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THE CURRENT

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of the Cornell Institute for Public Affairs

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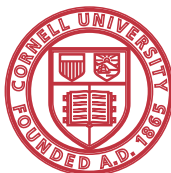
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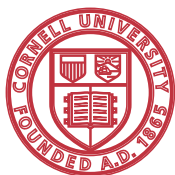


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Mission Statement

As the academic journal of the Cornell Institute for Public Affairs (CIPA), *The Current* provides a platform for public policy discourse through the work of CIPA fellows and their mentors, with contributions from the public affairs community.

Editor's Note

In our globalizing world, issues once considered state-based or culture-specific must now be viewed through a universal lens. The fall 2008 edition of *The Current* acknowledges this worldview in the analysis of public policy. Financial structures evolve to meet the needs of a population; economic growth begets inequality; the internet democratizes society; security becomes borderless; communication channels ease understanding; change is dulled by cultural norms; and ideologies merge in the interest of hatred.

As the categories of domestic and foreign policy have become outmoded, how much more important it has become for participants in the public arena to form a clear vision of public policy. Contributors to *The Current* as well as the students of the Cornell Institute for Public Affairs pursue depth of reasoning in their studies in order to draw innovative solutions to today's critical problems. We at *The Current* recognize and applaud their efforts.

The Current's online forum, which can be viewed at http://www.cipa.cornell.edu/cip_thecurrentoped.html is also representative of our commitment to academic engagement. First and second-year CIPA fellows have taken the reins in responding to a number of topical policy issues, spurring debate within and outside of the forum.

Without the strong commitment of *The Current* staff, both in-print and online, and support and guidance of CIPA faculty and administrative staff, none of this would have come to fruition. It is with great joy and some sadness that I give my final "thank you" to all involved and present the result of our efforts to our readers.

Sincerely,

Paula E. Reichel

The Current reflects the diverse political, cultural, and personal experiences of CIPA fellows and faculty. The views presented are not necessarily the opinions of *The Current*, the Cornell Institute for Public Affairs or Cornell University.

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Does Consumption Expenditure Determine Credit Demand in Rural North India?

Implications for Microfinance

Shailesh Kumar

ABSTRACT:

Most Microfinance Institutions (MFI) provide microcredit as part of their microfinance services. MFIs provide micro-loans to the poor for starting or enhancing small businesses. The practice of providing credit for consumption is less popular although ethnographic experience suggests that people in rural north India generally borrow for consumption purposes. Through an econometric study, the paper tries to establish that some consumption expenditures considered critical by the borrowers of rural north India significantly affect credit demand. The paper provides evidence that loans given for strengthening small businesses are being utilized for consumption purposes and hence MFIs are already bearing the risk of consumption loans. It recommends designing products for critical consumption needs after assessing risk and suggests savings and insurance products as an alternative to consumption credit.

It is estimated that more than 370 million people in India are living under the internationally accepted poverty line of one USD a day; adjusted for the purchasing power.¹ Access to affordable capital (financial services) is recognized as one of the most important preconditions for rising out of poverty. However, banks do not consider the poor as viable customers. Less than twenty percent of seventy-five million poor families in India have access to financial services from formal institutions. In the absence of formal financial services, the poor often borrow from informal sources at exorbitant rates. Although banks have been forced into financing small borrowers due to government efforts², their procedures are cumbersome, the staff unfriendly and the transaction costs high. Second-time loans, except for crop production, are rare even to borrowers who have repaid.³

Microfinance can be defined as the “provision of thrift, credit and other financial services and products of very small amounts to the poor for enabling them to raise their income levels and improve living standards”.⁴ The distinguishing characteristic of microfinance

is the provision of financial services to the poor on their terms. This normally means waiving the requirement of collateral for a loan involving collective liability.⁵ Therefore, microfinance is recognized the world over as an effective initiative for poverty reduction.⁶ Poor people need microfinance not only for investing in enterprises, but also for critical consumption purposes to tide over vulnerabilities. However, microfinance is often only provided for entrepreneurial activity.

