the area of negotiation theory. Also, it offers a methodology for teaching negotiation that employs Langdell's case method approach to address the concerns of the MacCrate Commission. Part One of this article focuses on the universal concept of leverage as the key element of all bargaining. Part Two illustrates how the universal principles of leverage can be taught and studied by utilizing the technique of historical negotiation analysis. Specifically, Part Two analyzes the Iranian Hostage Negotiation of 1979-1981 to illustrate how the use of leverage created, prolonged, yet ultimately resolved one of America's most painful international incidents. This article concludes by suggesting that this case study technique is one means by which law schools and practicing attorneys can meet the challenge of serving their varying constituencies with competence and integrity.

II. LEVERAGE: NEGOTIATION'S PRIME MOVER

While the merits of negotiation are readily ascertainable, the hidden rules giving life to the process are not so apparent. Case histories in law, business, politics, and international relations reveal fundamental concepts


34. Cf. id. (maintaining that problem solving can be taught adequately in simulation, whereas the "art of lawyering" cannot).
common to every bargaining transaction. These immutable and often hidden principles are referred to as leverage. Leverage, a prime mover of negotiation, is based on the overriding principle of self interest. It can be employed in every bargaining relationship to change the existing status quo, without regard to the substantive issues under consideration. Just as all matter is comprised of the basic elements of earth, air, fire and water, every negotiation strategy and tactic is linked to the basic elements of leverage: uncertainty, time, opportunity, and sanction.35 Although everything else in a negotiation is subject to flux, these four levers remain constant.

These four levers are the fundamental building blocks that provide the incentive and impetus necessary to make the bargaining process viable. Specifically, utilization of leverage prompts offers and counteroffers, fosters concession behavior, and ultimately leads business people and the majority of litigants down the path of dialogue and consensus. This section considers each of the four levers in turn.

A. Uncertainty

Uncertainty36 is clearly the most powerful lever of the four. The potency of uncertainty is derived from a fundamental truth of human nature: people fear the unknown. This basic fear drives all bargaining relationships. All negotiations reveal the common thread that bargainers consistently seek to trade uncertainty for certainty. The price paid to obtain certainty is measured in concessions and compromise.37 Illustrations of the leverage of uncertainty abound in the court system. Although numerous lawsuits are filed each day, two-thirds of these cases settle without a definitive judicial ruling.38 Despite the merits and genuine issues of law and fact, attorneys and their clients choose not to submit their cases to a judge or jury, opting instead to achieve and maintain control over their particular situation. The higher the stakes, the more important certainty and control become. In the case of litigation, the uncertainty of an

35. XAVIER M. FRASCOGNA, JR. AND H. LEE HETHERINGTON, NEGOTIATION STRATEGY FOR LAWYERS 19-26 (1984) (describing the four leverage elements and analyzing their fundamental importance in negotiations) [hereinafter NEGOTIATION STRATEGY].

36. Id. at 19-20. Uncertainty in negotiations rests on the principle that people fear taking action. Id. at 20.

37. Id. at 22 (discussing concessions and compromises in the context of approaching deadlines). Uncertainty causes defendants to settle cases for more than they think is due as opposed to taking a chance in court with the possibility of paying much more than the settlement amount. Id. at 20.

38. Galanter & Cahill, supra note 32, at 1340.
unfavorable jury verdict drives each side to compromise despite strongly held convictions to the contrary.\textsuperscript{39}

The multi-billion dollar insurance industry is predicated solely on the leverage of uncertainty. The prospect of premature death, disability, accident, hospitalization, surgery, robbery, burglary, fire, tornado, and earthquake drive individuals to pay thousands of dollars in premiums every year. While most individuals have not experienced any of the foregoing events over the past year, they cannot be certain that one or more of these possibilities will not occur in the year ahead.\textsuperscript{40}

While the potency of the leverage of uncertainty is unquestionable, it can also be transitory. Once uncertainty is faced, its power is correspondingly diminished. Similarly, the confrontation of uncertainty in negotiation reduces the value of this lever.\textsuperscript{41} Thus, a negotiator must learn how to use the leverage of uncertainty effectively while minimizing its effects when used as a weapon by the opposition. This may be done by offsetting uncertainty with certainty.

From a defensive standpoint, negotiators should take steps to insulate themselves from uncertainty by building an extensive knowledge base of every aspect of the deal at hand. Simultaneously, the negotiator should create as many viable alternatives as possible. Offensive use of leverage is maximized by imposing as much perceived uncertainty as possible upon the opponent's bargaining stance. The greater the level of doubt, the greater the likelihood of compromise and concession behavior. The rate and quality of concessions increases in direct relation to the value the opponent places on a negotiated resolution. Often, this will be influenced by the range and quality of alternatives available to the other side. Conversely, the more secure a negotiator feels about a given issue, the less incentive there is to compromise.\textsuperscript{42}

\textsuperscript{39}  
Negotiation Strategy, supra note 35, at 20 (stating that uncertainty drives more than 95\% of plaintiffs and defendants to settle their disputed claims).

\textsuperscript{40}  

\textsuperscript{41}  
Recall your own experiences with uncertainty—fear of riding a bicycle without training wheels; fear of driving the family car by yourself for the first time; fear of flying; fear of public speaking. We confront uncertainty throughout our lives. Once we do, and live to tell about it, the mountain is instantly reduced to a molehill. Negotiation is no different.

\textsuperscript{42}  
Imagine a well dressed man walking onto a car lot and announcing to the salesman that he has located just the car he wants to buy.

"It's that red convertible." The man points to a shiny new automobile in the dealership's showroom.

"Oh yes," responds the salesman. "That's a honey of a car. Do you drive a convertible now?"
B. Time

If uncertainty is the most powerful lever, time is the most subtle. This multi-faceted lever encompasses numerous phenomena, all of which are tied to recurring patterns of human perception and reaction. The starting point to understanding this pervasive lever is to realize that time is a precious, tangible asset. The precise amount of time each negotiator brings to the bargaining table is seldom the same. Smart negotiators never reveal their internal deadlines while always seeking to discover their counterpart’s end point for action.

Since bargaining does not occur in a vacuum, every transaction inevitably is subject to external pressures and circumstances. As time passes, interest rates rise and fall, fiscal years end and begin, markets open and close, alternatives develop and dissolve. The more time a negotiator possesses, the more options he has at his disposal and the more room to maneuver.

"Oh no, it’s for my wife. She’s always wanted a convertible."

"Well, you’re in luck. That’s the last convertible on the lot. It’ll probably be several months before I get another one in from the factory."

"That’s great. You know, I probably shouldn’t tell you this, but today is my wife’s birthday. I want to surprise her tonight. Can we talk price?"

Probably not.

44. Id. at 22. As deadlines draw near, negotiators are forced to concede and compromise positions they would not have if they had more time. Id.
45. Imagine that each party to a negotiation carries with him or her an hour glass filled with gold dust. At the commencement of bargaining, each negotiator turns over the hour glass. By doing so, separate deadlines for a negotiated outcome are set. As the dust dwindles, pressure to act mounts. Obviously, knowing how much gold dust everyone has becomes extremely helpful.
47. For example, if an opponent is anxious, there is time to wait. If he is angry, there is time to let him cool off. If his expectations are unrealistic, there is time to lower them. If an alternative is developing, there is time to let it mature. Most importantly, if you know your bargaining counterpart is under a deadline, there is time to take advantage of it. Id. Deadlines motivate people to take action; therefore, successful negotiators take advantage of deadlines or create them. Id.

