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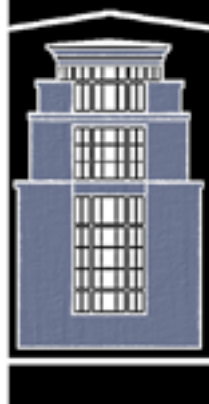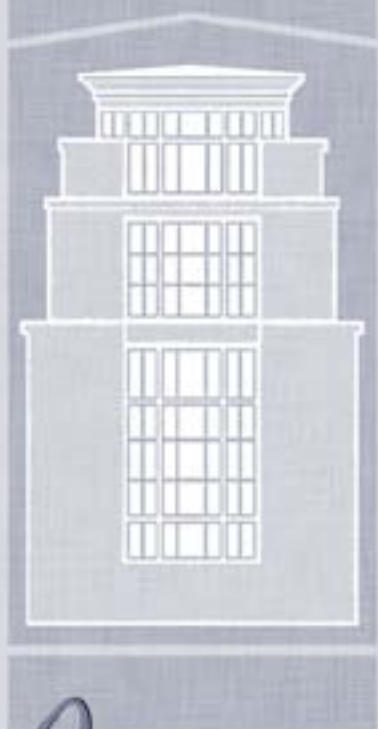
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This newest publication of UCLA School of Law acknowledges some of the celebrated work our faculty do in their respective fields of study. The writings of our faculty can ignite public debate, initiate policy changes and assist our lawmakers in their endeavors to create just laws.

With its influential scholarship and sharp focus on today's most pertinent issues, UCLA School of Law's faculty is emerging as the strongest in the nation. This year, many of our faculty published interesting and nuanced writings on a variety of relevant topics. With this inaugural issue of the Journal of UCLA School of Law, we are thrilled to share excerpts from some of these writings.

We hope to bring you a new edition of this Journal each summer, so that you can stay abreast of what some of our most renowned faculty members are achieving each year.

TABLE OF CONTENTS

Khaled Abou El Fadl

Professor Khaled Abou El Fadl is one of the leading authorities in Islamic law in the United States and the world, and has studied Islamic legal sciences in Egypt, Kuwait and the United States. He has been a member of the UCLA law faculty since 1998. Dr. Abou El Fadl has written ten books, the most recent being "Islam and the Challenge of Democracy" (2004), an insightful discourse on the challenges of democracy in contemporary Islam. He also has published numerous articles that have been translated into many languages, and has been interviewed and quoted on Islamic issues in major publications around the globe.

Islam and the Challenge of Democracy†

Dr. Khaled Abou El Fadl*

Like the well-known Muslim historian and sociologist Ibn Khaldun (d. 784/1382), a jurist writing a few centuries ago on the subject of Islam and systems of government would have commenced his treatise by separating all political systems into three broad types. The first, such a jurist would have described as a natural system—a system that approximates a primitive state of nature. This is an uncivilized system of lawlessness and anarchy in which the most powerful in society dominates and tyrannizes the rest. In such a system, instead of law, there would be custom, and instead of government, there would be tribal elders that are respected and obeyed only as long as they remained the strongest and the most physically able. The second system would be described as dynastic, which according to Muslim jurists, are tyrannical as well. Such systems are based not on custom, but on laws issued by a king or prince. However, according to Muslim jurists, such a system would be illegitimate as well. Because the king or prince is the source of the law, the system is considered baseless, whimsical, and capricious. In such a system, people obey laws out of necessity or compulsion, but the laws themselves are illegitimate and tyrannical. The third system, and the most superior, is the Caliphate, which is based on Shari'ah law. Shari'ah law, according to Muslim jurists, fulfills the criteria of justice and legitimacy, and binds the governed and governor alike. Because the government is bound by a higher law that may not be altered or changed, and because the government may not act whimsically or outside the pale of law, the Caliphate system is superior to any other.[1]

Many Muslim scholars, like Ibn Khaldun, consistently made the same assumption: the Islamic political system was considered as if a challenge to the world. While all other polities are doomed to despotic governance, and their laws are individualistic and whimsical, the Caliphate system of governance is superior because it is based on the rule of law.[2] Whether as a matter of historical practice this assumption was justified or not, the material point was that classical Muslim jurists exhibited a distinct aversion to whimsical or unrestrained government. A government bound by Shari'ah was considered meritorious in part because it is a government where human beings do not have unfettered authority over other human beings, and there are limits on the reach of power. So, for instance, a Sunni jurist such as Abu al-Faraj Ibn al-Jawzi (d. 597/1200) asserted that a Caliph who tries to alter God's laws for politically expedient reasons is implicitly accusing the Shari'ah of imperfection.[3] Ibn al-Jawzi elaborated upon this by contending that, without the rule of Shari'ah, under the guise of political expediency or interests, a ruler may justify the murder of innocent Muslims. In reality, he argued, no political interest could ever justify the killing of a Muslim without legitimate legal cause,

and it is this type of restraint that demonstrates the superiority of a Shari'ah system over the other two alternative systems of governance.[4]

This classical debate is rather fascinating for several reasons. It is fair to say that in the contemporary age, the challenge of good governance is posed most aptly by a democratic system of government, and not simply by limited or restrained government. In espousing the principle of limited government and the rule of law, classical Muslim scholars were, in fact, asserting principles that are at the core of all democratic practices in the modern world. But it is important to recognize that the idea of limited government is no longer in this day and age, by itself, sufficient for proving the merit of a particular system of governance. Today, the system of government that has the strongest and most compelling claim to legitimacy, and moral virtue, is a democracy. The mere fact that, with very few exceptions, every despotic regime in the world today claims to be more democratic, and less authoritarian, is powerful evidence of the challenge democracies pose to the world. Most authoritarian governments claim to be popular with the people they rule over, and attempt to conceal the appearance of despotism and arbitrariness, but in doing so, they also tacitly affirm the primacy and moral superiority of the democratic paradigm in the modern age. Although limited government and the rule of law are necessary for the establishment of a democratic order, these are not the elements that give a democracy its moral and persuasive power. The legitimacy of a democratic order is founded on the idea that the citizens of a nation are the sovereign; and that a democratic government gives effect to the will of that sovereign through representation. As such, the people are the source of the law, and the law is founded on the basis of fundamental rights that protect the basic well being and interests of the individual members of the sovereign. Whether there is a written constitution or not, according to democratic theory, there must be a process through which the sovereign may guard and protect its rights and also shape the law. As far as Islam is concerned, democratic theory poses a formidable challenge. Put simply, if Muslim jurists considered law derived from a sovereign monarch to be inherently illegitimate and whimsical, what is the legitimacy of a system in which the law is derived from a sovereign, but the sovereign are the citizens of a nation? The brunt of the challenge to Islam is: If God is the only sovereign and source of law in Islam, is it meaningful to speak of a democracy within Islam, or even of Islam within a democracy, and can an Islamic system of government ever be reconciled with democratic governance?

Struggling to answer this question is an endeavor fraught with conceptual and political pitfalls. On the one hand, arguing that constitutionalism and Islamic political doctrines are compatible immediately raises the problem of historical and cultural anachronism. How can a modern concept reflecting values that evolved over centuries within a particular cultural context be sought in a remarkably different context? In many ways, democracy cannot be theorized, but must be practiced through a culture that is tolerant of the other, open to disagreement,

amenable to change, and that values the process, quite often regardless of the results it generates. On the other hand, denying that Islamic political doctrines could support a democratic order implies that Muslims are doomed to suffer despotism, unless they either abandon or materially alter their traditions. Furthermore, culture can be reconstructed and re-invented partly through the power of ideas, and if ideas are lacking, there is really never a possibility of a systematic or directed cultural change. Therefore, any time one portends to discuss whether Islam and democracy are compatible; one is also taking an implicit normative stance. This is so because both Islam and democracy are conceptual frameworks anchored in systems of commitment and belief. Both require a conviction and a conscientious dedication without which they cannot really exist. In the same way that it is possible to perform Islamic rituals without ever being a believing Muslim, it is also possible to have all the trappings and processes of a democracy without ever creating a democracy. It is possible for a country to have a constitution, parliament, judiciary, elections, and other institutions of democracy, without being democratic.[5] Similarly, it is possible for a government to implement the rules and regulations of Islamic law without being, in any real sense, Islamic.[6] What define either a democracy or Islam are the moral values that one associates with either one of these systems of belief, and the attitudinal commitments of their adherents. I say this because, in my view, the broad tradition of Islamic political thought contains ideas and institutions that could potentially support or undermine a democratic order. There are trajectories or potentialities found in historical Islamic doctrines that could be utilized to promote or oppose a democratic system of governance. However, saying this is akin to asserting that there are raw materials that could be utilized to manufacture finished products. But without the will power, inspired vision, and moral commitment, these raw materials remain of little use. Similarly, regardless of the doctrinal potentialities found in the Islamic tradition, without the necessary moral commitment, and conscientious understanding, there can be no democracy in Islam. At least for Muslims for whom Islam is the authoritative frame of reference, they must develop a conviction that democracy is an ethical good, and that the pursuit of this good does not constitute an abandonment of Islam.

Should Muslims strive towards a democratic system of government, and if so, why? Any honest approach to the issue should start with these basic questions. Arguably, Muslims might legitimately prefer a system of government that submits to the divine will, instead of abiding by the vagaries of human whimsies. Arguably, conceding sovereignty to God is more virtuous than accepting the sovereignty of human beings, and in fact, the very idea of human sovereignty smacks of self-idolatry. In addition, one might even contend that the only reason that some Muslims seek to establish a democratic system of governance is because of their infatuation with everything Western, instead of choosing to hold steadfast to what is legitimately and authentically Islamic.

These are formidable questions, but I believe they are also the wrong ones. The Qur'an did not specify a particular form of government, but it did identify social and political values that are central to a Muslim polity, and it urged Muslims to pursue and fulfill these values. Among such Qur'anically ordained values are: the promotion of social cooperation and mutual assistance in pursuit of justice,[7] the establishment of a consultative and non-autocratic method of governance,[8] and the institutionalization of mercy and compassion in social interactions.[9] Therefore, it would stand to reason that Muslims ought to adopt the system of government that is the most effective in helping Muslims promote the pertinent moral values, and, in this regard, it could be plausibly argued that democracy is the most effective system for doing so. If Muslims are convinced that democracy is the best available means for serving the moral purposes of their religion, it hardly seems relevant that democracy is a Western, or non-Western idea. What is relevant is the existence of a conviction and belief in the merits of a democratic system, as opposed to any other possible system, and a commitment to the fostering and promotion of such a system through the moral venues facilitated by Islamic law and ethics.

In my view, there are several reasons that commend democracy, and especially a constitutional democracy, as the system most capable of promoting the ethical and moral imperatives of Islam. These reasons are elaborated upon below, but in essence, I would argue that a democracy offers the greatest potential for promoting justice, and protecting human dignity, without making God responsible for human injustice or the infliction of degradation by human beings upon one another. As I have argued elsewhere, authoritarianism, if inflicted in the name of religion, is a transgression upon the bounds of God. Authoritarianism allows despots to usurp the divine prerogative by empowering some human beings to play the role of God.[10] In order to avoid having a small group of people appointing themselves as the voice of God, and speaking in God's name, there are two main options. Either we ought to deny everyone the authority to speak on God's behalf, or we endow everyone with that authority—either we allow no human being to be vested with the divine power, or we vest everyone with such a power. The former option is problematic because the Qur'an provides that God has vested all of humanity with divinity by making all human beings the viceroys of God on this earth; the later is problematic because a person that does good cannot be morally equated with a person who does evil—for instance, a saint does not have the same moral worth as a serial killer. A constitutional democracy avoids the problem by enshrining some basic moral standards in a constitutional document, and thus, guarantees some discernment and differentiation, but at the same time, a democracy insures that no single person or group becomes the infallible representatives of divinity. In addition, a democratic system offers the greatest possibility for accountability, and for resistance to the tendency of the powerful to render themselves immune from judgment. This is consistent with the imperative of justice in Islam. If in a political system, there are no institutional mechanisms to prevent the unjust from rendering themselves above judgment, then the system is itself unjust, irregardless

of whether injustice is actually committed or not. For instance, if there is a system in which there is no punishment for rape, this system is unjust, quite apart from whether that crime is ever committed or not. A democracy, through the institutions of the vote, separation and division of power, and guarantee of pluralism, at least offers the possibility of redress, and that, in and of itself, is a moral good.

…It is important to acknowledge that regardless of the practical merits identified, there are serious conceptual challenges that stand as if an obstacle to a democratic commitment in Islam namely, the religious law of Shari'ah, and the idea that the people, as the sovereign, can be free to flout or violate Shari'ah law. This requires that we delve into the epistemology of Shari'ah, and the meaning of God's sovereignty. The problem, however, has been that in contemporary Islam, there has not been a serious and systematic effort to evaluate either the concept of sovereignty or Shari'ah, as each may relate to modern political systems. The dominant Muslim responses to the challenge of democracy have tended to be either apologetic and defensive, or nationalistic and rejectionist, but both responses remained largely reactive. Muslim apologists, primarily as a means of emphasizing the compatibility of Islam with modernity, tended to claim that democracy already exists in Islam. Typically, they maintained that the Qur'an is the functional equivalent of a constitution, and also tended to recast the early history of Islam as if it were an ideal democratic experience. Apologists defended the public image of Islam by indulging in anachronisms, often pretending as if the Prophet was sent to humanity in order to teach it the art of democratic governance. Therefore, they would declare the fundamental compatibility between Islam and democracy as a conclusion to be accepted as a matter of faith and belief, rather than as a proposition to be argued and proven. Importantly, however, this assumption was not the product of a moral commitment to democracy, but rather was the result of a keen interest in power. A democratic Islam was simply the vehicle by which they sought to empower themselves against the onslaught of various competing political forces, and Islam was also the means by which they sought to bid for domination over others. This is why we find that many of the apologists, for instance, were affiliated with the Muslim Brotherhood movement in Egypt, or with some other religio-political movement in the Muslim world. This is also why we find that the political practices of the apologists do not reflect the type of ethical virtues associated with democratic thought, such as tolerance of dissent, or valuing intellectual and cultural diversity. For example, we find many of the American-Muslim organizations which consistently affirm the compatibility of Islam with democracy are, in fact, quite despotic both in their internal dynamics, and in the type of theology to which they adhere. This is because, for these organizations, democracy is affirmed politically, but not believed or internalized ethically.[11]

The second main response in modern Islam has been to insist that the Islamic political system is different and unique, and to argue that such a system might overlap with a democracy in some regards and might depart on others. The main

emphasis of this approach is on cultural or intellectual independence and autonomy, and therefore, any attempt to commit to a democratic system of governance is seen as a sign of surrender to what is called the Western intellectual or cultural invasion of the Muslim world. For instance, the Pakistani propagandist Abu al-A'la al-Mawdudi contended that the Islamic system of government is a theo-democracy, which, he insisted, is very different from either a theocracy or a democracy.[12] In addition, adherents of this approach frequently proclaim that the political system of Islam is a shura government, which they claim has nothing to do with a democratic system of government. Like the apologist approach, this trend is largely reactive in the sense that it defines itself solely by reference to the perceived "other." According to this orientation, an Islamic system cannot be democratic simply because the West is. But, rather inconsistently, the partisans of this approach often spend a considerable amount of energy trying to prove that Western democracies are hypocritical, and that they are not democracies at all. It is as if they see the merits of a democracy, but out of a blind sense of nationalistic tribalism, they insist that the West does not really have it, and Muslims ought not pursue it. Importantly, however, what the adherents of this approach claim to be of essence to an Islamic political system is as alien, or indigenous, to Islam as is a democratic system of government. In other words, the adherents of this approach construct a reactive symbolism of what an Islamic system ought to be, but such symbolism is not necessarily derived from any genuine and authentic Islamic historical experience. It is wholly and completely derived from what they believe the "other" is not, and consequently, that derived construct is as much of a historical anachronism, as is a democratic vision of the Prophet and his companions' polity. It is fair to say that the adherents of this orientation are far more anti-Western than they are pro-Islamic.

