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Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli -
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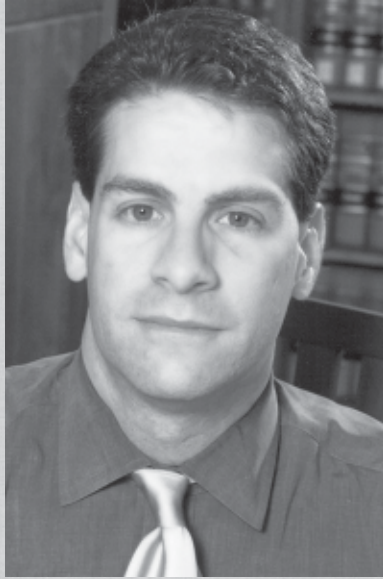
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Russell Korobkin

A UCLA School of Law faculty member since 2000, Russell Korobkin's writing focuses on negotiation and dispute resolution, behavioral law and economics, contracts, and health care law. Professor Korobkin is the author of the textbook, *NEGOTIATION THEORY AND STRATEGY* (2002), along with more than 30 law journal articles. His recent publications include *The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption*, 51 *UCLA L. REV.* 457 (2003), *Bounded Rationality and Unconscionability: A Behavioral Approach to Policing Form Contracts*, 70 *U. CHI. L. REV.* 1203 (2003), and *The Endowment Effect and Legal Analysis*, 97 *NW. U. L. REV.* 1227 (2003).



Jonathan Zasloff

Professor Jonathan Zasloff researches and writes in the area of local politics, world politics, environmental law, and welfare. He joined the faculty at UCLA School of Law in 1998 after earning a Ph.D. in the history of American foreign policy from Harvard and an M.Phil. in International Relations from Cambridge University. Much of his recent work concerns the influence of lawyers and legalism in U.S. external relations, and he has published articles on these subjects in the *NEW YORK UNIVERSITY LAW REVIEW* and the *YALE LAW JOURNAL*. More generally, his recent interests focus on the response of public institutions to social problems, and the role of ideology in framing policy responses.

Roadblocks to the Road Map:[†]

*A Negotiation Theory Perspective on the
Israeli - Palestinian Conflict After Yasser Arafat*

Excerpt from:

Russell Korobkin and Jonathan Zasloff *

In 1979, Israeli Prime Minister Menachem Begin and Egyptian President Anwar Sadat signed a peace treaty arising from their negotiations at Camp David, bringing an end to the state of war that had existed between the two nations since Israel had declared its independence thirty-one years earlier.¹ In so doing, Egypt and Israel created a new international legal order in the Middle East and a framework for future treaties. The basis for the agreement was, simply, "land for peace": Israel returned to Egyptian sovereignty the Sinai Peninsula, which Israel had captured in the 1967 Six-Day War; Egypt recognized Israel's right to exist and established diplomatic and trade relations with the Jewish state.² The two nations have maintained a peaceful relationship, if not a friendship, for a quarter-century since.³

Introduction

Following the Camp David model, the fitful efforts over the last decade to forge a negotiated peace between Israel and the Palestinians have also been based on the land-for-peace concept...In this Article, we attempt to analyze the impasse in Israeli-Palestinian peace negotiations—asking why it has arisen and how a third party can help the two sides get beyond it—from a unique conceptual perspective. Rather than dwell on particular historical events and antagonisms, our approach will be to use the analytical tools of interdisciplinary negotiation theory to categorize the range of roadblocks to a land-for-peace agreement and, from that analysis, to deduce the features of a U.S.-sponsored peace initiative that would have the best possible chance of overcoming the impasse. Our goal, then, is not to offer new facts about the events and antagonisms of the Middle East. Rather, we aim to provide a new analytical framework for organizing and making sense of the consequences of those antagonisms and deriving public policy recommendations from them.

Our approach to examining the Israeli-Palestinian impasse leads us to the following conclusions. The failure of the parties to reach an agreement based on the land-for-peace framework can be attributed to some combination of three common roadblocks to negotiation success: (a) the absence of a bargaining zone, such that no single set of agreement terms would be preferable to continued impasse for both parties; (b) internal division within one or both principal parties, such that an agent or a minority faction with the ability to block an agreement undermines a result that would benefit the party as a whole; and (c) mutual "hard bargaining," such that both sides refuse to accept an agreement that would be preferable to impasse and instead hold out for an even more desirable agreement.

Because the parties' rhetoric can be consistent with any of these explanations, only an omniscient observer could know for sure which of these three roadblocks (or combination thereof) is actually the but-for cause of the ongoing impasse. Consequently, any U.S.-sponsored peace initiative would be most likely to succeed in bringing peace to the Middle East if it were to include a conscious plan to overcome each of these roadblocks. We propose that such a plan should include three crucial features. First, the United States should present a non-negotiable set of terms to the two disputing parties that they can either take or leave but not bargain over. Second, because carrots and sticks linked to the terms of the deal may maximize the chances of success, the United States should offer side payments to the parties if they accept the proposed deal and simultaneously threaten to withhold political and economic support if the plan is rejected. Finally, Washington should work with the disputants and with U.S. allies to limit the ability of Palestinians and Israelis who are opposed to an agreement to stand in its way...