Negotiators can never have enough time. This is why it is vital to bring as much gold dust to the table as possible, while making sure not to let the other side get a peek at your hourglass. Meanwhile, a primary goal at the outset of any negotiation is to learn your counterpart’s deadline for action. Like our hypothetical car buyer, some negotiators will volunteer the information. Others may tell you if you ask. In most instances, determining the other side’s deadline requires looking for clues and reading between the lines. Once you have the information, act accordingly and watch non-negotiable positions magically soften and hardball resistance dissolve as the impossible becomes reality. See id. at 22 (explaining how nonnegotiable positions are replaced with flexibility as a deadline nears).
When the choice is to act or to wait, most people opt for the latter. Similarly, as a deadline draws closer, most people experience increased pressure to act. These two simple patterns of human nature explain why action occurs at deadlines. Tom Colosi, an accomplished negotiator and mediator for the American Arbitration Association in Washington, D.C., reports that 90 percent of all decisions are made during the last 10 percent of the negotiation. Examining the predictability of collective bargaining negotiations verifies this statistic.

This scenario has been played out with predictable regularity. For example, with days to go before a union strike, how many times have we observed parties who are far apart and locked into positions that are “non-negotiable?” However, labor and management almost always seem to bridge the gap at the eleventh hour to avert a strike that would damage both parties. Mutual self-interest coupled with intense deadline pressure inevitably increases the probability of late-stage resolution.

Although every negotiation has a beginning and end, there is no guarantee that the parties will agree on the exact location of these two points. Many Japanese frequently view a negotiation as merely a small part of an ongoing relationship. In effect, the negotiation begins after the relationship is established, with the specific terms of a deal viewed as subsequent actions flowing from the alliance. Most Americans, on the other hand, are more direct and decidedly less patient. Consequently, most negotiators in the United States think that the bargaining process begins

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49. Id. See also Mike Beamish, A Lot of These NHL Negotiations Are Nothing More Than Small Part of a Ritual Dance, VANCOUVER SUN, Jan. 10, 1995, at D7 (reporting that “when [the principals] finally emerged from the negotiating pit, it was beyond the 11th hour, the eastern midnight press conference adding a nice theatrical touch”); Martha M. Hamilton, USAir Retreats on Threat Aimed at Machinists Union: Immediate Strike Appears Averted at Carrier, WASH. POST, Oct. 3, 1992, at C1 (discussing a retrenchment by management to avoid a strike that was due to commence only hours later); Carl Nolte, BART Strike Averted—Tentative OK on Contract, S.F. CHRON., Jul. 1, 1994, at A1 (reporting a tentative agreement between labor and management which avoided a strike set to begin that evening); Anna Tomforde, Innovative Deal Averts IG Metall Strike, GUARDIAN, Mar. 7, 1994, at 9 (describing a “last-minute pay deal” settlement that avoided an impending strike).

50. See supra note 49 (describing examples of management-labor negotiations that were resolved under the pressure of an impending deadline).

51. Elliot J. Hahn, NEGOTIATING WITH THE JAPANESE, CAL. LAW., Mar. 1982, at 22 (advising how to conduct negotiations with the Japanese because of cultural differences).

52. Id. The Japanese typically do not negotiate contracts, but instead negotiate relationships, where goodwill and friendship are more important than specified terms. Id.
at the initial meeting of representatives. Negotiators should realize that, even in the most direct bargaining sessions, the Japanese approach can be effective. Though many do not realize it, the informal period prior to commencement of any formal negotiation is crucial for building rapport, creating trust, and gaining information. The party who is unaware that negotiations have commenced is at a decided disadvantage. This is but one more ramification of the leverage of time.

C. Opportunity

Business negotiation is predicated on the leverage of opportunity. People are willing to alter the status quo when they perceive that the outcome will generate some type of gain or advantage. Opportunity can be measured in an infinite variety of tangible benefits. Common examples include a bargain price, a favorable interest rate, or a unique parcel of real estate. Moreover, opportunity can be measured in intangible or psychological terms as well. People are willing to pay for such prized opportunities as recognition, inclusion and security. Often, it is information, the extension of time or the promise of some future consideration that motivates a negotiation, with more tangible elements such as money, shares of stock or real property playing a subordinate role.

The key to maximizing the lever of opportunity is to determine ways to satisfy the wants and needs of the bargaining counterpart. While some concessions may be relatively inconsequential, others may require substantial compromise of a negotiator's own objectives. An opportunity should be conferred only in return for benefits of comparable worth. In a classic win-win negotiation, it is possible for both parties to achieve their objectives with no detriment to either side.

53. Id. Most Americans view a negotiation and the ultimate contract as a legal agreement, whereas the Japanese view it as an ongoing relationship. Id.
55. Id. at 22-23. Before negotiations begin, a negotiator should identify what he or she can offer in exchange for something of greater value. Id. at 23.
56. Id. at 23-24. Something that is insignificant to one side may be highly valuable to the other. Therefore a negotiator should never concede a point just because he or she thinks it is not highly important. Id.
57. For example, two people arrive at a bakery at closing time. Both want to buy a dessert, but the only item available is a single cherry pie. Because the bakery is closing, the parties purchase the pie together and agree to negotiate for its possession. Both parties could learn from each other that a whole pie is too much and what they each really wanted was only a few pieces. Or perhaps one of the joint owners really wanted a cake, but settled on a pie because it was the only dessert the bakery had to offer. The party who wanted the pie for himself happens to know another bakery right around the corner which specializes in cakes and is still open. He offers to trade that information and half the price of the pie.
While the leverage of opportunity is an elementary concept, many negotiators fail to take maximum advantage of its power. Certainly, an advantageous interest rate or generous purchase price represents a valuable opportunity, but an advantageous deal is contingent upon many other minor points. Effective negotiators constantly seek to convert circumstances into the leverage of opportunity throughout the entire negotiation.58 A negotiator must be aware of the needs of his or her bargaining counterpart to maximize the lever of opportunity.

D. Sanction

The flip side of opportunity is the leverage of sanction.59 Although win-win negotiation and joint problem solving are more productive and enjoyable exercises, they are not always options. A sanction can be anything the other party will pay to avoid.60 An unfavorable deadline, an alternative offer, or a price hike can be just as effective as a threat to file a lawsuit or to break off negotiations. As with the other levers, the objectives of the parties and the surrounding circumstances provide opportunities to create credible sanctions. To be effective, a threatened sanction must be credible so as to compel action necessary for its avoidance. Nothing is more deflating than to threaten action and have the opposition respond with indifference.61 Once a credible sanction has been identified, the next step is to communicate it effectively. A sanction has no power to influence action if it is kept secret. Only when the promised sanction is combined with uncertainty will it produce results.

Because most people do not appreciate threats and ultimata, the leverage of sanction is potentially the most dangerous of all the levers. Harvard Law School Professor Roger Fisher wisely advises, “never combine a harsh message with a harsh tone.”62 Furthermore, a potential sanction is best communicated when it is masked or tied to objective cir-

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58. One should never give up something without receiving something in return. Negotiation Strategy, supra note 35, at 23.
59. Id. at 24-25.
60. Id. at 24. Sanctions rely on negative reinforcement to force the other side into action. Id.
61. Id. (noting that nothing is worse than to threaten a sanction and have the opposition say to go ahead with it).
62. This quote by Professor Fisher was proffered in a lecture at the 1981 Harvard Law School Program of Instruction for Lawyers. Unfortunately, Professor Fisher did not include this extremely insightful piece of advice in his seminal work, Getting to Yes. Nonetheless, every student of negotiation would be well advised to never lose sight of the statement’s profound wisdom.
cumstances beyond the negotiator's control. The leverage of sanction should be used sparingly, however, because of the potential downside of polarization. Nevertheless, under certain circumstances a sanction will be the most effective tool to bring about an agreement. Failure to recognize and use its power will place a negotiator at a competitive disadvantage.