The demand for microfinance by seventy-five million poor families is estimated to be around thirty billion USD annually.⁷ The supply of microfinance has improved, but it still covers less than ten percent of demand. Indian MFIs have shown exemplary growth in the past five years, with a compounded annual growth rate (CAGR) of around sixty-four percent. Some MFIs like *Bandhan* have exhibited a growth rate of 300 percent. If they continue to expand at present growth rates till 2010, the MFIs will have little impact on the market. There is a need to increase the MFIs' outreach dramatically and create mechanisms to include the poorest people in the network of microfinance services.

Figure 1: Microfinance Supply in India⁸

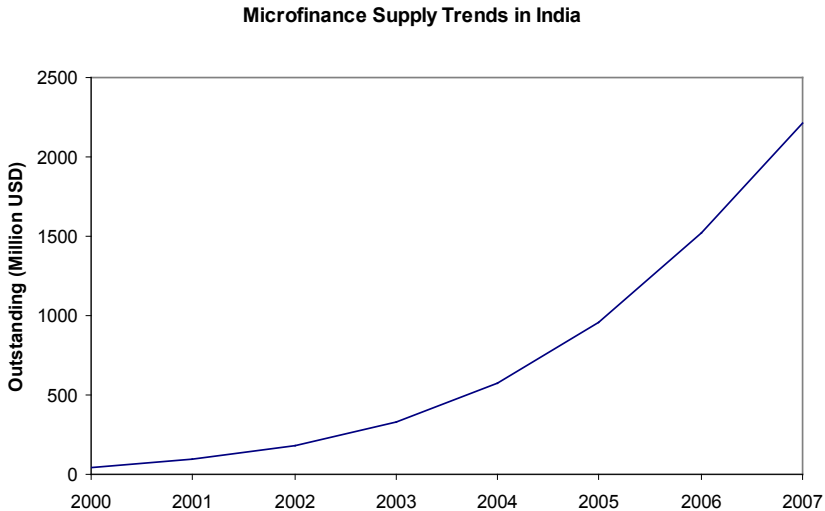
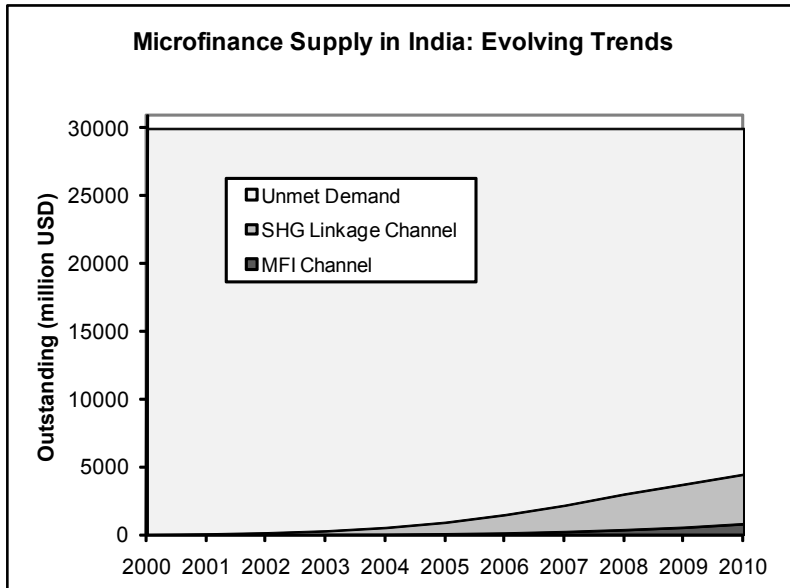


Figure 2: Microfinance Supply Projections at Current CAGR in India⁹



The states of Bihar and Uttar Pradesh are among the poorest states in India and are critically underserved when it comes to financial services. Household level data from these two states has been used to analyze the credit demand of the rural population in the study.

Purpose of the Loan

Micro-loans are classified into two broad categories – consumption loans and loans for productive/entrepreneurial activity. Consumption loans refer to loans given for household or personal spending where as enterprise loans are provided to support business activity.¹⁰ Providing financial access to the poor is seen as an important means of improving incomes, securing their existence and helping them cope with emergencies. The most common form of microfinance practiced today is provision of collateral free loans to the poor for developing and enhancing their micro-enterprises. MFIs refrain from providing loans for consumption.