The dominance of the apologetic or rejectionist orientations throughout the Colonial and post-Colonial eras in Islam have resulted in the stunting of the Islamic creative impulse towards the challenge of democracy. Is Islam compatible with a democracy? The response can only be that it depends on whether there are a sufficient number of Muslims willing to commit to the democratic ideal, and willing to undertake the type of critical re-appraisal of Islamic theology and law in order to give full effect to this commitment. Thus far, most of the efforts at achieving this have been on largely functionalist and opportunistic grounds that, if anything, ultimately discredit the very idea of reform within Islam. Overwhelmingly, contemporary Muslim reformers have attempted to justify a democracy in Islam solely on the grounds of *maslaha* (public interest). Typically, such reformers are satisfied with asserting that most of Islamic law may be changed to serve the public interests of Muslims, and jump from that assertion to the conclusion that the adoption of democracy ought not pose any serious obstacles because of the primacy of deference to public interest in Islamic jurisprudence. The fact is that such reformers have also tended to come from the ranks of people who have nothing more than the most superficial familiarity with the epistemology and

methodology of Islamic jurisprudence. In addition, the logic of public interest is like a harlot; it offered its services, as effectively, to democrats and despots alike. Between the often opportunistic logic of reformers, the obstinacy of rejectionists, and the insincerity of apologists, the possibilities for a democracy within Islam have not been seriously explored…

In the modern age, a large number of commentators have grown comfortable with the habit of producing a laundry list of concepts such as *shura* [consultative deliberations], the contract of the Caliphate, the idea of *bay'a* [allegiance or consent to the Caliph] and the supremacy of Shari'ah, and then concluding that Islam is compatible with democracy. In my view, these types of vacuous approaches are the product of intellectual torpor induced by the rather abysmal fortunes of the Islamic heritage in the modern age. Islamists who have pursued this superficial and apologetic method of dealing with the challenge of democracy in the modern age have done so largely in reaction to internal calls for the full-fledged adoption of secularism in Muslim societies. For these Islamists, secularism has come to symbolize a misguided belief in the supremacy of rationalism over faith, and a sense of hostility to religion as a source of guidance in the public sphere. In fact, secularism is seen as originating with Westernized intellectuals who were themselves not religious, and who sought to minimize the role of Islam in public life. As such, secularism, known as *'ilmaniyya*, is often treated as a part of the Western intellectual invasion of the Muslim world, both in the period of Colonialism and post-Colonialism—an invasion that is more insidious and dangerous than the Christian Crusades.[13]

While I do disagree with these reactive accusations against the secularist paradigm, I do agree that secularism has become an unworkable and unhelpful symbolic construct. To the extent that the secular paradigm relies on a belief in the guidance-value of reason as a means for achieving utilitarian fulfillment or justice, it is founded on a conviction that is not empirically or morally verifiable. One could plausibly believe that religion is an equally valid means of knowing or discovering the means to happiness or justice.[14] In addition, given the rhetorical choice between allegiance to the Shari'ah and allegiance to a secular democratic state, quite understandably most devout Muslims will make the equally rhetorical decision to ally themselves with Shari'ah. But beyond the issue of symbolism, as noted earlier, there is a considerable variation in the practice of secularism. It is entirely unclear to what extent the practice of secularism requires a separation of church and state, especially in light of the fact that there is no institutional church in Islam. Put differently, to what extent does the practice of secularism mandate the exclusion of religion from the public domain, including the exclusion of religion as a source of law?[15] But the fact that secularism is a word laden with unhelpful connotations in the Islamic context should not blind us to the seriousness of the concerns that secularists have about a political order in which Shari'ah is given deference or made

supreme. Shari'ah enables human beings to speak in God's name, and effectively empowers human agency with the voice of God. This is a formidable power that is easily abused, and therefore, it is argued, secularism is necessary to avoid the hegemony and abuse of those who pretend to speak for God. The challenge this poses for a democratic order is considerable because Shari'ah is a construct of limitless reach and power, and any institution that can attach itself to that construct becomes similarly empowered. Yet, Islamists, and secularists, often ignore the historical fact that the *'ulama*, until the modern age, never assumed power directly, and that Islamic law was centralized and codified only when it came under the influence of the French Civil Law system. Until the Ottoman Empire, no state succeeded in adopting a particular school of law as the law of the state, and even after the Ottomans adopted Hanafism as the official school of the state, the Ottomans never managed to enforce this school to the exclusion of the others. The very idea of a centralized and codified Shari'ah law was instigated by jurists, educated in the Civil law system, who sought to reform and modernize Islamic law by making it more adaptable to the needs of the modern nation-state. But it is important to realize that Shari'ah law, as a codified, state sponsored set of positive commands, is a serious break with tradition, and is a radical departure from the classical epistemology of Islamic law.

In order to engage in a more nuanced discourse on the dynamics between the Shari'ah and the state, it is necessary that we develop a more sophisticated understanding of Shari'ah itself…As part of this foundation, it is important to appreciate the centrality of Shari'ah to Muslim life. The pre-modern jurist Ibn Qayyim appropriately captures this sentiment in the following statement describing Shari'ah:

> "The Shari'ah is God's justice among His servants and His mercy among His creatures. It is God's shadow on this earth. It is His wisdom which leads to Him in the most exact way and the most exact affirmation of the truthfulness of His Prophet. It is His light which enlightens the seekers and His guidance for the rightly guided. It is the absolute cure for all ills and the straight path which if followed will lead to righteousness…It is life and nutrition, the medicine, the light, the cure and the safeguard. Every good in this life is derived from it and achieved through it, and every deficiency in existence results from its dissipation. If it had not been for the fact that some of its prescriptions remain [in this world], this world would become corrupted and the universe would be dissipated…If God would wish to destroy the world and dissolve existence, He would void whatever remains of its injunctions. For the Shari'ah which was sent to His Prophet…is the pillar of existence and the key to success in this world and the Hereafter."[16]

Shari'ah is God's Way; it is represented by a set of normative principles, methodologies for the production of legal injunctions, and a set of positive legal rules. As is well known, Shari'ah encompasses a variety of schools of thought and approaches, all of which are equally valid and equally orthodox.[17] Nevertheless, Shari'ah as a whole, with all its schools and variant points of view, remains the Way and law of God. The Shari'ah, for the most part, is not explicitly dictated by God. Rather, Shari'ah relies on the interpretive act of the human agent for its production and execution. Paradoxically, however, Shari'ah is the core value that society must serve. The paradox here is exemplified in the fact that there is a pronounced tension between the obligation to live by God's law, and the fact that this law is manifested only through subjective interpretive determinations. Even if there is a unified realization that a particular positive command does express the Divine law, there is still a vast array of possible subjective executions and applications. This dilemma was resolved, somewhat, in Islamic discourses by distinguishing between Shari'ah and *fiqh*. Shari'ah, it was argued, is the Divine Ideal, standing as if suspended in mid-air, unaffected and uncorrupted by the vagaries of life. The *fiqh* is the human attempt to understand and apply the ideal. Therefore, Shari'ah is immutable, immaculate, and flawless—*fiqh* is not.[18]

As part of the doctrinal foundations for this discourse, Sunni jurists focused on the tradition attributed to the Prophet stating: "Every *mujtahid* (jurist who strives to find the correct answer) is correct" or "Every *mujtahid* will be [justly] rewarded."[19] This implied that there could be more than a single correct answer to the same exact question. For Sunni jurists, this raised the issue of the purpose or the motivation behind the search for the Divine Will. What is the Divine Purpose behind setting out indicators to the Divine law and then requiring that human beings engage in a search? If the Divine wants human beings to reach *the* correct understanding, then how could every interpreter or jurist be correct? The juristic discourse focused on whether or not the Shari'ah had a determinable result or demand in all cases, and if there is such a determinable result, are Muslims obligated to find it? Put differently, is there a correct legal response to all legal problems, and are Muslims charged with the legal obligation of finding that response? The overwhelming majority of Sunni jurists agreed that good faith diligence in searching for the Divine Will is sufficient to protect a researcher from liability before God.[20] As long as the reader exercises due diligence in the search, the researcher will not be held liable nor incur a sin regardless of the result. Beyond this, the jurists were divided into two main camps. The first school, known as the *mukhatti'ah*, argued that ultimately, there is a correct answer to every legal problem. However, only God knows what the correct response is, and the truth will not be revealed until the Final Day. Human beings, for the most part, cannot conclusively know whether they have found that correct response. In this sense, every *mujtahid* is correct in trying to find the answer, however, one reader might reach the truth while the others might mistake it. God, on the Final Day, will inform all readers who was right and who was wrong. Correctness here means that the

mujtahid is to be commended for putting in the effort, but it does not mean that all responses are equally valid.

The second school, known as the *musawwibah*, included prominent jurists such as al-Juwayni, Jalal al-Din al-Suyuti (d. 911/1505), al-Ghazali (d. 505/1111) and Fakhr al-Din al-Razi (d. 606/1210), and it is reported that the Mu'tazilah were followers of this school as well.[21] The *musawwibah* argued that there is no specific and correct answer (*hukm mu'ayyan*) that God wants human beings to discover, in part, because if there were a correct answer, God would have made the evidence indicating a Divine rule conclusive and clear. God cannot charge human beings with the duty to find the correct answer when there is no objective means to discovering the correctness of a textual or legal problem. If there were an objective truth to everything, God would have made such a truth ascertainable in this life. Legal truth, or correctness, in most circumstances, depends on belief and evidence, and the validity of a legal rule or act is often contingent on the rules of recognition that provide for its existence. Human beings are not charged with the obligation of finding some abstract or inaccessible legally correct result. Rather, they are charged with the duty to diligently investigate a problem and then follow the results of their own *ijtihad*. Al-Juwayni explains this point by asserting, "The most a *mujtahid* would claim is a preponderance of belief (*ghalabat al-zann*) and the balancing of the evidence. However, certainty was never claimed by any of them (the early jurists)…If we were charged with finding [the truth] we would not have been forgiven for failing to find it."[22] According to al-Juwayni, what God wants or intends is for human beings to search—to live a life fully and thoroughly engaged with the Divine. Al-Juwayni explains: it is as if God has said to human beings, "My command to My servants is in accordance with the preponderance of their beliefs. So whoever preponderantly believes that they are obligated to do something, acting upon it becomes My command."[23] God's command to human beings is to diligently search, and God's law is suspended until a human being forms a preponderance of belief about the law. At the point that a preponderance of belief is formed, God's law becomes in accordance with the preponderance of belief formed by that particular individual. In summary, if a person honestly and sincerely believes that such and such is the law of God, then, as to that person "that" is in fact God's law.[24]

The position of the second school (*musawwibah*), in particular, raises difficult questions about the application of the Shari'ah in society.[25] This position implies that God's law is to search for God's law, otherwise the legal charge (*taklif*) is entirely dependent on the subjectivity and sincerity of belief. The first school (*mukhatti'ah*) indicates that whatever law is applied is potentially God's law, but not necessarily so.[26] In my view, this raises the question: Is it possible for any state enforced law to be God's law? Under the first school of thought, whatever law the state applies, that law is only potentially the law of God, but we will not find out until the Final Day. Under the second school of thought, any law applied by the state

is not the law of God unless the person, to which the law applies, believes the law to be God's Will and Command. The first school suspends knowledge until we are done living, and the second school hinges knowledge on the validity of the process and ultimate sincerity of belief.

Building upon this intellectual heritage, I would suggest Shari'ah ought to stand in an Islamic polity as a symbolic construct for the Divine perfection that is unreachable by human effort. As Ibn Qayyim stated, it is the epitome of justice, goodness, and beauty as conceived and retained by God. Its perfection is preserved, so to speak, in the Mind of God, but anything that is channeled through human agency is necessarily marred by human imperfection. Put differently, Shari'ah as conceived by God is flawless, but as understood by human beings, Shari'ah is imperfect and contingent. Jurists ought to continue exploring the ideal of Shari'ah, and ought to continue expounding their imperfect attempts at understanding God's perfection. As long as the argument constructed is normative, it is an unfulfilled potential for reaching the Divine Will. Significantly, any law applied is necessarily a potential—unrealized. Shari'ah is not simply a collection of *ahkam* (a set of positive rules) but also a set of principles, methodology, and a discursive process that searches for the Divine ideals. As such, Shari'ah is a work in progress that is never complete. To put it more concretely, a juristic argument about what God commands is only potentially God's law, either because in the Final Day we will discover its correctness (the first school) or because its correctness is contingent on the sincerity of belief of the person who decides to follow it (the second school). If a legal opinion is adopted and enforced by the state, it cannot be said to be God's law. By passing through the determinative and enforcement processes of the state, the legal opinion is no longer simply a potential—it has become an actual law, applied and enforced. But what has been applied and enforced is not God's law—it is the state's law. Effectively, a religious state law is a contradiction in terms. Either the law belongs to the state or it belongs to God, and as long as the law relies on the subjective agency of the state for its articulation and enforcement, any law enforced by the state is necessarily not God's law. Otherwise, we must be willing to admit that the failure of the law of the state is, in fact, the failure of God's law and, ultimately, God Himself. In Islamic theology, this possibility cannot be entertained.[27]

Of course, the most formidable challenge to this position is the argument that God and His Prophet have set out clear legal injunctions that cannot be ignored. Arguably, God provided unambiguous laws precisely because God wished to limit the role of human agency and foreclose the possibility of innovations. However, there is a two-part response to this argument. Regardless of how clear and precise the statement of the Qur'an and Sunna, the meaning derived from these sources is negotiated through human agency. For example, the Qur'an states: "As to the thief, male or female, cut off (*faqta'u*) their hands as a recompense for that which they committed, a punishment from God, and God is all-powerful and all-wise."[28] Although the legal import of the verse seems to be clear, at a minimum, it requires

that human agents struggle with meaning of "thief," "cut off," "hands," and "recompense."[29] Dealing with the fact of human agency, the question is: Whatever the meaning generated from the text, can the human agent claim that with absolute certainty that the determination reached is identical to God's? A further point is that, even assuming that the issue of meaning is resolved, can the law be enforced in such a fashion that one can claim that the result belongs to God? God's knowledge and justice are perfect, but it is impossible for human beings to determine or enforce the law in such a fashion that the possibility of a wrongful result is entirely excluded. This does not mean that the exploration of God's law is pointless; it only means that the interpretations of jurists are potential fulfillments of the Divine Will, but the laws as codified and implemented by the state cannot be considered as the actual fulfillment of these potentialities.