E. Combining the Levers

Leverage rules apply equally to all of humanity without bias or prejudice relative to gender, education, or material well-being. A negotiator can maximize the effectiveness of leverage by blending the four levers into the fabric of the negotiation relationship. For instance, the offer of an opportunity is more compelling when tied to a deadline for action. Likewise, hinting that undisclosed parties are interested in purchasing the seller's product often spurs the buyer into action. Finally, accentuating the uncertainty of higher interest rates or a collapsing market can move an opposing party to agreement. At this point, skill, resourcefulness, preparation and credibility pay huge dividends.

III. The Iranian Hostage Drama

October 19, 1979 brought the promise of a magnificent autumn day for the nation's capital. But as President Carter held his weekly foreign policy breakfast at the White House, the nation had no idea that an unprecedented national nightmare was only days away. The primary topic for discussion that Friday morning was whether to admit the exiled Shah of Iran into the United States for medical treatment. President Carter's in-

63. NEGOTIATION STRATEGY, supra note 35, at 24. A labor-management example illustrates this point:

Management - "Let me say first of all that our overriding goal is a continuation of a smooth working relationship with the union. Full employment is our goal."

Labor - "Full employment? What are you talking about?"

Management - "As you know, sales are off and our profits have been down the last three quarters. I am getting pressure from above to get labor costs under control through negotiation or be forced to layoff a percentage of the workforce. Can you help me find away to get a contract acceptable to you while making sure that I am not ordered to reduce payroll through layoffs?"

Here the threat of sanction is credible, yet it is communicated in a manner that is calculated to minimize negative fallout.

64. See id. at 25 (stating that most negotiations actually require the use of all four levers).

65. The use of all the levers is only limited by "imagination" and "resourcefulness."

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A circle of advisors, which included Vice-President Walter Mondale, Secretary of State Cyrus Vance, National Security Advisor Zbigniew Brzezinski, White House Chief of Staff Hamilton Jordan, and Secretary of Defense Harold Brown, weighed the request. In January, 1979, the Shah and his family had fled Iran in the face of civil strife fanned by his foe, the fundamentalist Islamic cleric Ayatollah Ruhollah Khomeini. Since the unrest grew, the Carter Administration increasingly distanced itself from the exiled Shah, who had been a longstanding ally of the United States. For most of the year, the United States had judiciously avoided aggravating the volatile domestic situation in oil-rich Iran, which strategically bordered the Soviet Union.

The deposed Shah, living in Mexico, was suffering from cancer and urgently needed treatment available only in the United States. Though the President's advisors were cognizant that medical treatment in the United States posed potential problems, they were unanimous in their recommendation to the President. In view of the Shah's past loyalty to the United States and due to the humanitarian nature of the request, the advisors believed that granting the Shah permission to enter the United States was a justifiable risk. President Carter concurred, but then uttered prophetic words that would seal his fate as a one-term President: "[w]hat are you guys going to recommend that we do when they take our embassy and hold our people hostage?" Sixteen days later and half a world away, President Carter's hypothetical query had become devastating reality for the American Embassy staff in Teheran. Militant Iranian students had seized the United States Embassy and demanded the extradition of the hospitalized Shah as the price...
for the return of the hostages.\textsuperscript{74} Ironically, the rag-tag student vanguard of the Islamic Revolution was unaware of the ramifications of their actions.\textsuperscript{75} The shockwaves produced by the embassy seizure reverberated around the world, especially in Washington. During those first few days, the students gradually realized that their original act of defiance had struck at the very core of the great and powerful United States. Not only had America been humiliated, but the Embassy's captors as well as the people in the streets of Teheran believed that, by holding their position, they could finally deliver the detested Shah to the dock of Islamic justice.

Two days later, the chances for a swift release of the captured Americans dwindled to near zero. Iran's secular government leader, Prime Minister Mehdi Bazargan, resigned over the students' illegal act.\textsuperscript{76} Khomeini, the de facto leader of an Islamic theocracy, had the authority and influence to persuade Prime Minister Bazargan to remain in office by ordering the students to release the American hostages.\textsuperscript{77} Khomeini, on several occasions since his return from exile in Paris early in 1979, had held Iran's fragile secular government together by convincing Bazargan not to resign.\textsuperscript{78} But this time, Khomeini accepted Bazargan's resignation.\textsuperscript{79} The students perceived this as an unambiguous signal from their spiritual leader.\textsuperscript{80}

What started as an act of defiance turned into a series of exceedingly complex and delicate negotiations that would last until the final hour of Jimmy Carter's Presidency.\textsuperscript{81} The unlikely coalition of students and their fundamentalist spiritual leader conspired to paralyze and humiliate the world's most powerful nation while altering the course of American domestic and foreign policy for years to come. Why did the crisis drag out for almost fifteen months? How could an ill-assorted bunch of students

\textsuperscript{74} Id. The students announced in a press conference that they would hold the embassy staff hostage until the Shah was returned to Iran to stand trial. Id.

\textsuperscript{75} The original plan was to hold the embassy for a few days to express student contempt for the United States and dramatize the Islamic Revolution.

\textsuperscript{76} Salinger, supra note 66, at 30.

\textsuperscript{77} Id. A practice had developed whereby when Prime Minister Bazargan could not get people to adhere to his orders, he would go to Khomeini and attempt to resign. Khomeini would then convince him to stay, and the people would obey the Prime Minister's orders due to Khomeini's support. Id.

\textsuperscript{78} See id. Khomeini said, "Mr. Bazargan, you must not resign. You are a man of great stature, and we need you." Id.

\textsuperscript{79} Id. Instead of resigning in person as he had done in the past, Prime Minister Bazargan sent his teenage nephew to resign for him. Id. Khomeini accepted the resignation either because he believed the Prime Minister did not believe the matter was important, or because the Prime Minister truly wanted to resign. Id.

\textsuperscript{80} Id.

\textsuperscript{81} The hostages would not be released until the day President-elect Ronald Reagan was sworn in as President. See infra note 155 and accompanying text.
bring a superpower like the United States to its knees? Where was the international community as this drama unfolded? How was the seemingly intractable standoff finally resolved, and most importantly, how could it have been avoided? The answers to these questions can be found in the fundamental principles of negotiation that were played out over those 444 unforgettable days.

A. The Backdrop

On one level, what happened was as simple as a transaction in a Middle Eastern bazaar. The students had something the Americans valued above all else, the hostages. Predictably, America was outraged by the illegal arrest of its embassy personnel. To an American citizen, this was emphatically a case of innocent bystanders, kidnapped by international terrorists thinly disguised as students. Iranians, on the other hand, viewed it far differently. The students, who were cheered as patriots and devout disciples of Allah, only wanted respect and simple justice for the quarter century of crimes and machinations of the rich and arrogant Americans and their tyrannical puppet, the Shah.82

As a result of different perspectives and a clash of cultures, both sides were certain they were in the right. For the impatient and self-righteous Americans, who were unaccustomed to being pushed around by a bunch of students from what they generally considered a third rate country, there was very little they could do. Unfortunately, it was precisely this attitude that provoked the Iranian action in the first place. The louder America screamed and the more self-righteous it became, the more Iranian resolve stiffened.