Research suggests that the poor use microcredit to smooth consumption over periods of unexpected crises.¹¹ Thomas Dichter argues that informal credit has been historically used for consumption or cash flow smoothing.¹² Jonathan Morduch¹³ and Don Johnston, in a recent study show that half of the poor borrowers utilized loans for purposes unrelated to businesses. The euphoric entrepreneurial perspective overlooks the fact that not all poor individuals are entrepreneurs and obscures the ability of microcredit to provide a safety net for

vulnerabilities. The paper explores the importance of consumption expenditure in shaping credit demand in rural north India.

Context of Rural North India (Bihar & Uttar Pradesh)

The states Uttar Pradesh and Bihar are among some of the least developed regions in the world. Based on the indicators of poverty, health, education, water supply and infrastructure¹⁴, the Sarma Committee Report (1997) states that the two states house more than half of the 100 most *backward* districts in the India. The economy is mainly agrarian and people are exposed to vulnerabilities due to seasonality and health hazards.

Rural households in these areas spend a significant share of their incomes on healthcare. Marriage or funeral celebrations account for another large share of expenditure. Anirudh Krishna¹⁵ in a study in North India cites health expenses, high-interest private debt, and social customary expenses as the major causes of poverty.¹⁶ Expenditure on celebrations is associated with social status and prestige in Indian culture. Researchers in an econometric study¹⁷ prove that the size of the wedding celebration reflects the quality of the new groom's family and thus enhances the social status of the bride's family. Susan Wolcott argues that Indian agriculture in the colonial period stagnated due to lack of investment because Indian cultivators spent large sums on ceremonial expenditures.¹⁸ Litigations are another common source of increased expenditure. The inhabitants often borrow from informal sources, to tide over such heavy expenditure of consumptive nature.

The Argument for Enterprise Loans

The specific objective of the study is to establish whether credit demand in rural north India is significantly dependent on consumption expenditure like expenses on medical and social ceremonies (marriages, funerals and rites).

I would like to argue that credit demand of north Indian villages' poorer inhabitants is significantly determined by consumption needs like health expenditure, expenditure on celebrations, apart from need for production inputs. If these assumptions hold true, the MFIs by not providing consumption loans are doing little to protect the borrowers from usurious debt traps.

Marguerite S. Robinson in her book, *The Microfinance Revolution*, argues that conventional theories of finance are not suited to explain the way microfinance works.¹⁹ Despite her acute critique, she maintains a focus on entrepreneurial lending and misses the non-entrepreneurial scope of microfinance. There is a lot of emphasis on entrepreneurship and most MFIs lend only for productive purposes. This is based on the premise that investing in enterprises will generate

revenues which will help the poor improve their economic well being and repay the loans. Therefore, any non-productive or “consumption” loan is considered economically non-beneficial for the poor, and more importantly, to carry a risk of default. However, contrary to this argument, post utilization data from MFIs suggests that a majority of the first few loans taken by the poor are utilized for consumption purposes with near perfect repayment. The problem of adverse selection²⁰ and moral hazard²¹ is taken care of by group lending and the joint liability approach.²² The group members are self-selected and take collective liability for the loan taken by each individual. The fears of default are also misplaced, as the poor will repay to keep their only credit line open. Karlan²³ and Zinman²⁴ demonstrate the positive impacts of consumption credit on the well-being and productivity of individuals²⁵.

Evidence from Indonesia suggests that a large proportion of the poor borrowing from MFIs utilize their loans for non-productive purposes. If given a chance to borrow, even non-borrowers articulated having non-productive uses of loans.²⁶ The consumption needs are often more pressing, and if the MFI is unwilling to lend, the needy will borrow from some other source. In cases where the borrower takes a productive loan from the MFI and a consumption loan from another source, the MFI still shares the risk of default. Such borrowers will rationally pay the consumption loan first as it is generally at a higher interest rate.

Research reveals that poor households have multiple sources of livelihoods.²⁷ So the repayments for loans do not always come from the enterprise they have taken a loan for. This fact is at the root of non-cash flow based repayment schedules in the Grameen Methodology.²⁸ Moreover, investment in human and social capital is equally important for them as these often translate into other forms of capital. Poor health limits the ability of a borrower to earn wages and meaningfully engage in an enterprise. Therefore, a loan for curing an illness is in fact productive for the poor borrower. Expenses on social occasions build the solidarity of the community which acts as a safety net in times of vulnerability.