Institutionally, it is consistent with the Islamic experience that the *ulama* can and do play the role of the interpreters of the Divine Word, the custodians of the moral conscience of the community, and the curators reminding and pointing the nation towards the Ideal that is God.[30] But the law of the state, regardless of its origins or basis, belongs to the state. It bears emphasis that under this conception, there are no religious laws that can or may be enforced by the state. The state may enforce the prevailing subjective commitments of the community (the second school), or it may enforce what the majority believes to be closer to the Divine Ideal (the first school). But, it bears emphasis; in either case, what is being enforced is not God's law. This means that all laws articulated and applied in a state are thoroughly human, and should be treated as such. This means that any codification of Shari'ah law produces a set of laws that are thoroughly human. These laws are a part of Shari'ah law only to the extent that any set of human legal opinions can be said to be a part of Shari'ah. A code, even if inspired by Shari'ah, is not Shari'ah—a code is simply a set of positive commandments that were informed by an ideal, but do not represent the ideal. Put differently, creation, with all its textual and non-textual richness can and should produce foundational rights, and organizational laws that honor and promote the foundational rights, but the rights and laws do not mirror the perfection of divine creation. According to this paradigm, democracy is an appropriate system for Islam because it denies the state the pretense of divinity. Moral educators have a serious role to play because they must be vigilant in urging society to approximate God, but not even the will of the majority can come to embody the full majesty of God. Under the worst circumstances, if the majority is not persuaded and insists on turning away from God, as long as they respect the fundamental rights of individuals, including the right to ponder creation and call to the way of God, those individuals who constituted the majority will have to answer, in the Hereafter, only to God. ❖

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1. Nizam Barakat, *Muqaddima fi al-Fikr al-Siyasi al-Islami* (Riyadh: Jami'at al-Malik Su'ud, 1985), 119.

2. See Abu al-Hasan 'Ali b. Muhammad b. Habib al-Mawardi, *al-Ahkam al-Sultaniyya* (Beirut: Dar al-Kutub al-'Ilmiyya, 1985), 19-21; al-Qadi Abu Ya'la Muhammad b. al-Husayn al-Farra', *al-Ahkam al-Sultaniyya* (Beirut: Dar al-Kutub al-'Ilmiyya, 1983), 28; Ann Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: Oxford University Press, 1981), 19; W. Montgomery Watt, *Islamic Political Thought:? The Basic Concepts* (Edinburgh: Edinburgh University Press, 1968), 102-103; Hanna Mikhail, *Politics and Revelation: Mawardi and After* (Edinburgh: Edinburgh University Press, 1995), 20-21; H.A.R. Gibb, "*Constitutional Organization*," in Law in the Middle East, vol. 1, *Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington D.C.: Middle East Institute, 1955): 3-27, 9, 12; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001); Muhammad Jalal Sharaf and 'Ali 'Abd al-Mu'ti Muhammad, *al-Fikr al-Siyasi fi al-Islam: Shakhsiyyat wa Madhahib* (Alexandria: Dar al-Jami'at al-Misriyya, 1978), 399; Yusuf Ibish, *Nusus al-Fikr al-Siyasi al-Islami: al-Imama 'ind al-Sunna* (Beirut: Dar al-Tali'ah, 1966), 55.

3. Abu al-Faraj al-Baghdadi Ibn al-Jawzi, *al-Shifa' fi Mawa'iz al-Muluk wa al-Khulafa'*, ed. Fu'ad Ahmad (Alexandria: Dar al-Da'wa, 1985), 55; *id.*, *al-Misbah al-Mudi' fi al-Khilaf al-Mustadi'*, ed. Ibrahim Najiyya (Baghdad: Matba'at al-Awqaf, 1979), 1:298.

4. Ibn al-Jawzi, *al-Shifa'*, 55, 57; *id..*, *al-Misbah*, 1:298.

5. Cases in point would be many third world countries that have all the formal trappings of democracies, but do not lead a democratic life.

6. In my view, a case in point would be Saudi Arabia, where many purported Islamic laws are in effect, but the government fails to embody most Islamic virtues or moralities.

7. Qur'an, 49:13; 11:119.

8. I am here referring to the concept of government through *shura*, which is discussed later.

9. Qur'an, 6:12, 54; 21:107; 27:77; 29:51; 45:20.

10. On this, see Khaled Abou El Fadl, *And God Knows the Soldiers: The Authoritative and Authoritarian in Islamic Discourses* (Lanham, Md.: University Press of America, 2001); Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001).

11. For instance, after writing for many years a regular column in an Islamic magazine, my column was suddenly terminated and my work banned because I disagreed with the leadership of the organization that publishes this magazine. Not surprisingly, this organization tirelessly proclaims the democratic nature of Islam, and even claims that the Prophet was a philosopher of democracy. But apologetic stances such as this often translate into a hypocritical despotism in actual practice.

12. See his main work on the subject, Abu al-A'la al-Mawdudi, *al-Khilafa wa al-Mulk*, Ahmad Idris, trans. (Kuwait: Dar al-Qalam, 1978), 13-21.

13. For instance, see, Muhammad al-Ghazali, *al-Ghazw al-Fikri wamtadd fi Faraghina* (Cairo: Dar al-Shuruq, 1998); Muhammad Jalal Kishk, *al-Ghazw al-Fikri* (Cairo: al-Mukhtar al-Islami, 1975); Yusuf al-Qaradawi, *al-Islam wa al-'Ilmaniyya* (Beirut: Mu'assasat al-Risalah, 1997); Tariq al-Bishri, *al-Hiwar al-Islami al-'Ilmani* (Cairo: Dar al-Shuruq, 1996); Salah al-Sawi, ed., *Tahafut al-'Ilmaniyya* (Cairo: al-Afaq al-Dawliyya li al-I'lam, 1992); Salah al-Sawi, ed., *al-Muwajaha bayna al-Islam wa al-'Ilmaniyya* (Cairo: al-Afaq al-Dawliyya li al-I'lam, 1992).

14. Christian Duquoc, ed., *Secularization and Spirituality* (New York: Paulist Press, 1969); Sayyed Hossein Nasr, *Islam and the Plight of Modern Man* (London: Longman, 1975); Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993); Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta, Georgia: Scholar's Press, 1993); Timothy L. Fort, *Law and Religion* (Jefferson, North Carolina: McFarland & Co., 1987); Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford: Oxford University Press, 1995); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); Milner S. Ball, *The World and the Law* (Chicago: University of Chicago Press, 1993).

15. The literature on the history, theory, and practices of secularism is vast. Most theoretical treatments understandably have remained wedded to the Western historical experience. See, Kriegel, *The State*, 123-134; Horace M. Kallen, *Secularism Is the Will of God: An Essay in the Social Philosophy of Democracy and Religion* (New York: Twayne Publishers, Inc., 1954); Harvey Cox, *The Secular City: Secularization and*

Urbanization in Theological Perspective (New York: Macmillan Co., 1965); Daniel Callahan, ed., *The Secular City Debate* (New York: Macmillan Co., 1966).

[16] Ibn Qayyim, *I'lam al-Muwaqqi'in*, vol. 3, 3. On the Shari'ah and competing comprehensive views of a moral life, see Abou El Fadl, "*Muslim Minorities and Self-Restraint in Liberal Democracies*," Loyola of Los Angeles Law Review 29:1525-42 (1996).

[17] The four surviving Sunni schools of law and legal thought are the Hanafi, Maliki, Shafi'I, and Hanbali schools. On the history of these schools, as well a those which are not extinct, such as the Tabari and Zahiri schools, see Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (Leiden: Brill, 1997). On the organization, structure, and curriculum of learning, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981).

[18] I am simplifying this sophisticated doctrine in order to make a point. Muslim jurists engaged in lengthy attempts to differentiate between the two concepts of *Shari'ah* and *fiqh*. See Mahmasani, *Fasafat al-Tashri'*, 21-24, 199-200; Weiss, *Spirit*, 119-121; Abu Zahra, *Usul al-Fiqh*, 291; Mustafa Zayd, *al-Maslaha fi Tashri' al-Islam wa Najm al-Din al-Tufi*, 2nd ed. (Cairo: Dar al-Fikr al-'Arabi, 1964), 22; Yusuf Hamid al-'Alim, *al-Maqasid al-'Ammah li al-Shari'ah al-Islamiyya* (Herndon, Va.: International Institute of Islamic Thought, 1991), 80; ?Muhammad b. 'Ali b. Muhammad al-Shawkani, *Talab al-'Ilm wa Tabaqat al-Muta'allimin: Adab al-Talab wa Muntaha al-'Arab* (n.p.: Dar al-Arqam, 1981), 145-151.

[19] The Arabic is "*kull mujtahid musib*" and "*li kull mujtahid nasib*". See, Abu al-Husayn Muhammad b. 'Ali b. al-Tayyib al-Basri, *al-Mu'tamad fi Usul al-Fiqh* (Beirut: Dar al-Kutub al-'Ilmiyya, 1983), 2:370-372; 'Ala' al-Dini 'Abd al-'Aziz b. Ahmadi al-Bukhari, *Kashf al-Asrar 'an Usul Fakhr al-Islam al-Bazdawi*, ed. Muhammad al-Mu'tasim bi Allah al-Baghdadi, 3rd ed. (Beirut: Dar al-Kitab al-'Arabi, 1997), 4:30-55; Abu Hamid al-Ghazali, *al-Mustasfa*, 2:363-367; Abu al-Ma'ali 'Abd al-Malik b. 'Abd Allah b. Yusuf al-Juwayni, *Kitab al-Ijtihad min Kitab al-Talkhis* (Damascus: Dar al-Qalam, 1987), 26-32; Abu Muhammad 'Ali b. Ahmad b. Sa'id b. Hazm al-Zahiri, *al-Ihkam fi Usul al-Ahkam* (Cairo: Dar al-Hadith, 1984), 5:68-81, 8:589-592; Muhammad b. Ahmad b. 'Abd al-'Aziz b.'Ali al-Fatuhi Ibn al-Najjar, *Sharh al-Kawkab al-Munir al-Musamma Mukhtasar al-Tahrir aw al-Mukhtabar al-Mubtakar Sharh al-Mukhtaasar fi Usul al-Fiqh*, eds. Muhammad al-Zuhayli and Nazir Hammad (Riyadh: Maktabat al-'Ubaykan, 1993), 4:488-492; Abu Bakr Ahmad b. 'Ali b. Thabit al-Khatib al-Baghdadi, *Kitab al-Faqih wa al-Mutafaqqih wa Usul al-Fiqh* (Cairo: Zakariyya 'Ali Yusuf, 1977), 245-250; Abu al-Thana' Mahmud b. Zayd al-Lamishi, *Kitab fi Usul al-Fiqh*, ed. 'Abd al-Majid Turki (Beirut: Dar al-Gharb al-Islami, 1995), 201-202; al-Qarafi, *Sharh*, 438-441; Fakhr al-Din al-Razi, al-Mahsul (1997), 6:29-36; Muhammad b. 'Ali b. Muhammad al-Shawkani, *Irshad al-Fuhul ila Tahqiq al-Haqq min 'Ilm al-Usul* (Beirut: Dar al-Kutub al-'Ilmiyya,n.d.), 383-389; Abu Ishaq Ibrahim b. 'Ali b. Yusuf al-Fayruzabadi al-Shirazi, *Sharh al-Lum'ah*, ed. 'Abd al-Majid Turki (Beirut: Dar al-Gharb al-Islami, 1988), 2:1043-1071; *id.*, *al-Tabsirah fi Usul al-Fiqh*, ed. Muhammad Hasan Haytu (Damascus: Dar al-Fikr, 1980), 496-508. In this context, Sunni jurists also debated a report attributed to the Prophet in which he says "whoever performs *ijtihad* and is correct will be rewarded twice and whoever is wrong will be rewarded once." See Jalal al-Din 'Abd al-Rahman b. Abi Bakr al-Suyuti, *Ikthilaf al-Madhahib*, ed. 'Abd al-Qayyum Muhammad Shafi' al-Bastawi (Cairo: Dar al-I'tisam, 1404 AH), 38; Ibn Hazm, *al-Ihkam*, 5:73-74, 8:591; *id.*, *al-Nubadh fi Usul al-Fiqh al-Zahiri*, ed. Muhammad Subhi Hasan Hallaq (Beirut: Dar Ibn Hazm, 1993), 119-120; Abu al-Hasan 'Ali b. 'Umar Ibn al-Qassar, *al-Muqaddimah fi al-Usul*, ed. Muhammad b. al-Husayn al-Sulaymi (Beirut: Dar al-Gharb al-Islami, 1996), 114-115; Mahfuz b. Ahmad b. al-Hasan Abu al-Khattab al-Kaluzani, *al-Tamhid fi Usul al-Fiqh*, ed. Muhammad b. 'Ali b.Ibrahim (Mecca: Markaz al-Bahth al-'Ilmi wa Ihya' al-Turath al-Islami, 1985), 4:317-318; al-Qarafi, *Sharh*, 440; Abu 'Abd Allah Muhammad b. Idris al-Shafi'I, *al-Risalah*, ed. Ahmad Muhammad Shakir (n.p.: Dar al-Fikr, n.d.), 494; al-Shirazi, *al-Tabsira*, 499; Muhammad b. 'Abd al-Hamid al-Asmandi, *Badhl al-Nazar fi al-Usul*, ed. Muhammad Zaki'Abd al-Barr (Cairo: Maktabat Dar al-Turath, 1992), 702-703.