The United States misread this vicious cycle. The situation was exacerbated by the American government's lack of knowledge regarding who to talk to, despite the sophisticated intelligence gathering capability and diplomatic influence at its disposal.83

The Iranians' stated price for the release of the hostages was the return of the hated Shah, a longtime American ally.84 The United States was dumbstruck by the demand. To arrest the Shah in his New York City hospital room and turn him over to a pack of gun toting thugs holding the United States Embassy in Teheran hostage was simply out of the question. Most Americans, including the Carter Administration, never under-

82. See Salinger, supra note 66, at 26 (stating that the students wanted "to protest the latest obstacle in returning the Shah to Iran to stand trial on charges that he had stolen money from the country and tortured his political opposition").
83. See id. at 104 (explaining that although Khomeini was Iran's leader, he could not control the students because it would cost him his political career).
84. Id. The Iranian people wanted the Shah returned to try him for his crimes. Id.
stood the Shah’s importance. When the deposed monarch fled his
country, he was replaced by an Islamic revolutionary movement led by
Ayatollah Ruhollah Khomeini.85 From the American standpoint, the
Shah no longer ruled Iran. What harm could there be in admitting him to
the United States for purely humanitarian reasons? And why was the
United States singled out for retribution by this clearly illegal act, which
violated every tenet of international law and diplomatic convention?

The first priority of any bargaining relationship is to understand the
needs and motivations of the opposing side. A brief review of history
would have helped American officials to clarify the framework and back-
ground of the hostage negotiations. Since the 1930s, oil had been at the
center of Iran’s relations with the west. After World War II, the Ameri-
can obsession with communist expansion was added to the agenda.86 To
help secure its future, the American Central Intelligence Agency (herein-
after CIA) backed a coup in 1953 that toppled the unreliable and nation-
listic Musaddiq movement in Iran.87 Many Iranians never forgot the
bloody coup that installed the Shah’s regime.88 For the next quarter cen-
tury, the United States provided generous economic and military aid to
the Shah in exchange for electronic listening posts, preferential status and
oil.89 Successive American Presidents ignored the torture, imprisonment,
and banishment imposed by the Shah’s secret police (SAVAK) to ensure
internal security, because the Shah’s regime was deemed essential to the
United States’ national interests.90 While the United States dismissed the
more unsavory aspects of the Shah’s regime as an internal Iranian matter,
the victims of the Shah and their families and friends viewed it quite dif-
ferently. To them, the Shah, SAVAK, and the United States were mutu-
ally synonymous. The betrayal of Iranian nationalism at the hands of the
CIA, and a quarter century of repression were not easily forgotten or
forgiven.91

85. Id. at 26. Khomeini returned to Iran after a fifteen-year exile, fully backed by the
military Society of Islamic Students, which was usually behind concerted student action.

86. JAMES A. BILL, THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRA-
NIAN RELATIONS 86 (1988). In the 1940s, CIA agents stationed in Iran directed their activ-
ities to combating the appeal of a communist organization and monitoring the Soviet
presence in Iran. Id.

87. Id. at 86-94 (discussing the August 1953 intervention).

88. See id. at 91-92. Some of the actions the United States took to overthrow the
Musaddiq government damaged American credibility in Iran for many years. Id. at 96.

89. Id. at 93 (concluding that the American intervention engendered the exploration
of oil at favorable terms).

90. Radical and extremist opponents of the Shah were forced into hiding. Id. at 161.

91. See id. at 91-92 (stating that the successful American intervention hurt American
credibility in Iran for years afterwards).
In the early 1960s, the Shah's regime targeted Ayatollah Ruhollah Khomeini, a religious zealot with a narrow world view which did not reach to the west. He was exiled by the Shah's government in 1964 after speaking out against a one-sided agreement that granted American nationals sweeping immunity from Iranian law, yet made Iranians answerable to Americans for the slightest transgression. Much of Khomeini's enmity toward the United States, which he considered the "Great Satan" is attributable to his opposition to the 1964 immunity treaty. Over this issue, Khomeini established himself as a critic of the Shah and the Shah's imperialistic co-conspirator, the United States. Over time, Khomeini became recognized as a major leader of the Shah's opposition. From exile in France, Khomeini made anti-Shah and anti-American tapes that were smuggled into Iran. Many of Iran's younger generation, who would be in the forefront of the 1979 Islamic Revolution, listened to his contraband speeches.

If America's first mistake was admitting the personification of Iranian tyranny into the United States for medical treatment, its second mistake was the failure to establish contact with the leaders of post-Shah Iran. Besides Khomeini, these figures included Sadegh Ghotbzadeh and Abolhassan Bani-Sadr, both western educated Iranians who opposed the Shah's rule while exiled in Paris. Both men understood the long term harm that could befall their country if the students were allowed to thumb their noses at international law by holding the hostages. In the early days of the crisis, they were moderate voices of reason who had sufficient access and authority to have resolved the crisis before it took on its own life. Unfortunately, no one in Washington knew who they were. America had put all of its diplomatic eggs in the Shah's basket. It viewed covert relations with the opposition as an act of disloyalty to the Shah. Unfortunately, when the hostages were taken, the National Security Council had no one to call. Many observers of the Iran Hostage Crisis

92. Id. at 156-61 (discussing the status of the agreement adopted in October, 1964 and Khomeini's exile to Turkey following his opposition speech).
93. Id. at 159-61 (including excerpt from text of Khomeini's impassioned speech against the 1964 immunity treaty).
94. SALINGER, supra note 66, at 78. At first, Khomeini did not want to go to Paris because it was so far removed from Iran. Once learning of his ability to gain free access to the media and produce cassettes at a greater frequency and distribute them more easily, he quickly changed his mind. Id. at 78-79.
95. Id. at 79-83 (relating the various exiles' history). These exiled Iranians welcomed Khomeini to Paris in hopes he would be the final link to solidify their movement to overthrow the Shah. Id. at 78.
96. Id. at 43 (noting that both men had direct access to Khomeini and held important posts in the revolutionary government).
97. See id.
assert that, had relations existed between American diplomats and the secular leadership of the new government, the crisis could have been resolved in a matter of days.\textsuperscript{98}

Even more problematic was that no single person or group in Iran could authorize the release of the hostages. A tenuous triad comprised of the students, the secular government officials, and the enigmatic Khomeini controlled the fate of the blindfolded Americans.\textsuperscript{99} Each one was ultimately answerable to the public opinion of the mobs in the streets who were not steeped in the fine points of diplomatic protocol. If America did not deliver the Shah, Iran would not tender the hostages. Both Khomeini and the secular leaders knew that thwarting the will of the people in the streets was a quick route to political, and perhaps, literal suicide. This emotionally charged atmosphere in Teheran, along with the absence of diplomatic contacts and a central figure with the authority and resolve to order the hostages' release, confronted President Carter in the early days of November, 1979.

\textit{B. The Wrong Message From the Rose Garden}

Shortly after the hostages were seized, President Carter faced the nation in a press conference from the Rose Garden. Certainly, no one felt a greater sense of responsibility than the President, especially in light of his fateful October query to the White House inner circle. Now that his premonition had become reality, President Carter wanted to reassure the American people that he assigned the highest national priority to the crisis.\textsuperscript{100} While this may have been the right message for the American people, it was precisely the wrong one for the Iranians. In his effort to reassure the American people, President Carter had unwittingly elevated the importance of the students' action, increasing the value of the hostages.\textsuperscript{101} President Carter's heartfelt message of concern for his countrymen all but assured that what might have been a quickly resolved international incident would be a full blown international crisis, stretching from 1979 into 1981.

\textsuperscript{98} Id. (asserting the hostage crisis could have been resolved quickly if the Americans had talked with Ghotbzadeh and Bani-Sadr).

\textsuperscript{99} Id. at 42-43.

\textsuperscript{100} President Jimmy Carter, National Television Address (Nov. 12, 1979) (available in LEXIS, Nexis Library, Reuter North America News File).

\textsuperscript{101} In essence, President Carter had walked onto the international equivalent of a car lot, picked out a shiny convertible telling the salesman, "I must have this one; no other will do. Money is no object, so how much?"
C. When You're Winning, Why Negotiate?