*The Conceptual
Apparatus*

*reservation
points and the
bargaining
zone*

In any bargaining setting, negotiations can have only one of two outcomes: Agreement or impasse.⁴ Agreement, of course, requires the assent of each party. The minimum set of terms necessary for a party to prefer agreement to impasse is called that party's "reservation point."⁵ If a set of terms causes a party to favor agreement over impasse, the potential deal "exceeds" the party's reservation point. The content of a party's reservation point depends on the consequence of impasse. The set of terms constituting a party's reservation point will be less favorable to that party, or "lower," if impasse is extremely undesirable than if impasse is only moderately undesirable. A negotiator's reservation point, then, is dependent on how that party perceives the quality of the outside options, or Best Alternative to a Negotiated Agreement (BATNA)...⁶

*situating the
middle east
conflict*

B. The Israeli-Palestinian peace negotiations can be mapped on a one-dimensional graph (Figure 2, right). On the left-hand side is the best possible resolution of the conflict from the Palestinian perspective. This outcome might include a complete withdrawal of Jews from the region and the establishment of a Palestinian state in what is now Israel and the Territories. We can label this agreement "Israeli surrender." Closer to the middle of the chart, although only slightly, might be the withdrawal of Israeli forces from the Territories and East Jerusalem and the establishment of a Palestinian state therein; Israeli recognition of the right of return to Israel of Palestinian refugees who left their homes during the 1948 War; and no official recognition of Israel by the Palestinians. At the other end of the graph would be the best possible agreement from the Israeli perspective, which we can label "Palestinian surrender." Perhaps this outcome would include the Palestinians departing the Territories for other Arab lands, which would leave the entire territory currently controlled by Israel to the Jewish state. Slightly toward the center from that point would be Palestinian recognition of the state of Israel (including East Jerusalem); an end to all violence against Israelis; a renunciation of

the right of return; maintenance of Israeli settlements in the Territories; and limited Palestinian autonomy in portions of the Territories...

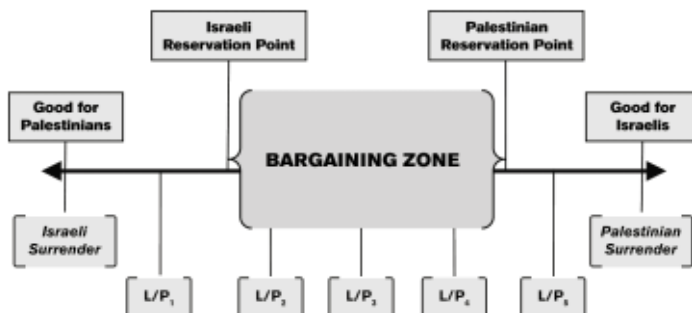


FIGURE 2

C. Our conceptual apparatus permits us to describe plausible explanations of why Israel and Palestine have failed to reach a negotiated agreement as falling into one of three distinct categories. First, it is possible that Israel, Palestine, or both have such high reservation points that no bargaining zone exists; that is, for all the talk of land for peace, there simply is no specific version of a land-for-peace agreement that both Israel and the Palestinians would prefer to continued warfare. Second, it is possible that there is a bargaining zone that encompasses one or more specific versions of a land-for-peace agreement, such that both parties would find that agreement dominates continued impasse, but that a minority of actors within Israel, Palestine, or both who hold contrary preferences can block agreement by preventing the majority from entering into or implementing the deal. Third, it is possible that there is a bargaining zone and that the parties have the ability to reach a mutually beneficial agreement, but that an agreement proves elusive nonetheless because both parties continue to press for a better deal rather than settle for a merely acceptable one.

roadblocks to conflict

The conceptual lens through which we view the Middle East conflict is useful not only for identifying and describing the causes of negotiation failure, but also for prescribing policy interventions geared toward breaking the impasse. Each of the three categories of roadblocks to a peace agreement that we describe logically suggests the need for different policies on the part of the disputants themselves or interested outsiders.

Whether a hypothetical agreement exceeds a negotiator's reservation point depends on the relationship between two variables, as perceived by the negotiator: the relative quality of the agreement's terms and the relative quality of the negotiator's BATNA. This suggests that if no bargaining zone currently exists, one might develop if the terms of the deal are altered to make agreement more

desirable to one or both parties or if actions are taken to make the BATNA of one or both parties less appealing.

In contrast, if a bargaining zone exists but minorities block the agreement, the implications are dramatically different. Steps must be taken to eliminate or co-opt the capacity of the rejectionist forces to exercise blocking power.

Finally, if a bargaining zone exists but impasse persists because one or both parties hold out for a more advantageous agreement rather than settling for one that is merely acceptable, the actions to be taken will differ once more. Either conditions must be changed to make one or both parties more impatient to reach agreement, or both parties have to be convinced that they can do no better than a particular set of terms that lies, among others, within the bargaining zone...

*Devising a U.S.
Policy to
Overcome
Roadblocks*

Designing a model peace initiative would be a far simpler task, at least analytically speaking, if it were clear which of the potential roadblocks to peace have actually caused the ongoing impasse in the Middle East. Unfortunately, while the issues that divide the parties are well known, the precise cause of their failure to bridge those differences in light of the obvious benefits of peace to both sides remains unknown, even to the most knowledgeable observers. Numerous potential factors could explain why Israel and Palestine remain at war fifty-seven years after the founding of Israel and thirty-eight years after the Six-Day War: perhaps no bargaining zone exists that encompasses a specific set of deal terms; internal divisions in the guise of faithless agents or blocking minorities may have prevented the parties from concluding a peace agreement on mutually beneficial terms; or the parties' desires to negotiate a perfect agreement may have prevented the conclusion of a merely acceptable one.

This observation suggests that a prudent U.S. peace effort would attempt to address all three of the potential categories of roadblocks simultaneously, and as many of the specific potential causes of impasse within each category as possible. The alternative to such a comprehensive approach is to forge a policy that is based essentially on guesses as to which of the plausible negotiation roadblocks actually have frustrated Middle East peace for two generations and continue to do so. Such an approach would run the obvious risk of failing to resolve the impasse, and it could even exacerbate the conflict by allowing current problems to fester. With this logic in mind, this Part attempts to outline the fundamental elements of a comprehensive U.S. policy initiative...

*eliminating
strategic hard
bargaining
over the
cooperative
surplus*

A. Compared to the other potential roadblocks to peace explored in this Article, the problem of hard bargaining over the cooperative surplus that a mutually beneficial transaction would create receives relatively little attention. But because the insistence of even one disputant on achieving better deal terms can prevent the

parties from reaching any mutually beneficial agreement, any sensible U.S. initiative should take steps to preclude such destructive hard bargaining. Overcoming the roadblock of hard bargaining is only one of three prongs of our policy proposal, but it is the linchpin on which the efficacy of the other prongs rests. Accordingly, we begin our analysis with consideration of this roadblock, first explaining why we believe it is a significant impediment to peace unlikely to be overcome without a third party's assistance, and then suggesting an approach to confronting it.