[20] This juristic position is to be distinguished from the early theological school of the Murji'a (Murji'ites) of suspension of judgement. The Murji'a developed in reaction to the fanaticism of the Khawarij, who believed that the commission of a major sin renders a Muslim a non-believer. The Murji'a believed that major sins are offset by faith, and argued that punishment in the Hereafter is not everlasting. They also refused to take a position on political disputes, arguing that judgment over any political dispute ought to be suspended until the Final Day. See, A.J. Wensinck, "Al-Murdji'a," in *Shorter Encyclopedia of Islam*, 412. Most of the jurists I am describing above did not adhere to Murji'ite theology.

[21] For discussions of the two schools, see al-Bukhari, *Kashf*, 4:18; Abu Hamid Muhammad b. Muhammad al-Ghazali, *al-Mankhul min Ta'liqat al-Usul* (Damascus: Dar al-Fikr, 1980), 455; idem, *al-Mustasfa*, 2:550-551; Fakhr al-Din Muhammad b. 'Umar b. al-Husayn al-Razi, *al-Mahsul fi 'Ilm al-usul al-Fiqh*

(Beirut: Dar al-Kutub al-'Ilmiyya, 1988), 2:500-508; al-Qarafi, *Sharh*, 438; al-Zuhayli, *al-Wasit*, 638-655; Hasab Allah, *Usul al-Tashri'*, 82-83; Badran, *Usul al-Fiqh*, 474.

22. Al-Juwayni, *Kitab al-Ijtihad*, 50-51.

23. Al-Juwayni, *Kitab al-Ijtihad*, 61.

24. Sayf al-Din Abu al-Hasan 'Ali b. Abi 'Ali b.Muhammad al-Amidi, *al-Ihkam fi Usul al-Ahkam*, ed. 'Abd al-Razzaq 'Afifi, 2nd ed. (Beirut: al-Maktab al-Islami, 1402 AH), 4:183; Jamal al-Din Abi Muhammad 'Abd al-Rahim b. Al-Hasan al-Asnawi, *al-Tamhid fi Takhrij al-Furu' 'ala al-Usul*, 3rd ed. (Beirut: Mu'assasat al-Risalah, 1984), 531-534; Muhammad b. Al-Hasan al-Badakhshi, *Sharh al-Badakhshi Manahij al-'Uqul ma'a Sharh al-Asnawi Nihayat al-Sul* (Beirut: Dar al-Kutub al-'Ilmiyya, 1984), 3:275-281; Abu H amid al-Ghazali, *al-Mustasfa*, 2:375-378; al-Juwayni, *Kitabl al-Ijtihad*, 41; Abu al-Thana' Mahmud b. Zayd al-Lamishi, *Kitab fi Usul al-Fiqh*, ed. 'Abd al-Majid Turki (Beirut: Dar al-Gharb al-Islami, 1995), 202-203; al-Qarafi, *Sharh*, 440; Fakhr al-Diin al-Razi, *al-Mahsul* (1997), 6:34-35, 6:43-50; Sha'ban, *Usul al-Fiqh*, 418-419; Badran, *Usul al-Fiqh*, 474; al-Zuhayli, *al-Wasit*, 643.

25. I deal with these two schools of thought more extensively elsewhere, see Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001).

26. I am ignoring in this context the role of *ijma'* (consensus) because of the complexity of the subject. Some modern Muslims have argued that the doctrine of consensus is the normative equivalent of majority rule. I think this is a gross over simplification, and at any case, majority rule is not the same as a constitutional democracy that defers to majority determinations unless they violate fundamental rights.

27. Contemporary Islamic discourses suffer from a certain amount of hypocrisy in this regard. Often, Muslims confront an existential crisis if the enforced, so-called, Islamic laws result in social suffering and misery. In order to solve this crisis, Muslims will often claim that there has been a failure in the circumstances of implementation. This indulgence in embarrassing apologetics could be avoided if Muslims would abandon the incoherent idea of Shari'ah state law.

28. Qur'an, 5:38.

29. The Qur'an uses the expression *iqta'u*, from the root word *qata'a*, which could mean to sever or cut off, but it could also mean to deal firmly, to bring to an end, to restrain, or to distance oneself from. See, 'Allamah Ibn Manzur, *Lisan al-'Arab* (Riyadh: Dar al-Thabat, 1997), 11:220-228. Ahmed Ali argues that the word used in the Qur'an does not mean to amputate a limb, but means to "stop their hands from stealing by adopting deterrent means…" Ahmad Ali, *Al-Qur'an* (Princeton: Princeton University Press), 113. Classical jurists placed conditions that were practically impossible to fulfill before a limb could be amputated.

30. This proposal is nonsense unless the *'ulama'* regain their institutional and moral independence.

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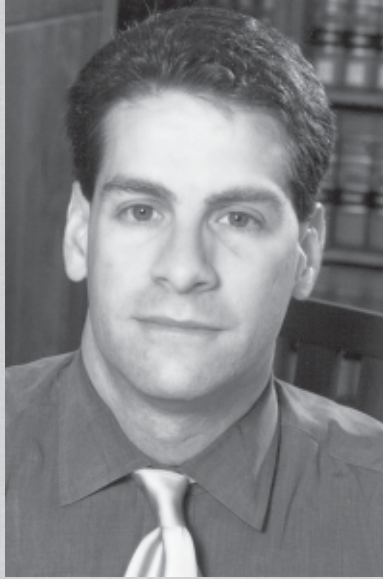
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in framing policy responses.

Roadblocks to the Road Map:†

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

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]

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…

BARGAINING ZONE

Israeli Reservation Point

Palestinian Reservation Point

Good for Palestinians

Good for Israelis

Israeli Surrender

Palestinian Surrender

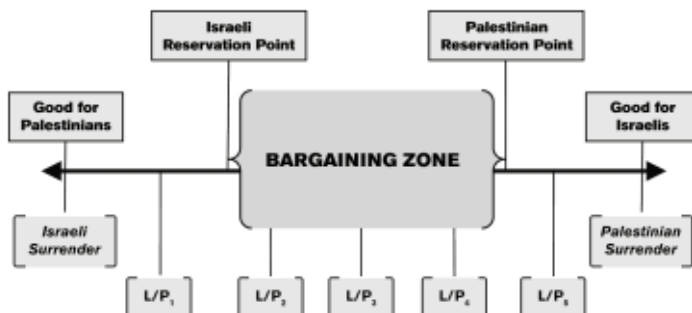L/P_1 L/P_2 L/P_3 L/P_4 L/P_5

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…

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…

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 that 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…

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…

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.

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.

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

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]

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.

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.

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]

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

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.jimmycarterlibrary.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"); Loraleigh 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?tcmuri=tcm: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/p5epressrelease.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 "Thirdonia" 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/bl090204ed5.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 Ephron, *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).

Gillian Lester

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A Defense of Paid Family Leave†

Gillian Lester*

The problem of combining work and family life is perhaps the central challenge for the contemporary American family. In this Article, I evaluate and defend government provision of paid family leave, a benefit that would allow workers to take compensated time off from work for purposes of family caregiving.

A legal intervention in the arena of work-family accommodation can only build on some prior normative understanding of the family, and embedded within that, contested value choices about women's identities and entitlements in workplace, family, and society. I am not the first legal scholar to advocate paid family leave of some kind.[1] The additional contribution here is to offer a normative defense of such a program based on its potential to increase the workforce participation of those who bear the principal obligation of caregiving-women. This, I argue, will increase equality of economic opportunity and the distribution of social power associated with status in paid labor markets. It also will enhance women's capacity to determine the conditions of their lives. In advocating paid family leave, I distinguish myself from those who would make family care subsidies available equally to caregivers who do and do not participate in the paid workforce, and from those who would shun workplace accommodations in favor of more "commodified" caregiving institutions external to the family.

Paid family leave is particularly valuable, I argue, because other possible alternatives, such as daycare, cannot entirely replicate the value of personal time away from work to engage directly in family caregiving. For women currently working who want to give personal care to family members but cannot afford adequate time off to do so, paid family leave will improve their quality of life and benefit those they care for. For women on the margin between working and staying home, the availability of paid leave may make market work more feasible and attractive, and as a result, increase their attachment to the workforce. At the same time, we must be wary of overly generous leave provision. Very generous leave provisions might encourage such lengthy absences from the job as to undermine women's development of human capital and connection to the workforce. Further, the method used to finance the program must be sensitive to important issues of distributive justice and the challenge of ensuring that the program confers gains on its intended beneficiaries. The government should spread at least some of the costs of the program beyond those workers—women in their childbearing years—most likely to take leave.

Paid family leave would have two components. It would have a family illness leave component, i.e., temporary paid leave for someone who is not herself

incapacitated, but who has a familial obligation to another person who is seriously ill or disabled. It would also have a parental leave component, covering non-medical temporary leave for purposes of allowing parents to nurture newborn children. The Family and Medical Leave Act ("FMLA") mandates that employers give up to twelve weeks of job-protected leave per year to workers who need to care for a newborn child or their own serious illness or the illness of a family member.[2] Coverage limitations mean that only about half of all workers, and less than one-third of steadily employed new mothers, receive these protections.[3] More importantly, the law does not require wage replacement. This makes the American system the least generous of industrialized nations. All western European nations have programs that give women workers the right to at least three months paid maternity leave, with as much as a year or more in some countries, as well as paid parental leave - for either parent.[4]

For workers who need to take time off to address family or medical needs, financial worries loom largest among their anxieties about taking leave.[5] The hardship of lost wages leads some workers to foreshorten their time away from work[6] or simply forgo a needed leave.[7] A sizeable percentage of workers who lack access to paid benefits resort to public assistance for support during family leaves.[8] Finally, although more difficult to measure, there are likely some workers who would enter or remain in the workforce if there were better prospects of supported family leaves, but who instead quit or stay home to address their family or medical needs.

Recently, the debate over paid family leave has been revitalized. In the past few years, twenty-one states have introduced bills to expand their unemployment insurance ("UI") programs to provide wage replacement to parents following the birth or adoption of a child.[9] In addition, several states are considering bills that would expand existing temporary disability insurance ("TDI") programs or create new public insurance schemes to provide paid parental or family illness leave.[10] In 2002, California became the first state in the nation to provide employees paid leave benefits not only for personal illness (including maternity leave), but also for parental bonding and caring for sick family members.[11] These developments make closer examination of paid family leave timely.

Although this Article deals exclusively with paid family leave policy, the goal of equalizing men's and women's respective contributions to both market work and family caregiving can only be achieved through a composite of interlocking social policies. For example, affordable, high-quality, publicly available childcare, while not a substitute for paid leave, is a critical part of the picture.[12] Effective antidiscrimination laws,[13] income tax policies that do not penalize dual-income married couples,[14] and a shorter workweek[15] are also key components. In addition, any paid leave policy we adopt must contain effective incentives for men to take leaves, [a challenge I pursue in some detail below].[16] Thus, paid leave is not the only

way to advance the goal of greater gender equality in the balance of work and family responsibilities, and paid leave cannot achieve such equality alone. Nevertheless, it is a crucial piece of the puzzle, deserving extended reflection in its own right…

Although paid leave alone cannot completely equalize the division of men's and women's respective contributions to family and market labor, in this section I argue that both theory and data suggest that it is a crucial piece of broader reform.

…Limited job availability and discrimination may make it difficult for the worker to find a match between her skills and the tasks of the job so that she can find a position as good as her previous employment.[17] As a result, she may decline to reenter the workforce, or may underinvest in developing her skills, knowing that downstream job-switching may reduce returns to the investment.[18]

The availability of family leave can alter these incentives, thereby increasing women's workforce attachment. Unpaid, or job-protected, leave such as the leave that the FMLA provides, reduces the risk of having to switch jobs after interrupting work to care for family members. Job-protected leave might, on the one hand, increase job interruptions because women who previously worked continuously for fear of losing their jobs will no longer face this risk. For other women, the availability of job-protected leave will increase their willingness to invest in skills that will advance their career with a particular employer because they know they will be able to recoup their investment. By allowing workers to return to their pre-leave position, job protection also reduces the degree of downward mobility associated with family-related career interruptions. It might also encourage some women to accept employment in the first place if they know that future family-related work interruptions will not jeopardize their employment security.

Adding a wage replacement component may further influence workers' leave decisions. Job protection is insufficient encouragement for some workers who need leave to actually take it.[19] Compensation would likely increase the willingness of these workers to take needed leaves. The fact that some workers may take longer leaves than they would have taken otherwise does not necessarily mean they will become less attached to work or experience downward mobility in the workforce. Some women, especially those who cannot afford *not* to work, will maintain a strong attachment to the workforce with or without paid family leave. In these cases, the availability of leave benefits may have a positive effect regardless of its neutrality with respect to workforce incentives. It may reduce the stress associated with balancing work and family, as well as improve the welfare of children and elders who receive care from these workers.

For other workers, the availability of paid family leave will decrease their workforce attachment. If wage replacement makes it possible for a worker to take a very long leave, for example, by combining paid and unpaid leave, the worker's workforce commitment may erode during the extended time away. She might decide she would prefer to exit the workforce, thus taking a longer hiatus from employment than she would have if she were limited to unpaid leave. In addition, skill erosion as well as the severing of her former employment relationship may mean that if she reenters the workforce later, she will find an inferior job match.