A fundamental rule of negotiation is that one bargains only when it would be advantageous to alter the status quo. In November, 1979, the Iranians had very little to gain by releasing the hostages, but a great deal to lose.102 The students understood that when you are winning, there is no reason to play offense. In holding the Americans, the students felt they were giving their countrymen symbolic vindication for the 1953 coup, the immunity agreement, and a thousand other grievances against "the Great Satan."103 More importantly, the students had restored Iranian national pride in a single day. The students could not have hoped for a better payoff. America was degraded, outraged, and desperate. All of its missiles, jets, international prestige and wealth were rendered impotent by a handful of Allah's soldiers. Although the average American could not locate Iran on a map, the average Iranian could recite the familiar litany of transgressions against the interchangeable demons of the Shah and the United States. More importantly, these young Iranian heroes had an audience: Americans occupied the best seats, while the world watched.104

Ironically, the Iranian students and supporting cast of street mobs were indebted to the American media for fueling attention.105 Americans and the rest of the world wanted to know what was going on, which was exactly what the Iranians wanted. In effect, the Americans focused the world's attention on their own humiliation, driving the price of the release of the hostages through the ceiling in the process. American frustration fueled the Islamic Revolution on a nightly basis.106 The hostages' captors were well aware that the free publicity they were receiving could not be purchased at any price. From the standpoint of negotiation princi-


103. Two justifications for keeping the hostages would be to make Iran look strong and to stand up to the United States. Id. at 45.

104. The amount of television coverage and the opportunity to tell the world about the grievances inflicted by the United States was a factor in continuing to hold the hostages. Id.

105. ABC's special coverage of the hostage drama on the popular late night news show Nightline was the flagship of American media coverage. The top brass at ABC News were committed to report the story until it was resolved. Each night the lead into the broadcast was prefaced by "America Held Hostage" Day 1, Day 3, Day 7... Day 444. See generally John J. O'Connor, Who's Behind the 'Nightline' Success Story?, N.Y. TIMES, Dec. 7, 1980, at D22 (discussing the growth and success of Nightline and its host, Ted Koppel).

106. Those who lived through the crisis would be quick to remember that the crisis headlined most news programs each evening.
Negotiating Lessons from Iran

pies, the American virtue of openness, as guaranteed by the First Amend-
ment, was an essential reason the hostages remained imprisoned.

D. President Carter's Use of Leverage

The Carter Administration's decision to admit the Shah into the
United States precipitated the crisis, while its lack of contacts with the
new Iranian government and the initial Rose Garden address prolonged
it. The President, however, did utilize some fundamental leverage tech-
niques in the early days of the crisis. President Carter's use of sanctions
as a leverage tool would eventually be the key to resolving the impasse,
but not until much later. On November 12, 1979, the President halted all
oil imports from Iran, and two days later, froze all Iranian assets held in
American banks.\textsuperscript{107} President Carter also halted shipments of military
spare parts to Iran and ordered the Justice Department to crack down on
Iranian students in the United States who had violated their visa require-
ments.\textsuperscript{108} A month later, the President ordered the expulsion of most
Iranian diplomats in the United States and the reduction of Iranian con-
sulate staffs.\textsuperscript{109}

On November 17, following President Carter's first round of reactive
measures, Khomeini ordered the release of all black hostages being held,
and all but two of the female hostages.\textsuperscript{110} It is unclear whether the Presi-
dent's actions played a part in these releases.\textsuperscript{111} It is more probable that
Khomeini's actions were a public relations gesture directed at defusing
negative world opinion against Iran. Despite President Carter's use of
sanction and the goodwill gesture of the partial hostage release,
Khomeini, the students, and the newly elected Prime Minister,
Ghotbzadeh, remained resolute in their demand for the return of the
Shah.

In the first months of the crisis, the United States moved on several
fronts. Realizing its mistake in admitting the Shah to the United States,
the Carter Administration was anxious for the deposed leader to leave
the country. White House Chief of Staff Hamilton Jordan began a secret

\begin{footnotes}
\item[107.] ROBERT D. MCFADDEN, JOSEPH B. TREASTER & MAURICE CARROLL, NO HIDING
PLACE: THE NEW YORK TIMES INSIDE REPORT ON THE HOSTAGE CRISIS 258 (1981) (pro-
viding a chronology of the events relating to the hostage crisis).
\item[108.] \textit{Id.}
\item[109.] \textit{Id.} at 260.
\item[110.] \textit{Id.} at 258.
\item[111.] \textit{See id.} at 258-59 (noting that Khomeini claimed the female and black hostages
were released because women were held in high regard in Islamic countries and blacks
were oppressed in the United States).
\end{footnotes}
search to find a new domicile for the Shah outside of the United States.\textsuperscript{112} Mexico had already made it clear that the Shah would not be allowed back into its country.\textsuperscript{113} Finally, a deal was struck with Panamanian General Omar Torrijos as a favor to the United States.\textsuperscript{114} Unfortunately for the United States, the Shah's removal to Panama did not sever the nexus between the hated ex-ruler and the United States. Despite sanctions and the relocation of the Shah, it was becoming clear that only the return of the Shah to Iran would precipitate the hostages' release.

\textbf{E. A Breakthrough}

Although the situation was bleak, the Carter Administration continued to initiate contacts around the world in an attempt to establish a dialogue with the new Iranian power structure. Finally, after two months of dead ends, the United States, acting on a tip from Torrijos, established contact with two unlikely representatives of the new regime: French lawyer, Christian Bourguet and Argentine businessman, Hector Villalon.\textsuperscript{115}

Over the next several weeks, White House Chief of Staff Jordan headed a top secret negotiating team which met with Bourguet and Villalon in various European cities.\textsuperscript{116} After weeks of tedious work, the two sides worked out a complicated scenario for the release of the hostages. The students would transfer the hostages to the Iranian government.\textsuperscript{117} The Iranian government would then release the hostages to the United States upon the issuance of a United Nations report that would independently evaluate Iranian charges against the Shah and the United States government.\textsuperscript{118} This report would be followed by mutual face saving

\begin{itemize}
\item \textsuperscript{112} See Salinger, supra note 66, at 86-88 (discussing Hamilton Jordan's top secret trip to Panama).
\item \textsuperscript{113} McFadden, supra note 107, at 259. At this point, White House Counsel Lloyd Cutler went to the Shah to discuss alternate asylum arrangements. \textit{Id.}
\item \textsuperscript{114} Salinger, supra note 66, at 86-88. One reason driving the Panamanian decision to aid the United States was the fact that President Carter had signed the Panama Canal Treaty, relinquishing the canal to Panama after three former Presidents had refused to do so. \textit{Id.} at 87.
\item \textsuperscript{115} \textit{Id.} at 102-04. Bourguet was a radical French lawyer who represented the Iranian opposition while in exile. Villalon, far from an ideologue, was a worldly international businessman with long-established ties to Iran. Villalon's primary motive was to help resolve a crisis that would harm his Iranian friends in the commercial world. \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 145-52. This phase of the crisis represents a fascinating chapter in personal negotiating styles and the importance of building trust on a one-to-one level.
\item \textsuperscript{117} \textit{Id.} at 152. The Iranian government could not release the hostages to the United States until the students relinquished the hostages to the Iranian government. \textit{Id.}
\item \textsuperscript{118} \textit{Id.}
\end{itemize}
statements from the United States and Iranian governments, each admitting to certain mistakes.\textsuperscript{119}

In the end, the deal fell apart when Iranian President Bani-Sadr backed out at the last moment, fearful that his endorsement of the plan would undermine his position with Khomeini and the Islamic Revolution.\textsuperscript{120} Even though Bani-Sadr knew that a negotiated settlement was in the best long-term interest of his country, he was unwilling to take the personal and political risk. Moreover, instead of going through with the plan, the Iranian President verbally attacked the United States government in an interview.\textsuperscript{121} On April 7, Khomeini, ruled that the hostages were to remain in the hands of the students, pending a decision by the Iranian Parliament.\textsuperscript{122} The United States responded by severing diplomatic relations with Iran.\textsuperscript{123} Thus, months of delicate negotiations fell apart as day 156 of the crisis ended.