1. Even assuming that Israel and Palestine both determine that the value of a land-for-peace agreement exceeds their reservation points and that no agents or minority constituencies can block agreement, no agreement will be reached if both sides believe they can garner even better terms by waiting for additional concessions from the other party. The passage of time is unlikely to resolve such a stalemate between the parties...

the state of the roadblock: the problem of mutual patience

2. In the terms of negotiation theory, in attempting to mediate the Middle East conflict, President Bush, like President Clinton... before him, has played essentially a "facilitative" role, disclaiming an intention or desire to impose a particular substantive resolution of the conflict.⁷ The United States should abandon this approach. Instead of presenting the parties with a broad framework, as the Road Map does, the United States should assume a more directive position and present the parties with a detailed set of agreement terms that it considers fair and reasonable to both sides. The U.S. president should then make it clear that the terms are not the starting point for negotiations, but the ending point; the United States should not dicker over the terms.

policy initiative: a detailed, non-negotiable U.S. proposal

Facing a set of non-negotiable terms, both parties will have the choice between agreeing to those terms and impasse. The option of holding out for better terms in the future—a recipe for stalemate if adopted by both sides—disappears, not only because the United States will not countenance arguments for altering the terms, but because it would be difficult under such circumstances for either party to accept anything less than what is contained in the proposal. It is doubtful that the Israelis would accept any settlement that the United States believed was unreasonably biased in favor of Palestine. The same is true for Palestine, and especially so if the U.S. position had Arab support...

Determining what specific terms would satisfy this criterion would require a considerably more detailed analysis than is possible in this Article. With this said, however, it seems likely that the terms of a non-negotiable U.S. peace plan would probably resemble in content the Geneva Accord and the similar but less well-known People's Voice initiative,⁸ although in considerably greater detail. These two recent plans are both final-status documents negotiated by prominent Israelis and Palestinians (although not by elected leaders), and both have received substantial public support in each nation.⁹ These facts suggest that a more detailed plan that

follows the outline of these documents would be likely to fall between the parties' reservation points. Moreover, both accords have attracted substantial international support,¹⁰ so basing an U.S. proposal on them would sharply increase the likelihood of desirable Security Council approval...

creating a bargaining zone

B. Skeptics might contend that our initial focus on countering the roadblock of mutual hard bargaining might be overly optimistic in the sense that hard bargaining can be the but-for cause of a negotiation impasse only if a bargaining zone exists. A straightforward implication of the historical failure of the parties to reach an agreement might be that there is simply no bargaining zone...

the state of the roadblock: reasons for cautious optimism

1. There is some reason to believe that, whether or not the historical failure of Israel and Palestine to reach a negotiated peace agreement can be attributed to the absence of a bargaining zone, social and political changes in the Middle East over the last decade have enabled a bargaining zone to emerge. This Section describes the reasons for such optimism.

israel and the occupation: diminishing benefits, rising costs

a. At its thinnest point, pre-1967 Israel is only nine miles wide, making the heart of the country extremely vulnerable to a first-strike military attack by hostile Arab forces without the West Bank serving as a buffer. Former Israeli Foreign Minister Abba Eban, a dove by Israeli standards, once provocatively described the pre-1967 territorial lines as "Auschwitz boundaries."¹¹ In light of this geographical fact, Israel might have believed in the past that its BATNA of occupying the territories and endlessly battling Palestinian nationalism was a more desirable option than trading land—especially the West Bank—for peace. In fact, many Israeli military and political figures contended that retaining control of most or all of the West Bank was an absolute requirement of Israeli security.

This view seems untenable today. Israel enjoys a better-equipped and better-trained army, navy, and air force than all Arab states combined.¹² The Jewish state is at peace with Egypt and Jordan. Israeli-Syrian relations remain cold, but the recent demolition of Saddam Hussein's regime in Iraq destroyed the last serious Arab military threat to Israel's existence. With this development, Israeli control of the West Bank can no longer be considered strategically critical, and security concerns that impeded Israeli-Palestinian negotiations as recently as the 1990s are far less critical today. Although Islamic militant groups operating beyond the Territories present a very real threat to Israeli security, the threat of a conventional army attack across Israel's eastern border is extremely small—even smaller than it was just two years ago.¹³

In contrast, the economic and psychological costs to Israel of occupying and governing a territory that is home to 3.5 million hostile Palestinians are large.¹⁴ Added to this is the fact that Palestinian militants have demonstrated their ability to keep Israeli citizens in near-constant fear of terrorism, creating further crippling economic as well as psychological effects.¹⁵ These primary results of the ongoing

intifada on Israeli society are compounded by the secondary effect of mounting emmigration of Israeli Jews—often the better educated—which increases the risk of worsening both Israel's long-term economic growth prospects and its precarious demographic balance.¹⁶ Overall, it seems that the possibility of trading land for peace would dominate Israel's alternatives. Polls of Israelis bear this out.¹⁷

b. As is true for Israel, the likelihood that Palestine perceives a land-for-peace agreement as superior to its BATNA of continued political and military struggle against Israel seems to have increased in recent years. While many Palestinians still dream of conquering the Jewish state, there is no serious prospect of this taking place. If there were any hope of Arab armies "liberating" Jerusalem after the Soviet Union collapsed and its military sponsorship of Arab states disappeared, the destruction of Saddam Hussein's regime in Iraq extinguished it. With Saddam's armed forces disbanded, no Arab nation to Israel's east possesses conventional military forces that could plausibly be considered a threat to the Jewish state.

palestine: a new realism?

Following Israel's withdrawal from southern Lebanon in 2000, many Palestinian leaders, and particularly Arafat, believed that Israel was a "spider web":¹⁸ outwardly impressive but ready to collapse in the face of a Palestinian military challenge. Four-and-a-half years of the second intifada and the continued disintegration of Palestinian civil society with no signs of Israeli capitulation, however, have undermined this theory severely...