For still other workers, we would expect wage replacement to increase workforce participation. First, the availability of wage replacement in conjunction with job-protection during family-related work interruptions will make working (and investing in job skills) more attractive for some women on the margin between working and staying home or between working and accepting public assistance. In families with children, for example, a dual-earner arrangement, while increasing household wage income, also imposes opportunity costs in terms of foregone opportunities to give personal care and attention to those children. In addition to the financial cost of obtaining childcare, the family may also view the forgone opportunity of having a parent provide care *personally* as being psychologically costly.[20] For some workers in their childbearing years, especially those of average or low income, the anticipation of unpaid work interruptions in the approaching years may lead them to feel that their economic contribution to the family through paid employment will be outweighed by the economic and noneconomic opportunity costs of market work. A policy of providing wage replacement during leaves of absence may tip the balance of opportunity costs in such cases…

In addition, we might predict that some women who would have quit and switched employers if the leave were unpaid will be more likely to return to their previous employer if the leave is paid. A worker who receives wage benefits while on caregiving leave may feel a sense of reciprocity for having received paid benefits and may be more likely to return to the former employer as a result. Sociologists have observed that workers may develop norms of reciprocity akin to those in a gift-giving relationship as a result of receiving generous treatment.[21] Of course, if paid benefits are mandated, as this Article suggests, the worker who is attentive to the sources of the various components of her compensation package will not treat the wage replacement as a gift, and this impulse to reciprocate will not arise. I think it is plausible and indeed likely, however, that for many workers, the accounting behind what makes up a paycheck may not be so clear cut. The worker's experience of continuing to receive a paycheck from her employer during a period of family leave may well have the effect of boosting her morale, commitment, and sense of loyalty to the employer. In addition to the morale-boosting effect on workers, the existence of "mandated generosity" may have a spillover effect on some employers. Basic government mandates may encourage firms that wish to be seen as "high road" employers to go beyond minimum compliance and offer benefits that exceed

the floor. In light of this phenomenon, we might expect paid leave, even if mandated by the government, to play a norm-setting role for at least some employers, and in turn trigger reciprocity impulses that enhance employee loyalty in the aftermath of family-related work interruptions.[22]

We might also expect wage replacement to increase women's workforce attachment beyond job-protection mandates because some family units will make structural adjustments in response to reduced income. If a worker is unable to take an income-supported leave from work, the whole family may make adjustments to accommodate reduced income, e.g., moving to a cheaper apartment or having the father take on more work responsibility.[23] These adjustments may, in turn, create a new set of family norms, expectations, and economic needs, and reduce the impetus for the caregiving spouse to return to work following job interruption. Wage-protected family leave, because it will minimize shocks to family income from workers' job interruptions, may inhibit more permanent adjustments that in the short run simply ease the strain of downward mobility, but in the long term tend to entrench the division of men and women into their traditional roles.

In sum, economic theory predicts that government mandates requiring paid leave for maternity purposes will affect different mothers differently: some will be unaffected, some will take longer leaves, some will take leaves instead of quitting, and some will enter the workforce who would not have done so otherwise. How aggregate labor supply (and demand) will change are empirical questions. Certainly, paid leave may confer benefits on workers and society aside from its effects on women's workforce participation. For example, it may have the beneficial effects of improving parent-infant bonding, and improve the health outcomes of sick children and disabled elders. However, from the normative perspective of encouraging women's involvement in market work, a leave program that results in some women taking more and longer leaves, thus decreasing their workforce experience, will have a net positive effect only so long as it: (1) does not actually lead them to quit or take extremely long leaves, and (2) has the offsetting effect of encouraging other women to join the workforce or refrain from quitting.

The next Section, which analyzes empirical studies on the relationship between family leave policies and women's labor market behavior, suggests that on balance, paid leave policies may enhance, rather than erode, women's workforce attachment.

Economists Jacob Klerman and Arleen Liebowitz compared female labor force behavior before and after the passage of state laws in the 1980s that provided unpaid maternity leave.[24] They found these laws had positive but insignificant effects on new mothers' labor market behavior.[25] An analogous study based on a more recent population sample found that the passage of the FMLA had similarly

Empirical Findings on the Relationship Between Family Leave and Women's Labor Market Outcomes

modest effects.[26] The authors of these studies concluded that in the absence of wage replacement, parental leave laws may do little to alter the status quo.[27]

Two other studies, measuring the effects of the FMLA alone, found that it had moderately positive effects on women's workforce attachment. One study that tracked mothers for a full two years after birth found that after the passage of the FMLA, mothers returned to work more quickly and in greater numbers, and were more likely to return to their former employer.[28] Another study found that the FMLA increased employment of women with children under the age of one.[29] Taken as a whole, studies of state and federal unpaid leave laws suggest that these laws led to increases in both maternal leave-taking and workforce attachment, but the effects were only modest.[30]

Some researchers have tried to measure the incremental effects of adding wage replacement to family leave policies. Economist Jutta Joesch found that women with access to paid leave were more likely to take time off from work during the birth month than women with access to unpaid leave only.[31] However, mothers with paid leave worked longer into their pregnancy and returned to work sooner once their infant was one month old.[32] These data suggest that in the absence of wage replacement, mothers are more likely to make "all-or-nothing" choices: either return to work immediately or significantly decrease attachment to the workplace by quitting or taking a very extended leave of one year or more.[33] By inducing some women who otherwise would quit or take a very lengthy leave and possibly switch jobs to remain with their employer and return fairly quickly, paid leave may improve their labor market attachment and status. As we have seen, returning to work for one's previous employer after taking time off has the advantage of allowing the worker to exploit firm-specific human capital, retain seniority, and relearn old skills rather than acquire new ones.[34]

A study published by the U.S. Census Bureau suggests that paid leave increases the likelihood that a worker will return to her previous employer rather than quitting or switching jobs.[35] In a sample of women between 1991 and 1994, among women who returned to work by the twelfth month after giving birth, those who returned to their pre-birth employer were more likely to have received paid leave (61%) than unpaid leave (48%) or no leave, i.e., quit (5%).[36] Conversely, among women who returned to work within a year but switched jobs, most had previously quit (63%), but a sizeable proportion had been on an unpaid leave (29%).[37] Only 12% of "switchers" had done so following a paid leave from their pre-birth employer.[38] The study found that workers who switched jobs had lower hours, lower pay, and jobs demanding fewer skills than workers who returned to their previous employer.[39]

These studies suggest a strong association between paid leave policies and rapid returns to work. What is difficult to discern from these studies is the direction of

causality. Are women with access to private employer-paid leave policies on average more motivated and career oriented than those whose jobs or employers do not provide such benefits, or does the provision of paid leave itself increase workforce commitment and motivation?

Studies of paid maternity leave policies in Europe are helpful in this regard. In Europe, paid leave benefits are government mandated, eliminating the possibility of selection bias between comparison groups. European studies cannot compare paid and unpaid leave policies because the norm for many years across European countries has been paid leave. However, the fact that European countries have been experimenting for several decades makes it possible to study the long-term effects of paid leave policies on workforce composition.

Economist Christopher J. Ruhm studied the economic effects of mandated paid parental leave in nine European countries over the twenty-four-year period of 1969 through 1993.[40] During that time, government-mandated leave entitlements roughly tripled in generosity.[41] Ruhm found these changes associated with a 3-4% increase in women's employment levels.[42] He also suggests that the increase would still be substantial even after adjusting for the likelihood that some women who would not otherwise work temporarily enter the workforce solely to trigger benefit eligibility,[43] and the likelihood that some women, while on parental leave, are counted as "employed" though they are physically absent from work.[44] Ruhm also analyzed the effects of paid leave laws on the employment levels of women in their childbearing years as compared with older women and found the effects to be concentrated in the younger cohort: for women aged twenty-five to thirty-four years, forty weeks of job-protected paid leave increased employment-to-population ratios by around 7-9% compared with an approximately 4% increase for all women.[45] Similarly, economists Cal Winegarden and Paula Bracy found that as the generosity of public paid leave programs in seventeen member countries of the Organisation for Economic Co-operation and Development ("OECD") increased over a thirty-year period, so too did the workforce participation of women in their childbearing years.[46]

A recent OECD analysis also concluded that paid family leave policies increase workforce participation for women in their thirties.[47] The report grapples with the issue of causality, pointing out that in countries where women are more present in employment, they may be better positioned to agitate for benefits, making the causality run from increased attachment to stronger policies, rather than the reverse.[48] Yet the report is skeptical that this alone explains women's employment growth in countries with strong policies, pointing out that many countries with currently high levels of female workforce participation, in particular, the Nordic countries, were among the first to introduce work-family reconciliation policies, prominently including paid family leave programs as part of a deliberate effort to increase female employment levels.[49]

Finally, if one's goal is to increase workforce attachment, there may be a limit on how generous a paid leave policy ought to be. The Joesch study found that among women with access to paid leave, the amount of leave available affected how much time they took: with more leave available, women took longer leaves, although this effect eventually leveled off.[50] Leaves of very lengthy duration might lead to a loss of work experience and depreciation of human capital.[51] Perhaps consistent with this, a study of social attitudes in countries with family leave benefits of varying generosity found that countries with extremely generous parental leave policies (Germany, with more than eighteen months leave, and Austria, with more than one year leave, though both with only a portion at full pay) tended to have the most "traditional" attitudes about working mothers.[52]

In sum, empirical studies suggest that paid leave policies increase the likelihood that women will take leave. At the same time, modestly generous leave policies appear to hasten women's return to work and increase the likelihood that they will return to their former employer. Such returns are associated with higher pay, greater use of skill, and more hours of work. Looking at labor market supply generally, paid leave policies appear to increase women's overall labor market participation.

Conclusion   Let me address some objections that will help situate my contribution within the existing feminist academic discourse on work/family conflict. First, I propose to direct resources to workers in particular, with no offsetting increase in subsidies to stay-at-home caregivers. One may question whether my scheme would be fair to stay-at-home caregivers. Some might go so far as to say that my position implicitly denigrates women's powerful contribution to the economy through the domestic sphere. My response is that I do not denigrate the value of family caregiving. I do, however, wish to expose the practical reality that different forms of contribution command different kinds of social and economic rewards. Facially neutral provision of subsidies would itself represent a choice that implicitly defends the status quo. Others might object in a similar vein that I fetishize work over other conceptions of the good life. In truth, however, I am less interested in advocating self-fulfillment from paid employment than I am in advocating women's economic independence, or more particularly, their practical access to work as a lever of economic independence.

Another objection could come from scholars at the other end of the spectrum who strongly advocate women's workforce participation, but believe that workplace accommodations such as paid leave will actually undermine labor market equality. Their argument is that by making it easier for women to move in and out of the workforce, paid leave may reinforce stereotypes about women's lack of commitment to paid employment. Instead of paid leave, these scholars emphasize policies such as high quality publicly provided daycare, or increased

subsidies for hiring professional caregivers in the home. Let me be clear: I strongly support the improvement of external institutions, like childcare, for facilitating work-family balance. Paid leave cannot do the work of changing the status quo without significant help from other policy reforms, such as childcare, tax reform, and vigorous enforcement of antidiscrimination laws. At the same, time, I do not think that something like childcare can fully substitute for paid leave. A significant group of workers has an inflexible demand to be able to give at least some care personally, especially in those acute moments of having a new infant, or a seriously ill child or spouse. Externally-available care is a necessary complement, but not a substitute, to the particular need that paid leave satisfies.

I do, however, take very seriously concerns about the hazards that paid leave could deepen gendered segmentation of labor markets, and I try to address these concerns in the details of program design. More specifically, these concerns push me towards advocating (1) financing benefits in a way that spreads the costs of provision beyond women, e.g., through across-the-board payroll taxes; (2) reasonably strict eligibility rules (several months of work in the previous year, and at least 60% full-time hours), (3) benefits that are not overly generous (70% of earnings, with a floor and ceiling to avoid severe regressivity), and (4) a serious effort to build in incentives for men to take leave. ❖

1. See, e.g., Jeremy I. Bohrer, *You, Me, and the Consequences of Family: How Federal Law Prevents the Shattering of the "Glass Ceiling,"* 50 Wash. U. J. Urb. & Contemp. L. 401, 418-21 (1996); Erin P. Drew, *The Birth and Adoption Unemployment Compensation Experiment: Did the Department of Labor Go Too Far?*, 106 Dick. L. Rev. 367, 387-88 (2001); Arline Friscia, *Reflections on Legislation: The Worker-Funded Leave Act: The Time is Now To Help Build Stronger Families with a More Stable Economy*, 26 Seton Hall Legis. J. 73, 76-84 (2001); Mikel Glavinovich, *International Suggestions for Improving Parental Leave Legislation in the United States*, 13 Ariz. J. Int'l & Comp. L. 147, 167-74 (1996); Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 Comp. Lab. L.J. 373, 383-90 (1996); Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 Wm. & Mary L. Rev. 1507, 1532-38 (2001); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 Colum. L. Rev. 2154, 2214-21 (1994); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & L. 39, 53-54 (1994); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. Rev. 707, 770-73 (2000); Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 Cal. L. Rev. 465, 467-76 (1987); Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 Yale J.L. & Feminism 1, 16-68 (2002); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 Mich. J. Gender & L. 113, 154 (1998).

2. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2000). Note that the FMLA provides both (unpaid) family and personal illness leaves. The analysis in this Article is limited to family leave. This is not because paid personal illness leave is unimportant, but because it raises a conceptually distinct set of questions that are not my central focus.

3. Christopher J. Ruhm, *Policy Watch: The Family and Medical Leave Act*, 11 J. Econ. Persp. 175, 177 (1997). "Steadily employed," as used here, means employed for at least one year before childbirth. *Id.* The Act only covers employees who have worked for their employer for twelve months and 1250 hours in the previous year, and whose employer has fifty or more employees working within seventy-five miles of the worksite. 29 U.S.C. §§ 2611(2)(A)-(B).

4. Ruhm, *supra* note 3, *at* 176.

5. U.S. Dep't of Labor, *FMLA Survey: Balancing the Needs of Families and Employers*, *at* tbl.4.1 (2001) [hereinafter *Balancing the Needs*] (reporting that among worries expressed by workers who took a leave in 2000 to care for a newborn child or their own or a family member's serious illness, whether or not covered by the FMLA, not having enough money to cover their basic needs was cited most frequently (53.8% of leave-takers)), *available at* http://www.dol.gov/asp/fmla/toc.htm (last visited Nov. 18, 2004).

6. *Id.* at tbl.4.8 (reporting that 37% of leave-takers in 2000 reported cutting short their leave time to cope with the hardship of lost wages).

7. Although 16.5% of all employees in the United States took leaves of absence from work to handle family or medical needs in 2000, another 2.4% of workers did not take leave despite reporting that they needed it (i.e., roughly 13% of workers who needed to take a leave did not take it). *Id.* at tbls.2.1, 2.14. Among those who were unable to take a needed leave, the most common reason cited (77.6%) was not being able to afford it. *Id.* at tbl.2.17. Workers who take leaves generally are more educated, have higher incomes, and are more likely to earn a salary rather than an hourly wage than those who do not. *Id.* § 2.1.3.

8. *Id.* at tbl.4.8 (reporting that 8.7% of leave-takers in 2000 used public assistance to finance leaves).