Determinants of Credit Demand in Literature

There is rich literature on the analysis of determinants of credit demand. Researchers have tried to estimate the determinants of credit demand in various studies. But each study differs in its underlying objective and therefore in the model and the variables under examination. Most studies focus on the borrowers’ personal characteristics or attributes of the credit, rather than the purpose the loan is utilized for. Fanwell Bokosi²⁹ tries to analyze factors that affect

household demand for credit for Malawi's smallholder farmers.³⁰ The results indicate that the credit demand was positively and significantly dependent on farm expenditure and family size.

D.C. Rweyemamu, M.P. Kimaro and O.M. Urassa also try to examine the determinants of credit demand in a study using data from an MFI in Tanzania. Through a regression analysis they found that credit demand is negatively affected by transaction costs and disbursement lag period but positively influenced by input expenditure, average household income and the borrowers' farming experience.³¹ William Parienté uses an ordered logit to estimate financial demand for microenterprises in Rio de Janeiro, Brazil.³² Loan classes were significantly correlated to credit attributes: repayment terms, type of guaranty, and interest rate. At the activity level, financial demand was positively related to sales levels, employment, stock investment, size of last loan, and the level of demand.

However, Don Johnston and Jonathan Morduch try to analyze the uses of loans in microfinance. They examine household-level data from 1438 households in six provinces in Indonesia. The results contradict the dominant microfinance rhetoric. Low income households in the survey used loans for household needs about thirty percent of the time. Important non-business uses include paying for school fees, medical treatment, home repair or expansion, daily consumption needs, and social and holiday expenses.

Anirudh Krishna has done a study of thirty-five north Indian villages in Rajasthan to probe the reasons for falling in or escaping from poverty. The findings of the study elucidate that in more than eighty-five percent of cases, three principal factors were responsible for increasing poverty levels. According to the study, a combination of health and health-related expenses, high-interest private debt, and social and customary expenses constitute the major reasons for falling into poverty in the vast majority of cases.³³ On careful examination, it becomes evident that high health and social expenses are the causes while high interest private debt is the result or effect. This is further confirmed by the cases in the study, where inhabitants fell into debt and finally into poverty due to health and celebration-related expenses.

Daughters' marriages in India are costly events, often driving parents into severe debt and destitution.³⁴ In addition to a dowry paid by the bride's family, which is a transfer of wealth, there is an extravagant celebration. The economic burden of a daughter's marriage in rural north India has been identified as a major cause of gender discrimination by Miller.³⁵ Francis Bloch³⁶, Vijayendra Rao³⁷ and Sonalde Desai³⁸ examine the determinants of expenditures on wedding celebrations by rural Indian families. The study is an empirical examination of conspicuous consumption expenditures. Based on their ethnographic findings, the researchers follow a "participatory econometrics" approach and develop

two theoretical models. Predictions from both these models are tested using regression involving four different models. The results show that the size of celebration has strong association with status seeking.

Dean Karlan, Yale University, and Jonathan Zinman, Dartmouth College probed the role of *consumer* credit in expansion initiatives in an empirical study³⁹. They estimated the impacts of a consumer credit supply expansion using a field experiment and follow-up data collection. A South African lender relaxed its risk assessment criteria by encouraging its loan officers to approve randomly selected marginal rejected applications.⁴⁰ The researchers estimated the resulting impacts using new survey data on applicant households and administrative data on loan repayment as well as public credit reports one and two years later. They found that the marginal loans produced significant benefits for borrowers across a wide range of economic and wellbeing outcomes. They also reported some evidence that marginal loans were profitable for the lender. The researchers concluded that consumer credit expansions could have positive effects on welfare.