...While a majority of Palestinians polled often express support for armed confrontation with Israel, majorities also favor peace based on the concept of Jewish and Palestinian states existing side by side.¹⁹ A July 2003 poll conducted by respected Palestinian political scientist Khalil Shikaki found that more than ninety percent of Palestinian refugees do not actually want to return to pre-1967 Israel.²⁰ A large majority said they would accept resettlement in the Palestinian state or elsewhere and compensation in lieu of the right of return to Israel.²¹ The percentage rose when pollsters told respondents their original pre-1948 villages no longer existed.²² These numbers suggest that giving up the right of return as part of a land-for-peace agreement might no longer be the third rail of Palestinian politics.

2. To help create a bargaining zone if none currently exists—or, alternatively, to increase the breadth of the existing zone—a U.S. peace initiative should maximize the benefits of agreement to each party while simultaneously maximizing the costs of impasse by reducing the desirability of each party's BATNA of maintaining the status quo.²³ To satisfy the first goal of maximizing the benefits of agreement, the U.S. proposal should include the promise of side payments when the proposed agreement is implemented, both in the form of cash assistance and in-kind aid.²⁴ These side payments should be designed to mitigate the most serious objections that the parties are likely to have to a land-for-peace agreement. To satisfy the second goal of maximizing the costs of impasse, the proposal should also be accompanied by the threat of serious adverse consequences should the parties

policy initiative: sweeten the agreement, worsen the BATNA

reject the proposal.²⁵ The ability of the United States, based on its economic, military, and political power, to employ both "reward power" and "coercive power"²⁶ gives it the unique ability among possible mediators of the Israeli-Palestinian dispute to implement this proposal...²⁷

*preventing
internal divisions
from blocking
agreement*

C. We believe that by crafting a specific land-for-peace proposal that serves as many interests of both parties as possible, accompanying that proposal with offers of side payments and other forms of U.S. assistance if it is accepted, offering that proposal on a strictly non-negotiable basis, and taking steps to worsen the quality of both Israel's and Palestine's BATNA of continuing the conflict, the United States can create a situation in which agreeing to the terms of that proposal will dominate any other option available to either side. This scenario will not guarantee that the proposed agreement is signed and implemented, however...two very different types of internal divisions within one negotiating party can prevent the consummation of an agreement that is desirable for both sides: the party can be represented by a faithless agent, or a minority faction can have the power to block an agreement desired by the majority.

In Israel, the ideologically driven and politically powerful settler community, though relatively small in number, has long set the agenda within the dominant Likud party.²⁸ It has also managed to extract significant and extremely costly benefits from the central government, even during times of economic hardship and national political peril.²⁹ Recently, settler opposition led Sharon's own Likud party to reject his proposal for unilateral disengagement from Gaza, and threatened his hold on the governing coalition.³⁰ Any U.S. peace initiative needs to take steps to minimize the likelihood that minority preferences could control Israeli policy concerning a peace agreement to the detriment of Israel as a whole.

Internal divisions on the Palestinian side present an even greater threat to the achievement of a mutually beneficial peace agreement. The Bush administration's Middle East policy attempted to address both the agency and blocking-minority problems with a single initiative: creating the office of the Palestinian prime minister. Although this initiative failed miserably, its ultimate goal—the replacement of Arafat as Palestinian leader—was recently achieved by Arafat's death. However, if internal divisions within the Palestinian nation in the form of a blocking minority are a primary roadblock to a peace agreement, the Bush approach shows no signs of surmounting it in the near term, and a new initiative is needed.

*the state of the
roadblock: the
accidental
success of the
"replace arafat"
strategy*

1. Early in his presidency, George W. Bush concluded that Yasser Arafat was himself a roadblock to a negotiated peace, both because the Palestinian leader was not willing to approve a land-for-peace agreement and because he would never use the full power of his office to stop terrorism and thus ensure that a Palestinian minority could not prevent an agreement.³¹ This belief created hope that a Palestinian leader

more committed to peace would solve not only the agency problem but the blocking minority problem as well.

2. No U.S. policy that hopes to forge peace in the Holy Land can succeed if the leaders of Israel or Palestine do not have the power to commit their internal constituencies to the terms of the deal proposed.³² ... A threat posed by a minority constituency to the adoption or implementation of a negotiated agreement can be confronted by co-opting or disempowering those constituencies. Carefully drafted, the terms of a specific land-for-peace agreement could co-opt many opponents to peace, winning their acquiescence if not their active support. For example, if the specific territorial division permits Israel to retain some Jewish settlements located near the Green Line and in the Jerusalem suburbs, perhaps in return for some Israeli territory elsewhere, many settlers would no doubt support the agreement. If the proposed terms also provide sufficient rights to Palestinian refugees—whether in terms of very limited opportunities to immigrate to Israel, financial compensation, citizenship in third countries, or some combination of these—many Palestinians who support rejectionist groups such as Hamas and Palestinian Islamic Jihad might reassess their opposition to peace.

*policy initiative:
disempower
rejectionist
groups*

This said, it would be unrealistic to believe that, whatever the specific terms of a land-for-peace agreement, all of the Israelis who believe that the land between the Mediterranean and the Jordan River must be entirely Jewish and all of the Palestinians who believe the same land must be entirely Arab could ever be assuaged. Consequently, a U.S. peace initiative should focus on disempowering these groups—that is, making it impossible for their opposition to block the implementation of a land-for-peace agreement.

a. For the past thirty years, Israeli settlers and their supporters have become a key component—perhaps the key component—in the power base of Ariel Sharon's Likud party.³³ These Israelis provide Likud's core constituency, and the Party reciprocates by providing enormous government benefits to the settler movement...³⁴