9. These states include Arizona, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Texas, Vermont, and Washington. *See* Nat'l P'ship for Women & Families, *State Paid Leave Initiatives in the 2004 and Prior State Legislatures: Making Family Leave More Affordable* (2004) [hereinafter *Leave Initiatives*] (reporting updates of state legislative developments in paid family leave),

available at http://www.nationalpartnership.org/portals/p3/library/paidleave/stateroundup2004.pdf (last visited Nov. 18, 2004).

10. *E.g.*, A.B. 173, 2004 Leg., 211th Sess. (N.J. 2004) (proposing "Family Leave Insurance," which would expand existing TDI and UI programs to cover family illness and birth/adoption leaves, respectively, to be paid for by a payroll tax on workers); H.B. 2399, 2004 Leg., 58th Sess. (Wash. 2004) (would create "Family Leave Insurance," which would pay employees a flat-rate weekly payment of $250 financed by taxing employers and employees one cent each per work hour); S.B. 6272, 2004 Leg., 58th Sess. (Wash. 2004) (same); H.B. 25, 2003 Leg., 22d Sess. (Haw. 2003) (would establish "Family Leave Benefits Insurance" to be financed by a payroll contribution by employees and employers totaling a maximum of two cents per work hour); S.B. 772, 2003 Leg., 22d Sess. (Haw. 2003) (same); S.B. 778, 2003 Leg., 22d Sess. (Haw. 2003) (would expand Hawaii's existing TDI program to include parental and family illness leaves); H.P. 567, 2003 Leg., 121st Sess. (Me. 2003) (proposing "Family Security Fund," which provides between fourteen and twenty-eight weeks paid maternity leave financed by up to ninety cents employee deduction per week plus matched employer contribution); S.P. 389, 2003 Leg., 121st Sess. (Me. 2003) (would establish "Temporary Disability and Family Leave Benefits Program," which would provide insurance covering leaves taken for birth, adoption, and family illness financed by equal contributions from employee and employer).

11. California Family Temporary Disability Insurance Program, Cal. Unemp. Ins. Code § 3301 (Deering 2004) (amending state disability compensation program, which previously provided compensation for individuals unable to work due to their own temporary illness or disability, including pregnancy and childbirth, to also include up to six weeks of compensation for leaves to care for an ill family member, or the birth, adoption, or foster care placement of a new child).

12. On public childcare reform, see, for example, Janet C. Gornick & Marcia K. Meyers, Families That Work: Policies for Reconciling Parenthood and Employment 185-235 (2003); Deborah L. Rhode, Justice and Gender 129-31 (1989).

13. On antidiscrimination litigation in the area of work-family conflict, see, for example, Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77 (2003).

14. *See*, e.g., Edward McCaffery, Taxing Women 16-23 (1999); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 Buff. L. Rev. 49 (1971); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. Cal. L. Rev. 339, 365-77 (1994) (showing how income tax laws are biased against secondary earners-overwhelmingly women-in two-earner families, thereby creating disincentives for women to choose market labor over unpaid home labor). Although the 2001 tax reforms reduced the so-called "marriage penalty," federal income tax treatment still creates incentives for second earners to opt out of the labor market. *See* Jamie Heller, *How New Tax Law Relieves Marriage Penalty*, Wall St. J., June 4, 2003, at D2 (explaining how despite recent amendments to the federal tax code that purport to phase out the marriage penalty, the poorest and wealthiest families get less than the full benefit due to the limitation of the amendments to the fifteen percent tax bracket, and highlighting the persisting marriage penalties in the earned income tax credit, phaseouts, capital loss offset provisions, and other areas of the tax code).

15. On shortening or increasing the flexibility of work hours, see Gornick & Meyers, *supra* note 12, at 147-84; Joan Williams, Unbending Gender: Why Family and Work Conflict and What To Do About It 100 (2000) (reviewing ethnographic studies describing working-class women's anxiety about leaving children in low-quality daycare and the strains of housework and the "split shift" on marital and family life); Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1956-57 (2000) [hereinafter, Schultz, *Life's Work*]; Vicki Schultz & Allison Hoffman, Precarious Work and Working Time: The Case for a Reduced Workweek in the United States (to be published in yet untitled book, Judy Fudge & Rosemary Owens eds., forthcoming 2005); Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 Colum. J. Gender & L. 271, 357-58 (2002).

16. [I discuss incentives for men to take leaves in more detail in Part VII, *infra*.] A lengthier discussion that appears in the article on creating incentives for men to take leaves has been excluded from this excerpt.

17. *See* Charles L. Baum, *The Effect of Work Interruptions on Women's Wages*, 16 Lab. 1, 18 tbl.4 (2002) at 25-30. He suggests that returning to the old job allows the worker to preserve a good job match, enjoy the benefit of relearning old skills rather than learning new skills, retain seniority, and continue benefiting from firm-specific human capital. *Id*. at 25; See Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1956-57 (2000) at 1894-96 (arguing that women's lower pay is due mainly to the segregation of women into

"separate-but-less-remunerative occupations,firms, and jobs," rather than the fact that women have more family responsibilities and therefore select lower paying but more flexible jobs or exert less work effort); Selmi, *supra* note 1, at 721-25, 730-33 (suggesting that employers may discriminate against women when making training opportunities available and that women occupy positions that tend to offer fewer training opportunities, and reviewing data challenging the work effort hypothesis and the notion that women choose more flexible jobs); *See* Barry McCormick, *A Theory of Signalling During Job Search, Employment Efficiency, and "Stigmatized" Jobs*, 57 Rev. Econ. Stud. 299, 308 (1990) (discussing the "stigma" attached to occupying unskilled jobs or being unemployed between jobs and how these situations "signal" to employers that the worker will not be committed and productive); Ian M. McDonald & Robert M. Solow, *Wages and Employment in a Segmented Labor Market*, 100 Q.J. Econ. 1115, 1124-25 (1985) (arguing that experience in secondary employment can stigmatize a worker and may subsequently block access to primary employment). Jacob Alex Klerman & Arleen Leibowitz, *Job Continuity Among New Mothers*, 36 Demography 145, 146 (1999) [hereinafter Klerman & Liebowitz, *Job Continuity*] (discussing the labor market choices a new mother confronts with respect to maternity leave).

18. Employers may also decline to invest in women's skills because they fear that they will not recoup their investment. *See Baum supra* note 17 and accompanying text.

19. *See supra* notes 5-8 and accompanying text (discussing the phenomenon of workers feeling financial anxiety about taking leaves for family or medical reasons, and in some cases, shortening or forgoing leave for that reason).

20. Jutta M. Joesch, *Paid Leave and the Timing of Women's Employment Before and After Birth*, 59 J. Marriage & Fam. 1008, 1012 (1997).

21. *See* George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. Econ. 543, 543-44 (1982).

22. *See*, e.g., Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, 40 Demography 191, 196 (2003). This study of the impact of unpaid leave mandates in state and federal law found an increase in the likelihood and duration of leaves taken by workers who were *not* beneficiaries of the mandate. *Id*. The authors speculate that this reflects the following spillover effect: as the laws became more generous, so too did firms covered by the laws, extending benefits even to workers they were not required to cover. *Id*.

23. *See* Lundberg & Rose, *supra* note 89 (finding that fathers' income tends to increase following the birth of a child, possibly because fathers increase their work hours as mothers spend more hours at home).

24. Jacob Alex Klerman & Arleen Leibowitz, *Labor Supply Effects of State Maternity Leave Legislation, in* Gender and Family Issues in the Workplace 65 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997) [hereinafter Klerman & Leibowitz, *State Maternity Leave*].

25. *Id*. at 81-82, 82 tbl.3.5 (finding no considerable effect of state unpaid leave laws on new mothers' employment levels, leave taking, or work levels during the first year after birth of a child).

26. Han & Waldfogel, *supra* note 22, at 196 tbl.1, 197 tbl.2 (finding no significant impact of FMLA on incidence of leave-taking or duration of leaves taken in the first three months by mothers or fathers eligible for benefits). These statistics controlled for state fixed effects, i.e., other changes in states that might have led to increased leave-taking during that time.

27. *Id*. at 198; *see also* Klerman & Leibowitz, State Maternity Leave, *supra* note 24, at 66.

28. Sandra L. Hofferth & Sally C. Curtin, Organization for Economic Co-Operation and Development, OECD Social, Employment and Migration Working Paper Series No. 7, The Impact of Parental Leave on Maternal Return to Work After Childbirth in the United States 14 tbl.1, 17 tbl.3 (2003). The study found that after the enactment of the FMLA, on average mothers returned to work over four months *sooner* than before its enactment. *Id*. These effects, perhaps not surprisingly, disappeared if the sample was limited to the states (roughly half) that had a maternity leave statute in place prior to the passage of the FMLA. *Id*.

29. Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. Pol'y Analysis & Mgmt. 281, 295-96 (1999) [hereinafter Waldfogel, *Impact of the FMLA*] (finding only a 1.2% increase in women's overall employment between 1992 and 1995, and a 7.6% increase when considering only those women with children under the age of one in 1995).

30. Another study also found positive effects of leave policies on the likelihood of recent mothers to return to their former employer, but is less helpful for present purposes because it did not distinguish between paid and unpaid or public versus private coverage. Jane Waldfogel et al., *Family Leave Policies and Women's Retention After Childbirth: Evidence From United States, Britain, and Japan*, 12 J. Population Econ. 523 (1999) [hereinafter Waldfogel et al., *U.S., Britain, and Japan*]. This study found that after controlling for

age, education, and first versus later birth, maternity leave coverage substantially increases the probability that a woman will return to her prior employer following childbirth. *Id*. at 536. In Britain, there was a 16% increase in likelihood that a mother would return to her prior employer within twelve months of childbirth; in the U.S., that figure was 23%; and in Japan, the chances that a mother returned to work within twenty-four months increase by 73%. *Id*.

31. Joesch, *supra* note 20, at 1016-17.

32. *Id*. at 1017 tbl.4. The authors control for observable differences between groups, such as age, education level, race, and marital status but caution that unobserved differences may explain some of the variance. *Id*. at 1013, 1018. For example, women who want to return to work sooner may tend to select employers that offer paid leave policies and vice versa. *Id*. at 1013.

33. *Id*. at 1018-19.

34. See Baum, *supra* note 17, at 25.

35. Kristin Smith et al., U.S. Dep't of Commerce, Maternity Leave and Employment Patterns: 1961-1995 19 (2001), available at http://www.census.gov/prod/ 2001pubs/p70-79.pdf (last visited Nov. 18, 2004).

36. *Id*. fig.6.

37. *Id*.

38. *Id*.

39. *Id*. at 18 tbl.K. For example, 23.7% of those mothers who found a different employer experienced a pay reduction, while only 4.1% of those who returned to previous employers had a pay reduction. *Id*. Similarly, while 21.2% of mothers with new employers experienced a drop in skill level required for their work, only 1.8% of mothers returning to their previous employer experienced a drop in skill level. *Id*. *See also* Hofferth & Curtin, *supra* note 28, at 18, 19 tbl.4 (sampling working mothers who gave birth between 1984 and 1997, and finding that those who returned to the same employer within two years after having a child earned about two dollars more per hour than those who switched jobs).

40. Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q.J. Econ. 285 (1998) [hereinafter Ruhm, *Economic Consequences of Parental Leave*].

41. *Id*. at 295, 296 fig.Ia (finding that entitlements grew from an average of ten to an average of thirty-three weeks of job-protected leave, and from an average of seven to an average of twenty-two weeks of fully paid leave).

42. *Id*. at 304 tbl.IV, 305, 311 (finding a 3.1% increase in women's employment-to-population ratio for policies permitting up to twenty weeks of paid leave, as compared with no leave, and a 4.2% increase for policies permitting up to forty weeks of paid leave). The analysis controlled for state-fixed effects, i.e., other changes in states (such as the growth of subsidized childcare) that might have increased women's employment during that time, although Ruhm acknowledges that it might not have captured them fully, meaning these numbers may slightly overstate the employment increase. *Id*. at 311.

43. *Id*. at 312-13 (suggesting that this phenomenon might account for anywhere between a 0.4% and 1.0% increase in women's employment). Note, importantly, that some of these "opportunistic entrants" will ultimately decide to remain in the workforce, offsetting at least some of this discount, but Ruhm does not attempt to measure the latter phenomenon.

44. *Id*. (suggesting that this phenomenon may explain between 25% and 50% of the increase in women's employment associated with longer entitlements, but should have a smaller effect for shorter entitlements).

45. *Id*. at 310 tbl.VII, 311.

46. See Winegarden & Bracy, *Demographic Consequences of Maternal-Leave Programs in Industrial Countries: Evidence from Fixed-Effects Models*, 61 S. Econ. J. 1020 (1995) (studying the effect of increased generosity in paid maternal leave policies in seventeen OECD countries between 1959 and 1989 and finding an inverse correlation between duration of paid maternity leave available and infant mortality) at 1029 tbl.III (estimated marginal effect of an added week of leave ranges from about 0.60 to 0.75 percentage points in the labor force participation rate for women ages twenty to thirty-four,with significance rates that are uniformly very high). The authors found no support for the possibility of reverse causation. *Id*. at 1030.

47. Organisation for Economic Co-Operation and Development, OECD Employment Outlook 137, 140 tbl.4.5 (2001) at 153.

48. *Id*.

49. *Id*.

50. Joesch, *supra* note 20, at 1017.

51. Ruhm, *Economic Consequences of Parental Leave*, *supra* note 40, at 314-15; *see* also Jeanne Fagnani, *Parental Leave in France*, in Parental Leave: Progress or Pitfall? 79 (Peter Moss & Fred Devin eds., 1999) (arguing that

France's policy of allowing up to three years of leave, taken overwhelmingly by women, leads to erosion of job skills and may reinforce employer prejudice regarding women's work commitment); See Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. Econ. Persp. (1998) at 142 (suggesting that Germany's policy of permitting up to three years of maternity leave, including a period in which women are prohibited from returning to work, has increased the wage gap between single women and single men and between married women and married men).

52. *See* James W. Albrecht et al., *A Cross-Country Comparison of Attitudes Toward Mothers Working and Their Actual Labor Market Experience*, 14 Labour 591, 597 tbl.3, 598 (2000). The authors qualify their conjecture to this effect, noting that the direction of causality is uncertain. I will also note that the attitudes polled were with respect to either part-time or full-time work without distinction. This leaves open the possibility that some societies have positive attitudes toward mothers working part time but negative attitudes about them working full time, a posture that I would argue is still fairly traditional.