\textbf{F. The Failed Military Sanction}

By April 11, prospects for a negotiated settlement were at an all time low while America’s frustration level continued to mount relentlessly. With the upcoming Presidential election looming closer, no American was more frustrated with the stalemate than the President. After the secret negotiations failed, President Carter weighed his alternatives. Iran’s hard-line climate made a negotiated resolution impossible over the short run and perhaps ever. In the wake of the collapsed talks, the students issued public threats to kill the hostages immediately if the United States took any military action.\textsuperscript{124} From the American standpoint, the possibility existed that radicals would begin holding public trials and executing one or more of the hostages, while holding the others as insurance against

\begin{table}
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119. & Id. Each side was to acknowledge “certain historical errors in its relation with the other.” & Id. \\
120. & Id. at 264-65. Bani-Sadr stated the Revolutionary Council would take control of the hostages if the United States agreed not to say or do anything hostile to Iran until the Iranian Parliament had decided the fate of the hostages. President Carter agreed to this, but his message was late in getting to Bani-Sadr. On April 4, 1980, the Iranian government, pressured by the hardline Islamic Republicans and because of the late message, renege the offer. & Id. \\
121. & See id. at 265. & Id. \\
122. & Id. & Id. \\
123. & Id. President Carter also ordered all Iranian diplomats to leave the country within 24 hours and imposed a trade embargo. & Id. \\
124. & The students vowed to kill the hostages immediately in response to the slightest military action. & Id. \\
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reprisal. President Carter finally made the decision to act, giving the order for a high risk rescue mission by an elite commando force.\textsuperscript{125}

April 24 was business as usual at the White House. Only a handful of top officials knew that Operation Eagle Claw was under way in the Arabian Sea.\textsuperscript{126} These officials knew the mission was high risk, with one military report anticipating up to 60% hostage casualties.\textsuperscript{127} The President, desperate to break the stalemate, resolved to proceed with the mission, feeling he had no bargaining alternatives left.

In the early morning hours, President Carter tracked the mission from the Situation Room in the White House basement. Three of the eight helicopters were forced to turn back due to mechanical problems. Still the mission went forward. Ultimately, the President received word that one of the Sea Stallion helicopters had collided with a C-130 transport plane on the ground at Desert One.\textsuperscript{128} Eight American military personnel perished in the desert as the C-130 and helicopter burned in the Iranian night. At 1:00 A.M., the White House announced that it had aborted the secret rescue mission.\textsuperscript{129} The Iranians responded to the news by dispersing the hostages to undisclosed locations throughout Iran, rendering another rescue mission impossible.\textsuperscript{130} The failed rescue bolstered the radical Islamic argument that the Americans could not be trusted.

From the American standpoint, however, the news was not all bad. The failed military mission heightened Iran's uncertainty regarding possible future sanctions by the United States in the event that the hostages

\textsuperscript{125} \textit{Salinger, supra} note 66, at 235. The Joint Chiefs of Staff had originally told the President that a rescue mission was impossible. However, over the next few months, the military learned where the hostages were being kept, formulated a plan and began training for a rescue operation. \textit{Id.} at 234.

\textsuperscript{126} \textit{Gary Sick, All Fall Down: America's Tragic Encounter with Iran} 297-98 (1985). At 7:30 P.M. Teheran time, eight RH-53D Sea Stallion helicopters on board the carrier U.S.S. Nimitz disappeared into the night sky en route to Desert One, a rendezvous point in the Iranian desert, some 275 miles southeast of Teheran. \textit{Id.} at 296. There, the helicopters would meet six U.S. Air Force C-130 Hercules transport planes and move the rescue team to Desert Two to board trucks and vans for a 50 mile ride into the Iranian capital for a pre-dawn raid on the embassy. \textit{Id.} at 297.

\textsuperscript{127} \textit{See Salinger, supra} note 66, at 237-38.

\textsuperscript{128} Because of dust storms and mechanical malfunctions, only five helicopters reached Desert One, the first rendezvous point, whereas six were required to complete the mission. After it was determined to abort the mission, the helicopters began refueling to return back. One helicopter collided with a refueling aircraft and immediately burst into flames. \textit{Sick, supra} note 126, at 297.

\textsuperscript{129} \textit{McFadden, supra} note 107, at 266. Incriminating secret documents, maps and equipment were left behind in the wake of an emergency evacuation. In the days that followed, details began to surface that revealed an ill-conceived rescue plan made worse by the incompetence of those responsible for its execution. President Carter took full responsibility for all decisions made. \textit{Salinger, supra} note 66, at 239.

\textsuperscript{130} \textit{See McFadden, supra} note 107, at 266.
were not released or were harmed. As a result, President Carter had breathed credibility into the leverage of sanction. For the first time, the President made the Iranians realize they were not as invincible as they had assumed. In the subsequent months, assurances against military reprisal became a key part of the final solution to free the hostages. But for the short term, the United States of America, the great military superpower, had reached its nadir.

G. External Events Change the Status Quo

1. Death Brings Hope

On July 27, 1980, in an Egyptian hospital, the Shah of Iran lost his long battle with cancer.131 The natural cycle of life and death removed the primary impediment to a resolution, thus breaking the deadlock that had existed for nearly ten months. With the primary impediment to the release of the hostages removed, other factors would now determine the fate of the Americans held captive in Teheran.

The Shah's death should have brought optimism to those Americans seeking the release of the hostages, but if it did, the Americans shrewdly chose not to show it. After months of frustration in trying to strike a deal, American officials had become much more savvy and realistic about the negotiating dynamic of time. Even though both sides knew that the Shah's death was a turning point, patience and discipline were essential. Accordingly, the United States downplayed the event's significance in its official response.132

Even before the death of the Shah, evidence indicated a changing mood within Iran. The publicity value of the hostages had diminished greatly as nightly coverage from Iran grew repetitious. The human prize, which now numbered 52, was becoming a burden. Iran was beginning to feel the effects of the sanctions imposed by the United States, including the freezing of foreign assets and the embargo on spare parts for the American-made military hardware that the United States had provided the Shah.133

133. See GARY SICK, OCTOBER SURPRISE: AMERICA’S HOSTAGES IN IRAN AND THE ELECTION OF RONALD REAGAN 40-42 (1991) [hereinafter OCTOBER SURPRISE]. Iran was facing war with Iraq and would need these military parts in the event that war did break out. Id. at 40.
The low-key American response to the Shah's death demonstrated a change in the demeanor of the United States. July's business as usual sense of resignation replaced April's visible desperation. President Carter diverted attention from the nagging hostage crisis while surviving a challenge to his renomination at the Democratic National Convention by Senator Edward Kennedy. However, he privately harbored hope that the Shah's death along with the internal changes in Iran signaled a cause for optimism. A diplomatic solution to the hostages crisis was, at long last, a real possibility. While the climate had improved, the Iranians still needed a catalyst to bring them to the bargaining table. As with so many negotiations, that catalyst was an event over which neither party had any control.