*detaching the
settlers*

Any U.S. initiative should drive a wedge between the settlers and both their supporters inside the Green Line and the rest of the Israeli population. U.S. efforts to reduce the quality of Israel's BATNA by threatening to withhold economic, military, and political support should Israel reject the proposed agreement, as explained above, might have this effect... In addition, the U.S.-sponsored land-for-peace initiative should include as one element a large economic aid package to Israel for use in dismantling the settlements on land that would, under the proposal's terms, be part of the state of Palestine.³⁵ Withdrawing from the settlements would be tremendously expensive—the cost of withdrawing from just the small Gaza settlements is expected to exceed \$1 billion, including relocation payments.³⁶ It would be particularly difficult for Sharon's government to reject a

U.S.-sponsored agreement if an obvious and immediate consequence of doing so would be to turn down a large subsidy to dismantle settlements and instead sacrifice services to Israelis living within the Green Line in order to preserve the settlements.³⁷

*controlling the
capacity of
palestinian
rejectionist
groups*

b. As we asserted above, any U.S.-sponsored peace agreement should include a specific warranty committing the PA to use all its available resources to dismantle the infrastructure of terrorist organizations within the Territories.³⁸ However, relying on the PA alone to control terrorism and make a land-for-peace agreement both possible and enduring has failed thus far, and its future prospects remain uncertain at best. To maximize the chances of success, a U.S. peace initiative should include a multi-pronged approach to controlling terrorism by Palestinian rejectionists, with commitments of the Palestinian security forces only part of that approach. In addition, the United States needs to exert direct political pressure on Arab and Muslim nations that provide economic and military assistance for Palestinian rejectionists to eliminate (or, more likely, reduce) that assistance, and to support Israel's construction of a separation barrier to provide a level of defensive protection against terrorist attacks.³⁹

Conclusion

The repeated failure of Israelis and Palestinians to negotiate an enduring peace agreement, however, suggests the need for new analytical prisms through which to view the Middle East conflict. We believe that our framework, informed by negotiation theory, presents a fresh way to conceptualize the impediments to peace in sufficient detail to generate policy proposals but not in so much minutiae that paralysis results.

Our framework also leads logically to policy prescriptions for the United States that do not fit neatly into the usual political debates on the subject. Neoconservatives (often closely aligned with the Bush administration) have argued that to struggle for Middle East peace requires the United States to use all military, political and economic means at its disposal to pressure recalcitrant Arab and Muslim regimes to make peace and overthrow those that will not.⁴⁰ Liberals, in contrast, insist that Middle East peace requires the United States to become directly involved in Israeli-Palestinian negotiations and work more closely both with multilateral institutions such as the United Nations and with its European allies.⁴¹ Our framework suggests that a strategy most likely to help break the impasse would include elements of both of these approaches plus a number of other features as well.

Most importantly, our analysis suggests that any U.S.-sponsored Middle East initiative can maximize its likelihood of success by consciously addressing the full range of potential roadblocks to peace. The Bush administration's determination that Yasser Arafat was the primary impediment to peace resulted in four years of

single-minded focus in Washington on eliminating his influence. Pursuing a policy so narrow was and continues to be a high-risk approach. Even if Arafat's ultimate successor is a faithful agent of the Palestinian people, the absence of a bargaining zone, blocking minorities on one or both sides, and strategic hard bargaining will still threaten to derail attempts to settle the Israeli-Palestinian conflict on the basis of land for peace. Arafat's death has given many Israelis, Palestinians, Americans, and other interested parties a renewed sense of optimism that an Israeli-Palestinian peace might be possible. A reinvigorated U.S. policy must be comprehensive—that is, consciously designed to overcoming each of the potential roadblocks. ❖

[†]Excerpt from the full article "Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat," 30 *YALE JOURNAL OF INTERNATIONAL LAW* 1 (2005).

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1. Two agreements creating a framework for peace were signed by the Israeli and Egyptian leaders on September 17, 1978. The peace treaty was signed on March 26, 1979. See Saada Touval, *THE PEACE BROKERS* 300-03 (1982).

2. Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978, Egypt-Isr., 1138 U.N.T.S. 40, available at <http://www.jimycarterlibrary.org/documents/-campdavid/accords.phtml> (last visited Dec. 12, 2004); see also Jill Allison Weiner, *Israel, Palestine, and the Oslo Accords*, 23 *FORDHAM INT'L L.J.* 230 (1999).

3. See generally Steven L. Spiegel, *That Sinking Feeling: At 25, the Israel-Egypt Treaty Survives But Is Badly Frayed*, L.A. *TIMES*, Mar. 28, 2004, at M1 (calling the countries' relationship a "cold peace").

4. See Russell Korobkin, *NEGOTIATION THEORY AND STRATEGY* 14 (2002).

5. Howard Raiffa, *THE ART AND SCIENCE OF NEGOTIATION* 45 (1982).

6. Roger Fisher & William Ury, *GETTING TO YES* 104 (Bruce Patton ed., 1981).

7. See generally Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *HARV. NEGOT. L. REV.* 7 (1996). Many different terms are used to distinguish third-party participation in disputes to merely facilitate negotiation and third-party attempts to use influence or leverage to push the parties toward agreement. See, e.g., Chester A. Crocker et al., *Multiparty Mediation and the Conflict Cycle*, in *HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD* at 19, 20-24 (Chester A. Crocker et al. eds., 1999) (distinguishing between the "structuralist" mediation paradigm in which the third party uses "persuasion, incentives, and disincentives" to encourage settlement and "social-psychological approaches" to third-party intervention based on the goal of facilitating "processes of communication and exchange"); Loreleigh Keashly & Ronald J. Fisher, *Towards a Contingency Approach to Third Party Intervention in Regional Conflict: A Cyprus Illustration*, 45 *INT'L J.* 425, 434 (1990) (distinguishing between the third-party approach of "consultation," premised on the belief that an improved relationship between disputants will lead to a good substantive outcome, and "mediation" premised on the belief that a good substantive settlement will lead to a better relationship); I. William Zartman & Saadia Touval, *International Mediation: Conflict Resolution and Power Politics*, *J. Soc. ISSUES*, Spring 1985, at 27, 38-39 (distinguishing between mediators that play the role of a "communicator" or "formulator" from those that play the role of a "manipulator").