Lynn LoPucki

Professor Lynn LoPucki is a leading scholar in the areas of Bankruptcy, Information Law, Business Associations, and Commercial Law. His book, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2004) has ignited national debate on the issue of bankruptcy courts and has led to the introduction of a bill to correct this problem. Professor LoPucki is also co-author of two widely used casebooks: SECURED CREDIT: A SYSTEMS APPROACH (4th edition, with Elizabeth Warren, 2003) and COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH (with Warren, Keating, and Mann, (2nd edition, 2003). He has done extensive empirical research (with Whitford, Eisenberg, Kalin, and Doherty) on the bankruptcy reorganization of large, public companies and he maintains an extensive database on the subject. LoPucki's articles have stirred debates in the Yale, Stanford, Vanderbilt, and Michigan law reviews as well as in the popular press and professional publications.

Courting Failure:[†]

How Competition for Big Cases is Corrupting the Bankruptcy Courts

Lynn M. LoPucki*

I n late 2001, the Enron Corporation was preparing to file what remains to this day the biggest bankruptcy case in history. [1] At the time, a half dozen or more United States Bankruptcy Courts were competing to attract big cases. For those courts, Enron was the ultimate prize. The court that got Enron would be the focus of the bankruptcy world's attention for years and distribute a billion dollars in professional fees.

Introduction

The stakes were especially high because big-case bankruptcy was booming. The number of large, public companies[2] filing bankruptcy in the United States had increased steadily from 15 in 1996 to 97 in 2001—a sixfold increase in just five years. The court that got Enron—and handled it to the satisfaction of the Enron lawyers and executives who chose the court—would get many more. The judge who presided would win national attention for him- or herself and, possibly, a billion-dollar-a-year or more bankruptcy reorganization industry for his or her city. It would be like winning the competition to host the Olympic Games—not just for a year, but every year—for as long as the court continued to please the lawyers and executives who could supply the cases.

The United States Bankruptcy Court for the District of Delaware was a major contender for the Enron case. Delaware had 41 new big-case filings in 2001, compared with runner-up New York's 15. But Delaware lacked the judges it needed to process the cases it had attracted already and the bankruptcy legislation that would have provided them was stalled in Congress. Delaware's lead in the competition for big cases remained vulnerable. Other courts, including Chicago, Houston, and Dallas, had—like New York—copied Delaware's practices and procedures and publicly declared themselves in competition with Delaware. But at the end of 2001, they remained minor players. Only Delaware and New York had more than five big cases that year.

This competition among the bankruptcy courts for big cases put Kenneth Lay, the founder and chairman of the board of the Enron Corporation, in the catbird seat. Lay would have his choice of courts for the Enron bankruptcy. If he chose wisely, the grateful court would protect him from cresting public outrage and, by so doing, make itself attractive to the corrupt or incompetent executives of future bankrupt firms.

Ken Lay was not a man who deserved protection. In 1999 and 2000, he had approved the Rhythms and Raptor transactions that resulted in gross misstatements of Enron's financial position.[3] From 1998 to the day Enron filed bankruptcy in December 2001, Lay sold over $200 million of his Enron stock.[4] In the final year before bankruptcy, Lay was selling the stock to Enron itself, even though Enron's Board of Directors had not given the approval required by law for the corporation to make such purchases.[5] As the evidence of Enron's impending failure mounted in the spring and early summer of 2001, Lay accelerated his stock "sales," taking $24 million from the company for worthless stock in June and another $16 million in August. In mid-August, 2001, as the end neared and he dumped his own stock at the rate of $4 million a week, Lay issued his famous memo to Enron employees assuring them that "I have never felt better about the prospects for the company . . . Our performance has never been stronger; our business model has never been more robust; our growth has never been more certain . . ."[6] On October 17, 2001, the day after the Securities and Exchange Commission began the investigation that put the final nail in Enron's coffin, Enron "locked down" it's retirement plan.[7] The effect was to prevent the company's employees from selling the Enron stock in their 401(k) pension accounts.[8] The stock was trading at $32 when Enron imposed the lockdown; it was trading at $9 when the lockdown ended 30 days later.[9] During the lockdown, Lay sold an additional $6 million of his own stock to Enron.[10] Lay continued dumping the worthless stock on Enron to the very end, grabbing his last $1 million on November 27, 2001[11]—five days before Enron filed bankruptcy. Shareholders who kept their shares until the bankruptcy filing got nothing for them. Conveniently, Enron's auditors, Arthur Andersen, shredded many of the records that prosecutors would need to investigate Lay and Enron.[12] Lay refused to testify about any of what he had done, invoking his Fifth Amendment privilege against self incrimination.[13]

Ken Lay was a personal friend of the President of the United States and the President's largest campaign contributor. Until recently, the President had called him Kenny-Boy and sought his advice on energy policy. But as Kenny-Boy prepared to choose a bankruptcy court, the President was pretending not to know him. Employees who had lost their pensions were crowding the evening news, and Congress was gearing up to do something about the abuses in corporate America. In December 2001, the shareholders, the creditors, and the press were all at Enron's door. The investigators would be there soon. Kenny-Boy needed protection. He would find it in a bankruptcy court.

From Lay's perspective, the key was to retain control of Enron, if not personally, through others who owed their jobs—and so their allegiance—to him. As long as Lay, or others beholden to him, retained control of the company the investigators would deal with Enron from across the table.

What Lay probably feared more than anything else was that the bankruptcy court would appoint a trustee. A Chapter 11 trustee is a genuinely independent individual chosen by a division of the United States Department of Justice to take complete, direct control over the bankrupt company. If that happened, the trustee would employ the investigators, and the investigators would be inside. They would not be demanding documents in discovery and fighting about their right to access in court.[14] They would control Enron's employees, attorneys, and accountants and have the full, free run of the files. Enron's lawyers would be required to divulge to the trustee everything Lay had told them—before and after the bankruptcy filing. The attorney-client privilege would no longer apply.[15] Everything would come out.

Absent the bankruptcy court competition, a trustee probably would have been appointed in the opening days of the Enron bankruptcy. Bankruptcy law required the court to appoint a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement by current management, either before or after the commencement of the case."[16] If Enron didn't fit that bill, it was hard to imagine a company that would. Nor does a bankruptcy judge have to wait for someone to request the appointment of a trustee; the only federal appeals court to address the question ruled that if case warranted appointment of a trustee, the court could order that appointment even if no creditor requested it.[17] Once Enron filed, all that would stand between Ken Lay and justice would be a judge of the bankruptcy court Lay had chosen.

Enron was a Houston, Texas company. The company's headquarters were a gleaming 50-story glass tower in downtown Houston known simply as the "Enron Building." That building was the center of the company's national and international operations, the office space for thousands of the company's employees, and the most widely recognized symbol of the company. The offices of Enron's top managers were on the fiftieth floor. Ken Lay's was among them.

The United States Bankruptcy Court for the Southern District of Texas, Houston, Texas Division was just seven blocks away. In an earlier time—before the rampant forum shopping of the 1980s—the Houston bankruptcy court would have owned the Enron case by virtue of geography. But in 2001, the Houston bankruptcy court was merely the most conveniently located of a half-dozen competitors for Enron's business.

The Houston bankruptcy court had joined the competition for big bankruptcy cases just two years earlier. It did so by copying the rules and procedures of the Delaware bankruptcy court and publicly announcing the judges' willingness to approve higher fees for bankruptcy lawyers who brought cases to the court.[18] The Houston court's move had been only a modest success. The court had attracted no bankrupt companies from other cities in 2000 or 2001, but it had hung on to the bankruptcies of eight of the ten big Houston companies that filed bankruptcy

during that period. Considering that Delaware got almost half the big cases filed in the United States during those two years, Houston's 80 percent retention rate was not bad.

Enron spoiled the Houston court's record by choosing the United States Bankruptcy Court for the Southern District of New York, Manhattan Division. The New York court was more than 1,600 miles from Enron's headquarters, in a city where the company had almost no physical presence (57 employees worked for an Enron subsidiary in New York).[19] But New York had other advantages.

One was that the New York bankruptcy court had more to gain—or lose—from Enron than did other courts. New York was home to many, if not most, of the country's leading bankruptcy professionals, which gave it an edge in attracting cases. Despite that natural advantage, the New York court had stumbled in the mid-1990s, allowing Delaware to take center stage. Only in 2000, after several years with almost no big cases, had the New York bankruptcy court's effort to attract cases begun to pay off. Although New York joined the competition at about the same time as Houston, New York had greater success. Enron was the fifteenth big case the New York court had attracted from other cities in 2000 and 2001. With Delaware short of judges and unable to manage its caseload, New York was positioned to once again become the bankruptcy capital of the United States.

Another reason Delaware was not a good choice for Enron was that one of the district judges there had recently appointed a trustee in a big case merely because the relationships among the parties had been acrimonious. The Third Circuit Court of Appeals had upheld the appointment, thus imposing on the Delaware bankruptcy court perhaps the most liberal standard for appointment of a trustee applicable anywhere in the United States.[20]

New York bankruptcy judge Arthur J. Gonzalez drew the Enron case. From Ken Lay's perspective, Gonzalez performed splendidly. The creditors moved to transfer the case to Houston. Judge Gonzalez denied the motion.[21] Several major creditors requested the appointment of a trustee.[22] Gonzalez delayed a hearing until he brokered a deal that left most of Enron's management in place.[23] During the delay Ken Lay was able to choose Stephen Cooper as Enron's new CEO.[24] Because Cooper was a respected turnaround manager, the prospects for appointment of a trustee dimmed. The creditors soon gave up the fight. That meant that directors chosen by Ken Lay and in office long before the scandal broke remained in control of the company through the crucial stages of the bankruptcy case. They resigned only after they too had chosen their own successors.

As a result, the investigators remained on the outside for the duration of the Enron case. For a management engaged in massive fraud, it was the best bankruptcy result for which one could hope. The government took almost three years putting together a case sufficient to indict Lay. Lay has still not been sued for

his mismanagement of Enron, and it seems likely he never will be. The New York bankruptcy court had proven itself a trustworthy protector of managements accused of fraud.

The market reacted swiftly. By mid-2002 managements accused of fraud delivered three more corporate giants—Global Crossing, a supposedly Bermudan company actually run from Los Angeles; Adelphia Communications, a Coudersport, Pennsylvania company; and Worldcom, a Clinton, Mississippi company—to the New York bankruptcy court. The managers of all three were able to remain in control through the crucial stages of the cases and choose their own successors. By its deft handling of the four cases, the New York bankruptcy court surpassed Delaware in 2002 to become the nation's most attractive bankruptcy court.

T he competition that broke out among the U.S. bankruptcy courts in the 1990s was the product of a complex set of laws, practices, and institutions. One must understand those laws, practices, and institutions to understand the competition, and so it is with them we begin.

The Structure of Bankruptcy Court Competition

The U.S. government operates bankruptcy courts at about 200 locations throughout the United States. Each court consists of a "panel" of one or more bankruptcy judges and serves a specifically designated geographical area called a "district" or "division." Generally speaking, when a bankruptcy case is filed by or against a debtor located in the court's district or division, a judge from the panel hears the case.

Determining where a debtor is located can sometimes be difficult. This is particularly true for large, public companies that have operations throughout the United States. Such companies can be incorporated in one state, have their headquarters in another, and conduct the bulk of their operations in a third. A truly national company can be everywhere and thus nowhere in particular. To address the problem, Congress enacted a "venue" statute that specifies the appropriate court or courts based on characteristics of the debtor. ("Venue" is legal jargon for "place." A venue statute prescribes the places where cases should be heard.)

The venue statute that allowed the bankruptcy court competition to develop was initially written and adopted as a bankruptcy rule by the recently formed Bankruptcy Rules Committee in 1974. From 1974 to 1978, Congress comprehensively revised and codified the bankruptcy laws of the United States. In so doing, Congress incorporated the bankruptcy venure rule into the statute. The provisions so adopted would have surprising, unintended consequences in the 1980s and 1990s, as large public companies began filing bankruptcy cases in significant numbers and bankruptcy judgeships gained stature and became viable career paths. The bottom line, however, was that by the 1980s, large public companies were free to file their bankruptcies pretty much anywhere they chose.

For the law to offer a litigant a choice among courts is not particularly unusual. For many kinds of cases, the law gives the person filing the case a choice between filing in a state or federal court or a choice between filing in the court where the defendant resides or the court where the events in litigation occurred. The exercise of such choices is referred to as "forum shopping." The choice offered large companies under the 1974 rule and 1978 code revisions were, however, of an entirely different magnitude. These choices typically would be among dozens of courts, not just two or three. The revisions became part of the Bankruptcy Code enacted in 1978 and went into effect on October 1, 1979.

Through the 1980s, big bankrupt companies and their lawyers exercised their new powers of choice to pick courts that offered various advantages. About a third of the cases were filed in a court located somewhere other than where the company was headquartered. That forum shopping was not particularly alarming to those who managed the bankruptcy system. The bankruptcy courts, laws, and rules of procedure are all federal. Theoretically, at least, they are the same throughout the United States. Forum shoppers certainly could gain some advantage by their choices, the system managers thought, but not much.

The Competition Emerges

Beginning in 1990, the bankruptcy forum shopping produced an unexpected dynamic. That year, the single-judge backwater bankruptcy court in Wilmington, Delaware began attracting corporate giants. Within six years, nearly 90 percent of all large public companies filing bankruptcy in the United States filed in Delaware. The sudden change surprised and alarmed bankruptcy lawyers and judges through the United States—and federal policymakers.

In 1997, the National Bankruptcy Review Commission recommended elimination of the venue provision the big companies were relying on to get to Delaware. Delaware's two determined senators, however, prevented the Commission's venue recommendation from coming to a vote in Congress. By the end of 1998, it was clear that Congress would take no action on bankruptcy venue. The bankruptcy system had accepted Delaware as its new leader.

Delaware's new bankruptcy industry came at the expense of bankruptcy lawyers practicing in major cities throughout the rest of the country. Those lawyers began pressing their local bankruptcy judges to respond to Delaware's competitive threat. Courts in several major cities modified their local rules and practices to compete for large public company bankruptcies.

This response to Delaware was possibly unprecedented. In other circumstances, courts have sometimes expressed views or made rulings that attracted cases. In the 1980s, for example, the liberal Texas state courts attracted the cases of workers

injured on North Sea Oil rigs. In the early 1990s, U.S. district judge Jack Weinstein attracted gun and tobacco plaintiffs from all over the United States to his court in Brooklyn. But those were merely situations in which judges expressed views that attracted cases. Judges were not changing their views in order to compete with other courts for cases.