2. The Iran-Iraq War: the Turning Point

On September 19, border tensions between Iran and Iraq escalated into full-scale war. While the hostages marked time in the hands of their student captors, assets frozen in western banks and military spare parts became Iran's new focus. Ideology suddenly took a back seat to survival as Iran tried to fend off Iraq which was seeking to exploit Iran's internal weakness to grab disputed territories rich in oil. Every new Iraqi air and missile attack increased the practical value of the hostages. The hostages were no longer an abstract symbol in a war of words with the ally of a dead despot; the fifty-two Americans now represented the key to the bank vaults and military storehouses of the west.

It is no coincidence that on September 9, only ten days before the imminent outbreak of war with Iraq, the Iranians indicated through the West German government that they wanted to reopen discussions on the hostages. The United States, seeking proof that they were dealing with a person of authority, were told that Khomeini himself would outline conditions for the release of the hostages in a speech the next day. As promised, Khomeini set forth these conditions in a speech broadcast to

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135. See McFADDEN, supra note 107, at 271.
136. Khomeini actually went to a hostage, Colonel Scott, and offered his release if Scott would promise to negotiate with the United States government to restore military deliveries to Iran in exchange for the release of more hostages. OCTOBER SURPRISE, supra note 133, at 42.
137. The Iranians possessed a large quantity of military supplies, but could not locate them because the United States had prepared a computerized inventory system for the Shah, to which the Iranian government could not gain access. Id.
138. McFADDEN, supra note 107, at 270.
139. Id.
the Muslim world. The conditions were fourfold: return of the Shah's property; return of the frozen assets; cancellation of all claims against Iran; and a pledge not to intervene in Iranian internal affairs. Conspicuously absent from this list was Khomeini's longstanding demand that the United States apologize to Iran for its past actions, a condition that President Carter always maintained as unacceptable. After months of threats, counter-threats, and stalemate, Iran had finally come to the bargaining table. The stage was set for a deal, but a thousand details remained.

3. Ronald Reagan and the January 20 Deadline

For the fifty-two Americans, there was finally a glimmer of hope, but it was too late for Jimmy Carter's presidency. The onset of the Iran-Iraq war in September precipitated a furious tug of war between the Carter Administration and the numerous factions within Iran. For President Carter, the prize was another term in the White House; for Iran, it was the means to fend off Saddam Hussein. The Iranians had the edge, both because they held the hostages and they knew that the American President was pressured by a November 4 deadline, the date of the election. Ironically, that particular Tuesday would also mark the one year anniversary of the seizure of the American Embassy. The Carter White House, knowing that another term depended on resolution of the hostage crisis, was prepared to take any action short of sacrificing American honor and credibility. The primary lure was the promise of military spare parts for the American-made Iranian war machine. The day before the Presidential election, the students met with Khomeini and announced that they would transfer the hostages to the Iranian government. This was accompanied by the formation of a special Iranian commission to address the details of a release. But as one impediment was removed, another replaced it in the form of the factionalized Iranian Parliament. Hardline conservative Hashemi Rafsanjani held a press conference threatening to put the hostages on trial if Iranian conditions were not met. November 3 ended much as it began; despite encouraging signs, the status quo held.

140. Id.
141. Id. Even though Khomeini did not list an apology as one of the conditions, President Carter stated the United States would not apologize for any of its actions in Iran. Id.
142. Edward Cody, Iranians Demand Fast Response to Hostage Terms, WASH. POST, Nov. 5, 1980, at A1. In addition, the Iranian government demanded that the United States respond quickly to its publicly announced conditions for release. Id.
143. See McFADDEN, supra note 107, at 275-76. Iran named Algeria as its intermediary for any actions to release the hostages. Id. at 275.
144. Id. at 276.
The next day, Ronald Reagan defeated President Carter by a margin of 489 to 49 electoral votes.\footnote{David S. Broder, \textit{Carter Yields Early in Night}, \textit{Wash. Post}, Nov. 5, 1980, at A1; Hedrick Smith, \textit{Reagan Easily Beats Carter; Republicans Gain in Congress D’Amaio and Dodd Are Victors}, \textit{N.Y. Times}, Nov. 5, 1980, at A1.} In retrospect, the American electorate, sick of humiliation at the hands of the raving Ayatollah and the gun-wielding students, had played a part in the negotiation by invoking the leverage of uncertainty. They communicated a message to the Iranians: either conclude a deal with the Carter Administration by January 20, Inauguration Day, or take your chances with a tough-talking Hollywood actor who had won the election largely on the implicit representation that he had a short and potentially lethal fuse.\footnote{The contrasting approaches of the Carter Administration and Ronald Reagan was reflected by their respective public responses to the Shah’s death. Whereas the State Department downplayed its effect and the relation between the Shah and the United States in hopes of calming Iranian hatred, Ronald Reagan praised the Shah as the kind of loyal friend to whom the United States should remain faithful. Sulzberger, \textit{supra} note 132.} Based on his campaign rhetoric, it was not out of the question that the new President would be willing to sacrifice the hostages for American honor.\footnote{See MCFADDEN, \textit{supra} note 107, at 292, 296 (recognizing Ronald Reagan’s tough stance on the hostage negotiations).} Islamics have always understood martyrdom. Even before the election, Ronald Reagan had Teheran’s ear, but after November 4, the man who had relished roles as an American warrior in World War II movies had a mandate as well.

To his credit, the President-elect played his part superbly, maximizing the leverage of uncertainty by casting a long shadow on the post-election negotiations while projecting a highly effective combination of restraint and toughness.

\textit{H. Time and Money: the Universal Issues}

As with any deadline, the pace of negotiation correlates with the amount of available time. To the Iranians, January 20, 1981 looked far away on November 5, 1980. While even the hardliners began to realize it was time to negotiate in earnest, they still wished to press for the return of the Shah’s wealth as well as Iran’s frozen assets and an assurance of no reprisals. The everpresent threat of espionage trials and executions served as Iran’s leverage, but the United States had the January 20 deadline and the Iran-Iraq war working in its favor.

As November passed and December began, the pace surrounding the negotiations predictably accelerated. While the public rhetoric continued, the two sides, working through Algeria, steadily narrowed their differences.\footnote{Id. at 284-92 (listing a chronology of the December negotiations).} Iran emphasized the return of its frozen assets while
demands concerning the Shah's wealth took a back seat. By January, the Shah's wealth was a non-issue.

On December 19, Iran demanded a deposit of $24 billion in Algeria to cover the frozen assets and the Shah's wealth.149 Secretary of State Muskie responded to this demand by declaring that it would be virtually impossible to complete this deal by January 20. On Christmas Eve, President-elect Reagan broke his silence on the hostage negotiations by characterizing the Iranians as "'nothing better than criminals and kidnappers who have violated international law totally.'"150 On December 28, the United States made a counter-proposal to return nearly $6 billion in frozen assets immediately and to seek to have private court claims against Iranian assets dismissed in favor of international arbitration.151 By January 6, the gap narrowed to an Iranian demand for $9.5 billion and an American offer of $7.3 billion.152 On January 11, Ronald Reagan indicated that he would approach the hostage situation with a 'clean slate' if it had not been resolved by the time he took office.153 In other words, all prior deals would be off.

The race was on. With only a few days left, Iran continued to make concessions, even agreeing that its frozen assets could be allocated to satisfy outstanding claims by Western banks and companies.154 Finally, because both sides now wanted a deal badly, the focus shifted to more technical matters.