8. See *The Geneva Accord* (Draft Permanent Status Agreement) (Oct. 2003), available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=351461> (last visited Dec. 12, 2004). The People's Voice draft agreement, proposed last September by former Israeli Shin Bet security chief Ami Ayalon and Palestinian Sari Nusseibeh, prescribes a settlement quite similar to that of the Geneva Accord, calling for two states based on pre-1967 borders adjusted by equal territorial swaps, dismantlement of all Jewish settlements not covered by the land swap, an "open" Jerusalem with Israeli control over Jewish sectors of the city and religious sites and Palestinian control over Arab sectors and religious sites, and compensation but no right of return to Israel for Palestinian refugees from the 1948 War and their descendants. See *People's Voice* (July 27, 2002), available at <http://www.mifkad.org.il/en/principles.asp>.

Admittedly, the People's Voice initiative and the Geneva Accord do differ in some critical respects, most importantly in regard to Palestinian refugees. The People's Voice initiative quite clearly states that refugees shall have the right to return to the Palestinian state, but not to Israel. People's Voice. The Geneva Accord is more complex. Article VII specifically states that Israel will have complete "sovereign discretion" as to how many refugees it will accept, and further states that it will only have to accept the number that it submits to the International Commission overseeing the process. Geneva Accord art. 7, § 4(e)(iii). At the same time, however, the Accord creates a number of Technical Committees to "oversee and manage" the refugee issue, *id.* § 11(a)(iii)(1), which "shall have full and exclusive responsibility for implementing all aspects of this Agreement pertaining to refugees," *id.* § 11(a)(i), and "shall establish mechanisms for resolution of disputes arising from the interpretation or implementation of the

provisions of this Agreement relating to refugees." *Id.* § 11(c)(iv). Skeptics argue that providing for such committees presents a procedural opportunity to inflame the refugee issue and could allow a Commission so disposed to interpret the agreement to force Israel to take in hundreds of thousands of refugees. They argue that the Commission would be so disposed because of its members, only the United States would be sympathetic to Israel (other prominent members could include Arab states, the European Union, and Norway).

The foregoing describes the ambiguities contained in the Accord's English text. For these reasons, some sophisticated observers who believe in a two-state solution have expressed qualms about the Accord. See Asher Susser, *A Shaky Foundation*, HA'ARETZ, Dec. 15, 2003, <http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml>. Cf. M. Cherif Bassiouni, *Laudable in Rekindling Hope*, bitterlemons-international.org, at <http://www.bitterlemons-international.org/previous.php?opt=1&id=17> (Nov. 13, 2003) (noting that the Geneva Accord "fudges the issue"). There is little doubt in our minds that the best reading of Article VII protects Israel's interest on the issue, and that "sovereign discretion" actually means sovereign discretion. Thus, we feel confident, despite the differences, in aligning the Geneva Accord with the People's Voice initiative. Still, we acknowledge that the creation of the International Commission does introduce a potentially dangerous procedural wrinkle. Cf. Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong. 312 (1983) (statement of Rep. Dingell) ("I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time."); Karl N. Llewellyn, *THE BRAMBLE BUSH* 9 (1960) ("[W]hat substantive law says should be means nothing except in terms of what procedure says that you can make real.").

9 · See Poll: *Most Israelis, Palestinians Support Geneva Accord*, HA'ARETZ, Nov. 24, 2003, <http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml> (citing a poll finding that Israelis support the Accord 53% to 44% opposed, and Palestinians support it 56% to 39% opposed). Israeli support for the Accord declined toward the end of 2003; one commentator suggests that support "dropped as the public became aware of the full extent of its implications," "its identification with Yossi Beilin, who is viewed as Israel's leading dove," and "because of the Accord's European support."

See Palestinian Ctr. for Policy and Survey Research, *Public Opinion Poll #1*, <http://www.pcpsr.org/survey/polls/2000/p1a.html> (July 27-29, 2000). One could interpret this finding as showing that even before the current war, Palestinians supported terrorist activity. That said, it is also undeniable that support for Arafat and his Fatah Party, relative to more radical Palestinian groups, has taken a strong hit since the outbreak of the war. As Khalil Shikaki has noted, "the domestic legitimacy of the PA has been severely damaged. Its ability to provide services has been crippled, and the standing of Yasir Arafat and Fatah has dropped dramatically." Khalil Shikaki & David Makovsky, Wash. Inst. for Near East Pol'y, *Special Policy Forum Report: Assessing Palestinian-Israeli Violence: Two Years On*, PEACEWATCH No. 398, at <http://www.washingtoninstitute.org/watch/index.htm> (Oct. 3, 2002). In other words, a complicated process emerges whereby Israeli attacks undermine the PA and its ability to provide services, leaving a gap to be filled by Hamas. It is not clear that this trend will continue inexorably; instead, Hamas has achieved important political gains from the intifada and has been able to become the dominant force in Palestinian politics. It may have hit its maximum. See David Makovsky, Wash. Inst. for Near East Pol'y, *Israel and the Palestinians: An End of Year Assessment (Part I)*, *Peacewatch* No. 438, at <http://www.washingtoninstitute.org/watch/index.htm> (Dec. 23, 2003). Still, Makovsky concedes that opposition to the Accord only reached 50%, hardly a stinging rebuke. *Id.* Makovsky also reports that 58% of Palestinians opposed the Geneva Accord, mostly due to its provisions on refugees and its limitations on Palestinian sovereignty. *Id.* These poll results also suggest that political space exists to gain Palestinian approval. In addition, Makovsky states that only 37% of the Israeli public opposed the People's Voice initiative, and that the initiative had gained 100,000 Israeli and 60,000 Palestinian signatures through the end of October 2003. *UN's Annan Boosts Nusseibeh-Ayalon, Geneva Peace Plans*, HA'ARETZ, Oct. 29, 2003, <http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml>. A resolution along the lines of the Geneva Accord and People's Voice would also be unlikely to attract a French veto, as Paris has already endorsed the Accord. See *France, Belgium Draw Israeli Ire Over Geneva Accord*, EurActiv.com, <http://www.euractiv.com/Article?tcaturi=tcu:29-116516&type=News> (Oct. 28, 2003). French and Belgian support for the proposal is so strong that Israeli officials believe that Paris and Brussels are bankrolling it. See Gideon Alon & Aluf Benn, *Shalom: France, Belgium Offering \$7 Million To Promote Geneva Accord*, HA'ARETZ, Oct. 23, 2003, <http://www.haaretz.com/hasen/pages/arch/-ArchSearchEngArt.jhtml>. Former Israeli Foreign Minister Shlomo Ben-Ami has called for a Security Council resolution embodying the Clinton Plan of December 2000, which is referenced in the Geneva Accord and is essentially restated by