Some of the changes that resulted from the bankruptcy court competition were for the better. Judges who had thought of themselves as emperors presiding over federally allotted domains suddenly found that they had to treat lawyers and litigants with courtesy and respect. If the judges didn't, the "customers" would go elsewhere. The judges became more responsive and accessible. They scheduled hearings for the convenience of the lawyers and litigants, not merely for their own. They published rules and guidelines explaining what they wanted from the lawyers, and they committed to what they would do in response. One effect was to make the bankruptcy reorganization process more predictable, generally to the benefit of everyone involved.

The pressures of competition did not, however, stop at the boundaries of propriety. The lawyers, corporate executives, banks, and investment bankers who chose the courts for their cases—the "case placers"—had the power to make winners or losers of the courts. The case placers wanted more money for themselves and freedom from the restrictions of bankruptcy law and procedure. In cities across the United States, they pressed the judges to see how much each judge was willing to give them.

Slowly, but surely, the entire bankruptcy system began shifting in response to the case placers' wishes. Professional fees, which had fallen sharply since the 1980s, began to increase. The courts relaxed conflict of interest standards and granted lawyers and financial advisers unprecedented releases and indemnification from liability for their own wrongdoing. The jobs of executives—including those who led their companies into financial disaster—became more secure, and the courts allowed their companies to pay their executives huge bonuses, supposedly to retain the failed executives' valuable services. Deals made among the case placers were sacrosanct, even if they violated the rights of other parties. Procedures designed to protect small investors and the public were abandoned.

Even before the nation's bankruptcy courts began emulating Delaware's reorganization methods, evidence of those methods' failure had begun to accumulate. Delaware-reorganized firms failed at rates substantially exceeding those for firms reorganized in other courts. The failures of individual firms were of course noticed, and efforts were made to explain them. But in the complex, sprawling world of big case bankruptcy, the pattern of failure—and in particular, Delaware's role—went unnoticed. When it finally came to light in the spring of 2000, the reaction was one of disbelief and denial. By then, the competition was so

far along in altering the practices of the bankruptcy courts and the attitudes of bankruptcy lawyers, judges, and academics, that it seemed impossible to turn back. As the evidence accumulated, however, it became increasingly evident that turning back was the only viable alternative.

In the 1990s, the frequency and size of multinational bankruptcies also increased, with cases such as Bank of Credit and Commerce International (BCCI) and Maxwell Communications. The newly bankrupt giants discovered that the competing U.S. bankruptcy courts welcomed the cases of companies from anywhere on earth. Those in a position to place the cases of multinational companies generally preferred the U.S. courts because U.S. bankruptcy law permitted the debtor's executives to remain in control during bankruptcy. The laws of most other countries put creditors in control. From a Brazilian cable television company to a Greek shipping concern, multinational companies—and some foreign companies with virtually no connection to the United States—began filing their bankruptcies in the United States.

International forum shopping was, however, subject to a limitation not present in domestic shopping within the United States. Courts anywhere in the United States were bound by decisions of the Delaware bankruptcy court, but courts outside the United States were not. A Delaware bankruptcy court decision had only as much authority outside the United States as the courts of other countries were willing to give it. This sharply limited what the competing courts could accomplish for those who brought them the cases.

Coincidentally, an international reform movement that sought to remove that limitation was already well under way. "Universalists" were seeking to bind the nations of the world by treaty or model law to honor the decisions of the courts of a multinational debtor's "home country." In a universalist world, a multinational debtor's home country court would apply home country law to people and events all over the world. Other countries would pre-commit to honor the home country's decisions.

The universalists could not explain what they meant by a multinational's "home country," and it was apparent that, however the universalists defined that attribute, multinationals could easily change it. As a result, the growing universalist movement threatened to replicate the problems of domestic forum shopping and court competition on a global scale in a far less controlled environment.

Most people are surprised to hear that bankruptcy judges want big cases. Bankruptcy judges are appointed for 14-year terms. The federal government pays each an annual salary of $142,324 and, if they leave office after even a single 14-year term, a full federal pension. Attracting big cases changes neither the salary nor

the pension. The judges who attract the cases generally end up with heavier caseloads than those who do not. Big cases mean more work.

Not all judges do want the cases. Those who do, want them for any of four reasons. The most obvious are personal. A judge who presides over the reorganizations of large, public companies has the opportunity to work with the leading professionals in the fields of bankruptcy and finance. When the judge does so, the judge is the most powerful person in the room. Millions and sometimes even billions of dollars turn on his or her decision. The status that power confers extends beyond the courtroom.

Celebrity comes along with the power. The judges' decisions are reported in the media. Judges in the biggest cases have standing invitations from professional organizations to travel to resort cities at the organizations' expense to give speeches and be honored. If they return to law practice, which many do, clients with big cases will seek them out. When a bankruptcy judge dies, the obituary will likely mention the big cases over which the judge presided—assuming, of course, there were any.

The most important reasons that the judges want the big cases, however, are somewhat more subtle. Each bankruptcy judge is a member of a community. In any large city in the United States, there are 100 or more lawyers and other professionals specializing in bankruptcy practice. Those professionals interact daily as they resolve cases in the local bankruptcy court. The professionals in a city typically form an association that meets regularly for lunch and occasionally for multiday conferences. Many of the members become close friends.

When a bankruptcy judgeship becomes available, the community seeks to install one of its own. More often than not, the effort succeeds. As with any position of leadership, the one chosen incurs a debt to his or her supports. Those supporters expect a certain amount of loyalty. If a judge forgets how he or she got the job, the judge will be reminded if and when the judge seeks a second term. The committee that passes on reappointments will probably survey the members of the local bankruptcy bar regarding the quality of the judge's prior service.[25] A recent study found that more than 8 percent of the bankruptcy judges who applied for reappointment during the period 1998 to 2002 were not reappointed.[26] Others won reappointment, but only after their competence had been challenged and they had been "put through the wringer."[27]

For bankruptcy professionals, bankruptcy venue is a bread-and-butter issue. If a big St. Louis company—such as TWA, Purina Mills, or Solutia—files in St. Louis, leading St. Louis bankruptcy lawyers are likely to get the key roles in the case and the big fees that come with them. If the case is big enough, virtually every bankruptcy lawyer in St. Louis will have a client. If instead the company files in some

other city, bankruptcy lawyers in that city will get most of the work and the money. If most of the cases from a city go elsewhere, the career prospects in that city may be limited. And if the lawyers in a city view their judges as the cause of that problem, things can get ugly…

The process by which pressure to compete is brought to bear on the judges is brutal and intimidating. The lawyers who place cases are among the most powerful and prestigious of the bankruptcy bar. They publicly laud the judges who give them what they want and harshly criticize those who do not. Some of the latter become pariahs of the national bankruptcy bar—judges considered so bad they drive the cases away. Lawyers—and other judges—malign them as "toxic judges."

Forced to a simple choice between popularity and integrity, most judges would choose integrity, even under these conditions. But the choice is seldom presented so starkly. A judge can easily suppose him- or herself clever enough to achieve popularity and maintain integrity simultaneously. But the game is played over a long period of time and the pressure of competition is relentless. As the judges are put to choice after choice, the changes occur in increments, each too small to be recognized for the erosion of integrity it is. To corrupt the bankruptcy system, it was not necessary to corrupt all of the bankruptcy judges. Once a few judges succumbed, the cases flowed to them, rendering the remaining judges irrelevant. ❖

†Excerpt from Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts, University of Michigan Press (2005).

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1. Court-approved professional fees in the Enron bankruptcy are expected to exceed $1 billion, substantially more than those in Worldcom and any other case. *Enron fees to exceed $1 billion*, United Press Iinternational, November 14, 2003.

2. For explanations of "large" and "public" *see* A Note on the Statistics in *Courting Failure*.

3. Final Report of Neal Batson, Court-Appointed Examiner, Appendix D, filed Nov. 24, 2003, Docket No. 14455, at 51-52, In Re Enron Corp., Case No. 01-16034 in the United States Bankruptcy Court for the Southern District of New York [hereafter "Final Report of Neal Batson, Appendix D"]("The Board heard a presentation about the Rhythms transaction, and approved necessary components relating to the use of Enron stock, on June 28, 1999 at a specially called meeting. The board also ratified a determination by Enron's Office of the Chairman (meaning Lay and Skilling) under the company's Code of Ethics that Fastow's role as general partner of LJM1 would 'not adversely affect the interests of the company'"); *id*. at 68-69, ("The Finance Committee and full Board reviewed and approved the formation of Raptor I in May 2000. The Executive Committee approved the formation of Raptor II in June 2000, and the Finance Committee and the full Board approved the formation of Raptor IV in August 2000. . . . Lay and Skilling were present at each meeting and participated in explaining the transactions and they voted in favor the transactions").

4. Final Report of Neal Batson, Appendix D, *supra* note 3, at 28 ("During the four year period 1998 through 2001, Lay had gross proceeds of over $209 million from Enron stock sales.").

5. Final Report of Neal Batson, Court-Appointed Examiner, Annex 1 to Appendix D, filed Nov. 24, 2003, Docket No. 14455, at 13, In re Enron Corp., Case No. 01-16034, in the United States Bankruptcy Court for the Southern District of New York [hereafter "Final Report of Neal Batson, Annex 1 to Appendix D"] ("Oregon law was clear at the time of these transactions: committees of the Board were not permitted to approve repurchases of company stock without specific authority from the Board. In this instance, that authority was apparently never granted to the Compensation Committee [that approved the repurchases].").

6. Peter C. Fusaro & Ross M. Miller, What Went Wrong at Enron 207 (2002) (reproducing memo in full).

7. Theo Francis & Ellen Schultz, *Enron Faces Suits by 401(k) Plan Participants*, Wall Street Journal, Nov. 23, 2001 ("Amid growing disclosures of financial problems in recent weeks, the company 'locked down' the retirement plan from October 17 to Nov. 19 . . . which prevented employees from selling Enron shares as the share price collapsed.").

8. *Id*.

9. *New York Stock Exchange Composite Transactions*, Wall Street Journal, Oct. 18, 2001 (Enron Corp. [ENE] Closing Price of $32.20 for October 17, 2001); *New York Stock Exchange Composite Transactions*, Wall Street Journal, Nov. 20, 2001 (Enron Corp. [ENE] Closing Price of $9.06 for November 19, 2001).

10. Final Report of Neal Batson, Annex 1 to Appendix D, *supra* note 5, at 7.

11. Complaint to Avoid Certain Pre-Petition Loan and Annuity Transactions as Fraudulent Transfers, Docket No. 1, dated Jan. 31, 2003, In re Enron Corp. (The Official Committee of Unsecured Creditors of Enron Corp. v. Kenneth L. Lay and Linda P. Lay), Case No. 01-16034, Adversary No. 03-02075 in the United States Bankruptcy Court for the Southern District of New York.

12. Indictment, filed Mar. 7, 2002, Docket No. 1 at para. 13, United States v. Arthur Andersen, Case No. 02-121, in the United States District Court for the Southern District of Texas.

13. Final Report of Neal Batson, Appendix D, *supra* note 38at 3-4.

14. Order Pursuant to 11 U.S.C. §§ 1104(c) and 1106(b) Directing Appointment of Enron Corp. Examiner, dated April 8, 2002, Docket No. 2838, In re Enron Corp., Case No. 01-16034, in the United States Bankruptcy Court for the Southern District of New York (reflecting compromise that gave examiner some information privileges, but left examiner an outsider in other respects).

15. Commodities Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985) (holding trustee in bankruptcy to be the owner of the debtor's attorney-client privilege).

16. 11 U.S.C. § 1104(a)(1).

17. In re Bibo, Inc., 76 F.3d 256 (9th Cir. 1996) ("The statute plainly gives the bankruptcy judge authority to appoint a trustee in Chapter 11 proceedings [when no party has made a request].").

18. *Houston, We Know We Have a Problem (But We're Working on It!)*, Bankruptcy Court Decisions News and Comment, February 8, 2000.

19. In re Enron Corp., 274 B.R. 327, 337 (Bankr. S.D.N.Y. 2002).

20. *See also* In re Marvel Entertainment Group, Inc., 140 F.3d 463, 469 (3rd Cir. 1998) ("The district court appointed Gibbons as trustee on December 22, 1997 . . . ."); Transcript of Omnibus Hearing Before Honorable Mary F. Walrath United States Bankruptcy Judge, dated Feb. 12, 2002, Docket No. 1457, at 41, In re Coram Healthcare, Case No. 00-3299, in the United States Bankruptcy Court for the District of Delaware (later case in which a Delaware bankruptcy judge appointed a trustee pursuant to the *Marvel* standard).

21. In re Enron Corp., *supra* note 19.

22. *E.g.*, Motion of Absolute Recovery Hedge Fund LP and Regents of the University of California for Order (i) Directing the Appointment of a Chapter 11 Trustee, (ii) Pending the Appointment of a Permanent Chapter 11 Trustee, Directingthe Appointment of an Emergency "Gap" Trustee, and (iii) Directing the Debtors to Cooperate with the Trustee, dated Jan. 25, 2002, Docket No. 1125, In re Enron Corporation, Case No. 01-16034, in the United States Bankruptcy Court for the Southern District of New York; Motion of the Florida State Board of Administration for Order Appointing a Chapter 11 Trustee Pursuant to Section 1104 of the Bankruptcy Code, dated Feb. 14, 2002, Docket No. 1472, In re Enron Corp., Case No. 01-16034, in the United States Bankruptcy Court for the Southern District of New York.

23. Memorandum from Entwistle & Cappucci LLP, to Our Institution Clients 2 (April 10, 2002) *available at* http://www.entwistlelaw.com/news/institutional/enron/enron9.htm (last visited August 8, 2004) ("After the FSBA filed its Trustee Motion, presiding Judge Arthur J. Gonzalez convened a conference call to facilitate discussions between the [parties]. At Judge Gonzaelez' request, we pursued a course of negotiations with the Debtors' counsel to resolve the trustee issue.").

24. *See* Chapter 6.

25. *See*, *e.g.*, Regulations of the Judicial Conference of the United States for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges, Sec. 5.02, March 1997, *available at* http://www.ncbj.org/faq1bktcylaw/bankrupt.htm (providing for public notice and the solicitation of comments on an application for reappointment).

26. Stan Bernstein, THE REAPPOINTMENT OF BANKRUPTCY JUDGES: A PRELIMINARY ANALYSIS OF THE PRESENT PROCESS (October 15, 2001) (unpublished manuscript on file with the author).

27. *Id*. at 2 ("[Q]uite a significant number of applicants for reappointment were put through the wringer.")