As a result of around-the-clock work of bankers, accountants and government officials of the United States, Iran, and Algeria, the plane carrying the fifty-two American hostages cleared the runway in Teheran at 12:45 A.M. EST, just as Ronald Reagan was completing his inaugural address.155 A day later, President Reagan's personal envoys, including former President Jimmy Carter, greeted the hostages in Wiesbaden, West Germany.156 These former captives had paid the onerous price of lost

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150. McFADDEN, supra note 107, at 291.
151. See id. at 292. Edwin Meese warned the Iranians they should not expect a better deal from Ronald Reagan. Id.
152. See id. at 295. The Iranian offer came on the heels of its counteroffensive against Iraq. Id.
liberty. Simultaneously, their countrymen had suffered with them, forced to sacrifice much of their national honor at the hands of those they regarded as international terrorists. No one will remember the 444 day nightmare more than the man who led the country from its beginning to end. For Jimmy Carter, the nightmare was finally at an end, but the experience would surely haunt him the rest of his life. Iran's lessons would also ensure a string of bargaining triumphs in later years that would earn the former President new-found respect and admiration throughout the world.

IV. NEGOTIATING LESSONS FROM IRAN

Could the Iranian hostage crisis have been avoided, or were the tensions in Iran such as to make the confrontation inevitable? On a more practical level, what can be learned from this painful episode that can be carried over to personal and professional negotiations?

The Iranian hostage crisis echoes the importance of the first question any negotiator must ask. With whom am I dealing? The United States could not answer this question until it was too late. During the 1950s, 60s and 70s, it was clearly in the United States' best interest to support the Shah. Once his regime appeared vulnerable, however, the United States government failed to cultivate ties with the opposition that would eventually rule Iran. Had those channels been open, it is possible that the crisis could have been resolved in a matter of days.

On a more fundamental level, the United States did not understand the frustrations and motivations of the Iranian people. Although it would be easy to place this failing at the feet of the Carter Administration, this lack of understanding is more an American trait. An unwillingness to understand and appreciate the values, concerns, and needs of unfamiliar cultures has repeatedly plagued the foreign policy of the United States throughout the twentieth century.\(^1\) Beginning with Theodore Roosevelt and Central America, and proceeding to Korea, the Cold War, Vietnam, and Iran, insular American attitudes have repeatedly sown the seeds of discord.\(^2\) It was America's failure to respect or value Iranian sovereignty and the Islamic revolution that helped create the climate resulting in the hostage crisis. The Americans framed the controversy in terms of irrational students run amok, initially placing too much emphasis on financial or military solutions rather than confronting the more inscrutable aspects of the situation.

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table issue of recognizing the legitimacy of the Iranian point of view. Most of the world recognized that the Iranians had committed an egregiously illegal act. Yet, to the Iranians, this act was merely a justifiable retaliation for a quarter century of perceived illegal acts. Although the United States believed any repression of Iranian nationals had been the responsibility of the Shah, the Iranians linked the United States and the Shah as one, regarding them as equally responsible. Unfortunately, neither side could surmount the obstacle these fundamentally different points of view posed.

This lesson is applicable to any negotiation forum. Regardless of substantive differences, a negotiator’s failure to accord basic respect to his counterpart, coupled with an unwillingness or inability to understand his underlying needs, motivations and concerns, is a recipe for disaster. This does not require a surrender of self-interest or compromise of values, but it does encourage a good faith effort to view the negotiation objectively through the eyes of the other side.

The Iranian incident also validates the proposition that neither the status quo, nor the applicable leverage to alter it, is ever static. In the first months of the crisis, Iran had nothing to gain and much to lose by bargaining for the release of their captives. The United States government and press unwittingly furthered this position by providing the outcry and press coverage needed to fan rather than extinguish the flames. But with the passage of time came the Shah’s death, the war with Iraq, and the election of Ronald Reagan: all external events beyond the control of either party. Each of these events illustrates how the dynamics of any bargaining relation ebb and flow with changed circumstances. The true skill of any negotiator is to interpret unfolding events and transform them into leverage to provide the impetus for an agreement.

The hostage negotiations also demonstrate the crucial role of negotiating authority and timing. In post-Shah Iran, no single entity had full authority to make a deal. Ultimately, it was the street demonstrators who dictated the continued captivity of the Americans, rather than the students, the Iranian moderates, the Parliament, or even Khomeini. Only after passions had cooled, the Shah had died, and authority within Iran had been consolidated, was a deal possible. Even then, it was Iraq who ultimately brought the Iranians to the negotiating table; not the United States, the United Nations or world opinion.

The immense power of deadlines is yet another lesson. When credible, deadlines can constitute powerful manifestations of leverage, capable of bringing closure to a negotiation. After the war with Iraq provided the impetus for a deal, it was the unpredictability of the imminent Reagan
presidency, coupled with Jimmy Carter's early use of the leverage of sanction that finally brought about the hostage release. The January 20 deadline elevated the strength of these factors. As time dwindled, Iran faced the twin prospects of lost opportunity and uncertain sanction if a deal did not emerge by the end of President Carter's term. At long last, all four levers were in play. The result: mutual concessions leading to a deal orchestrated at the eleventh hour.

Hostage negotiations involving human bargaining chips are both dramatic and memorable. Yet, less exciting forms of these negotiations are played out on a daily basis. We are all capable of being held hostage, whether in the realm of business or interpersonal matters. The stakes need not involve life and death to replicate many of the same issues that faced the United States and Iran.

The hostage profile of bargaining becomes a probability whenever one party identifies a specific outcome as so essential that few or no available alternatives will suffice. An initial recommendation is to create alternatives in advance so as to avoid such an intractable situation. But if this is unavoidable, the negotiator must adopt the demeanor of a poker player: outwardly unconcerned and blessed with all the time in the world. Success invariably belongs to the one who can effectively manage his or her own internal pressures and deadlines while patiently identifying and utilizing available leverage to break the impasse.

Though it took some time, the United States finally became adept at playing this role in the hostage negotiations. The bloodless resolution took 444 excruciating days of intrigue and frustration to achieve. But for the sake of the human lives held in the balance, a negotiated resolution was indeed achieved.

V. Conclusion

The findings of the MacCrate Commission are entitled, "Report of The Task Force on Law Schools and the Profession: Narrowing the Gap."159 Despite this self-adopted title, the Commission took great pains to conclude that in reality, the perceived gap between law schools and the legal profession is fictitious.160 In a paradoxical effort to heal the rift that supposedly does not exist, the initial paragraph of the report strives to remind lawyers and professors that they are both full partners in a legal profession subdivided by differing missions and fractured by misperception of those missions.

159. See MacCrate Report, supra note 1.
160. MacCrate Report, supra note 1, at 8 (stating, "[T]hus we have concluded that there is no 'gap' ").
Understandably, the Commission wanted to avoid alienating the only two groups capable of closing the distance between the classroom and the law office. Notwithstanding the work of dedicated members of the profession, there is indeed a gap that continues to exist between law school and law practice. As the MacCrate Commission has recognized, fault-finding and finger-pointing is neither appropriate nor desirable. The focus should be directed towards improving the quality of legal education and professional development. The responsibility should be shared, requiring everyone to trade their parochial attitudes for a more expansive spirit of input and innovation.

While the technique of analyzing negotiations from a historic case study perspective is not offered as a substitute for clinical training or simulation, it can certainly be a cost-effective complement to any program that seeks to address the concerns of the MacCrate Commission. Similar experiments should be encouraged as professors search for new ways to accomplish old tasks. The artificial barriers that legal educators have erected between the traditional law school case method and skills training should come down. Similarly, practicing lawyers should strive to understand and appreciate the complete mission of law schools while finding ways to offer their time and talents in augmenting the work of law school faculties. Ultimately, bridging the gap depends on how the law schools and the legal profession choose to collaborate on their common goal of raising the overall level of competence in the ongoing education and training of America's lawyers. This process will be accelerated when all concerned realize that the success of one segment of the profession ultimately inures to the benefit of all.