People's Voice. See Shlomo Ben-Ami, *The Security Council May Hold the Key*, INT'L HERALD TRIB., Nov. 13, 2003, at 6.

¹⁰ See *To Israelis and Palestinians: A Statement of Support*, N.Y. REV. BOOKS, Jan. 15, 2004, at 46. As we argue below, international actors play a crucial role in maintaining both the Israeli and the Palestinian positions. Thus, strong international support of the American proposal would also significantly assist in creating the bargaining zone because this could change the adversaries' BATNAs. See Part VI.B.2 *infra*.

¹¹ Interview with Daniel Pipes, CNN Newsnight (CNN television broadcast, Mar. 26, 2002), available at <http://www.danielpipes.org/article/144>.

¹² For specific figures, see Central Intelligence Agency, World Factbook: Israel, at <http://www.cia.gov/cia/publications/factbook/geos/is.html> (last updated Nov. 2, 2004) [hereinafter World Factbook: Israel].

¹³ See, e.g., David Makovsky, *How to Build a Fence*, FOREIGN AFF., Mar./Apr. 2004, at 50, 62: [M]any Israelis of both parties have long considered the Jordan Valley essential to their security . . . [But] as former IDF Strategic Division Head General Shlomo Brom and others note, there has not been an interstate war against Israel since 1973, and Israel has since signed peace treaties with Egypt and Jordan. Syria's military prowess has been greatly weakened by the loss of its Soviet patron and the end of the Cold War, and the U.S. toppling of Saddam Hussein has removed the Iraqi threat. The Jordan Valley is therefore no longer a likely gateway for an invading Arab army.

¹⁴ A 2002 Israeli National Security Council report concluded that continued occupation of the Territories endangers both the Jewish and the democratic character of Israel. See Aluf Benn, *Background: Mapping out Israel's Future*, HA'ARETZ, Aug. 23, 2002, <http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml>.

¹⁵ See, e.g., Erik Schechter, *Back to Square One?*, JERUSALEM POST, July 11, 2003, at 1B (observing that Palestinian terrorist groups caused "a tremendous amount of psychological, economic and military pain to Israel," and "terrorism within the Green Line costs Israel . . . 14 to 19 billion [shekels] a year in lost revenue and the country's GDP per capita is plummeting at a rate of 3% per year").

¹⁶ See, e.g., Bernard Wasserstein, ISRAELIS AND PALESTINIANS: WHY DO THEY FIGHT? CAN THEY STOP?, 141-45 (2003).

¹⁷ Recent polls have found, for example, that 78% of Israelis support withdrawal from most of the settlements in the Territories, and even a (slim) majority of conservative Likud voters were willing to accept a Palestinian state. See James Bennet, *Israel Coalition Nears Collapse in Budget Fight*, N.Y. TIMES, Oct. 30, 2002, at A1.

¹⁸ The phrase is actually that of Hizbullah leader Sheikh Hassan Nasrallah. Farid Mustafa, *In Hizbullah's Footsteps?*, JERUSALEM POST, June 2, 2000, at 3B. See also Efraim & Inari Karsh, *EMPIRES OF THE SAND: THE STRUGGLE FOR MASTERY OF THE MIDDLE EAST*, (2000) at 181-82; showing the influence of Lebanon withdrawal on Palestinian strategic thinking). For excellent histories of the collapse of the Ottoman Empire and the creation of the British Mandate, see Efraim & Inari Karsh, *EMPIRES OF THE SAND: THE STRUGGLE FOR MASTERY OF THE MIDDLE EAST, 1789-1923* (2000); David Fromkin, *A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST* (1990). An important although highly controversial description of Jordan's conquest of the West Bank in 1948-1949 is Avi Shlaim, *COLLUSION ACROSS THE JORDAN: KING ABDULLAH, THE ZIONIST MOVEMENT, AND THE PARTITION OF PALESTINE* (1988). Shlaim's work receives a thorough, trenchant, and respectful critique in Itamar Rabinovich, *THE ROAD NOT TAKEN: EARLY ARAB-ISRAELI NEGOTIATIONS* (1991), which also provides important background on Jordanian actions. It receives a thorough, trenchant, and not-very-respectful critique in Efraim Karsh, *FABRICATING ISRAELI HISTORY: THE "NEW HISTORIANS"* 69-193 (1997). Another excellent history of the 1948 war is Yoav Gelber, *PALESTINE 1948: WAR, ESCAPE AND THE EMERGENCE OF THE PALESTINIAN REFUGEE PROBLEM* (2001).

¹⁹ See Wasserstein, *supra* note 16. Glenn E. Robinson, *Being Yasir Arafat: A Portrait of Palestine's President*, 82 FOREIGN AFF., Nov./Dec. 2003, at 136, 138 ("Polls consistently show that about 70 percent of Palestinians [in the Territories] want a twostate solution and believe in reconciliation with Israel after the Palestinian state is created."); *Palestinian Ctr. for Pol'y and Surv. Res.*, Poll No. 5, <http://www.pcpsr.org/survey/polls/2002/psepressrelease.html> (Aug. 26, 2002) (finding 73% of surveyed Palestinians residing in the Territories support reconciliation between the Israeli and Palestinian people on the basis of Israeli recognition of a Palestinian state).

²⁰ The best description of the poll's findings and guide to interpreting it is found on the website of the Saban Center at the Brookings Institution. Khalil Shikaki, *PALESTINIAN REFUGEES: PREFERENCES IN A FINAL ISRAELI-PALESTINIAN PEACE AGREEMENT*, LUNCHEON DISCUSSION (July 16, 2003),

<http://www.brookings.edu/fp/saban/events/20030716.pdf>.

21. *Id.*

22. *Id.*

23. This approach is called "mediat[ion] with muscle." See TOUVAL, *supra* note 1; KEASHLY & FISHER, *supra* note 7, at 438.

24. Cf. Daniel Ehrenfeld et al., *Aid Conditionality and the Peace Process: An Analysis of Its Implementation*, INT'L J. WORLD PEACE 59 (2003).

25. Cf. Chester A. Crocker et al., *Multiparty Mediation and the Conflict Cycle*, in HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD, *supra* note 7, at 19, 31 (noting that "offers of side-payments or coercive threats" will sometimes have to be used by third parties to change the "cost-benefit calculus of warring parties away from violence to a consideration of various political alternatives"); Jeffrey Z. Rubin, *Conclusion: International Mediation in Context*, in MEDIATION IN INTERNATIONAL RELATIONS 249 (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992) (discussing "reward power" and "coercive power" employed by mediators).

26. For a typology of power that includes the use of these terms, see *id.* at 249, 255.

27. The Arab-Israeli conflict demonstrates the importance to would-be peace-makers of the ability to use positive and negative leverage to affect the choices of disputants. In a careful study of mediative interventions in the region, Saadia Touval juxtaposes a description of a failed mediation attempt in which a U.N. envoy "possessed no resources that could enable him to provide incentives or to threaten punishment" with the effort of an American envoy (acting on behalf of the United Nations) the following year who succeeded in brokering an Arab-Israeli armistice, in part due to his potential ability to "affect U.S. attitudes and relationships with the government[s] in question," all of whom wanted diplomatic or economic assistance from Washington. TOUVAL, *supra* note 1, at 51-52, 72-73. Touval also, in explaining how U.S. Secretary of State Henry Kissinger succeeded in forging a series of Arab-Israeli agreements in the early 1970s, calls the "weight of American pressure and the lure of U.S. incentives . . . the decisive impact." *Id.* at 281.

28. See, e.g., Yossi Alpher, EIGHTEEN MORE MONTHS AT LEAST, bitterlemons.org, at <http://www.bitterlemons.org/previous/bl290903ed37.html> (Sept. 29, 2003) (noting that while Israel has the ability to deal with its major threats, "the Jewish body politic appears to be paralyzed by fear" of, inter alia, "angry settlers and their rabbis").

29. See *The Price of the Settlements*, HA'ARETZ, Sept. 26, 2003, <http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml> (noting that the Israeli government spends 2.5 billion shekels per year on the settlements and 40,000 shekels per settler family over and above the normal funds spent per citizen); Moti Bassok, *Decades of Tax Breaks for the Settler Population*, HA'ARETZ, Sept. 26, 2003, <http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml>. The settlers have, in fact, brilliantly used their leverage between the larger parties to extract enormous benefits out of proportion to their numbers. In a classic article, Albert Hirschmann demonstrated the underlying logic of this strategic behavior. See Albert O. Hirschmann, *The Stability of Neutralism: A Geometric Note*, in ECONOMIC THEORIES OF INTERNATIONAL POLITICS 292-99 (Bruce M. Russett ed., 1968) (showing how "Thiridonia" can extract large payments out of "Usonia" and "Russonia").

30. See *infra* Part V.C.2.a.

31. For a detailed description of Clinton's post-Camp David ideas, see Dennis Ross, THE MISSING PEACE at 784 (2004); ("President Bush . . . believe[d] that we had indulged Arafat too much.")

32. Cf. Lawrence Susskind & Eileen Babbit, *Overcoming Obstacles to Effective Mediation of International Disputes*, in MEDIATION IN INTERNATIONAL RELATIONS, *supra* note 25, at 30, 33 (noting that a condition of mediation effectiveness is that party representatives have "authority to speak for their members and to commit to a course of action").

33. For a background on the settler movement and its role in the Likud, see Isabel Kershner, *Tearing Ourselves Apart*, JERUSALEM REP., Nov. 18, 2002, at 12. Over the last four years, right-wing settler movements have become more influential within the Likud party. See Leslie Susser, *The Infiltrators*, JERUSALEM REP., Dec. 2, 2002, at 34.

34. See, e.g., Gerald M. Steinberg, Israel's Best Option, bitterlemons.org, at <http://www.bitterlemons.org/previous/blo90204ed5.html> (Feb. 9, 2004) (noting that Sharon's "long-term core constituency" is the settler population located in "Judea, Samaria and Gaza").

35. As we suggested above, a U.S.-sponsored land-for-peace agreement might permit Israel to retain some settlement blocks that are located close to the Green Line, perhaps in return for territorial concessions elsewhere. See *supra* Part VI.A.2. Any land-for-peace proposal, however, would likely call on

Israel to evacuate a large number of settlements and turn the land over to Palestine.

36. Greg Myre, *Israeli Panel Approves Payout for Settlers Who Leave Gaza Strip*, N.Y. TIMES, Sept. 15, 2004, at A5.

37. By one estimate, relocating all Jewish settlers into Israel would cost \$6 billion. Dan Efron, *Middle East: The Sky's the Limit*, NEWSWEEK, May 27, 2002, at 44, 46.

38. See *supra* Part VI.B.2.a.

39. See *infra* Part VI.C.2.b.2.

40. See generally David Frum & Richard Perle, AN END TO EVIL: HOW TO WIN THE WAR ON TERROR (2004). Frum served as President George W. Bush's principal speechwriter during the first two years of the Bush administration; Perle formerly served on the Defense Intelligence Advisory Board and is a leading thinker in the neoconservative camp.

41. A representative statement can be found in Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1490-91 (2003).