The first three studies try to estimate determinants of credit demand but their objectives differ; none seek to analyze underlying uses for demand. The study by Morduch and Johnston tries to analyze the purposes of loans and their findings support the hypothesis of this paper. Krishna's study provides support for the importance of expenditures of consumptive nature like health related, social and customary. The study by Bloch, Rao, and Desai builds on Krishna's findings and explores expenditure on wedding celebrations as a status seeking practice in rural India. Karlan and Zinman provide evidence of the welfare improving effects of microloans. They conclude that such loans were profitable both for the borrowers and lenders. The literature reviewed revealed lack of econometric studies, which focus on the importance of consumptive uses of credit, which underscores the rationale for such a study.

Methodology

The data was obtained from the World Bank's Survey of Living Conditions in Uttar Pradesh and Bihar conducted during 1997-98.⁴¹ This is the latest comprehensive poverty related household level data on India available at the World Bank. Data were collected through household and village-level questionnaires in 120 villages drawn from a sample of twenty-five districts in UP and Bihar states; a total of 2,250 households were interviewed during the course of the survey. The household questionnaire comprised ten main sections, and collected information on (1) household demographics, (2) economic activities, (3) housing, (4) education, (5) health, (6) marriage and maternity history, (7) expenditures and durable goods, (8) vulnerability, (9) farming and

livestock, and (10) remittances and transfers.

The Econometric Model

Total amount of borrowing per household, taken as a proxy of the credit demand, was the dependent variable. Various important variables (explanatory variables) that influence credit demand were regressed against total borrowing. Following is the econometric model and the considered explanatory variables:

$$CD = F(M, SC, LT, F, LS, FA, L)$$

CD = Credit demand (Total Borrowing)

M = Medical Expenses

SC = Social Expenses (Weddings, deaths, rites)

LT = Litigation expenses

F = Fertilizer Expenditure

LS = Value of Livestock

L = Land in acres

FA = Value of Farming Assets

An Ordinary Least Squares (OLS) estimator was used to estimate the model. The results were used to test the hypothesis given below:

Hypothesis

H_0 : Credit demand is not dependent on consumption expenditure like medical expenses, and social expenses.

H_A : Credit demand is significantly dependent on consumption expenditure like medical and social expenses.

Estimation: Specification

Regressions were run using the above model. The parameters showed correct signs, but there were large variations in some error terms. Ramsey RESET test commonly used for checking misspecification was used. The Ramsey RESET test uses various polynomials of the given variables, which test for misspecification as well as act as proxy for missing variables. There were high scores for Ramsey Test both using fitted values of the dependent variable and the powers of independent variables.

Ramsey RESET test using powers of the fitted values of credit

Ho: model has no omitted variables

$$F(3, 1436) = 8.26$$

$$\text{Prob} > F = 0.0000$$

Ramsey RESET test using powers of the independent variables

Ho: model has no omitted variables

$$F(21, 1418) = 6.75$$

$$\text{Prob} > F = 0.0000$$

Therefore, we reject the null and conclude that the model has a number of missing variables. A variable for measuring income and household size was required but these measures were not easily available in the dataset. The dataset did not provide family size or family wages but reported individuals in each household. After aggregating the individuals in a single household, the variables for family size and family wage were obtained. The variable for litigation expenditure was dropped as the frequency of response on it was very low. The value of farming assets was also dropped as theoretically it should be related to land holding. Land per capita was thought of as more representative as it has been used by other researchers as well. *Remittance received*, and *incidence of food credit*, were important explanatory variables added to the model. The model was also tried with powers of dependent and independent variables.

After various changes in the model, the significant variables and signs on the coefficients did not change. Even after deleting some observations, there was not much change in the output. Thus the data did not show evidence of multicollinearity. Finally the following model was obtained, which was approved by Ramsey Test as well.

Estimation Model

$$CD = \beta_0 + \beta_1 M + \beta_2 SC + \beta_3 FC + \beta_4 F + \beta_5 LS + \beta_6 RR + \beta_7 LPC + \beta_8 FS + \beta_9 FW + \varepsilon$$

CD = Credit demand (Total Borrowing)

M = Medical Expenses

SC = Social Expenses (Weddings, deaths, rites)

FC = Incidence of Food Credit

F = Fertilizer Expenditure

LS = Value of Livestock

LPC = Land per capita in acres

RR = Remittance Received

FS = Family Size

FW = Family wages

The new score on the Ramsey Test was

$$F(3, 1434) = 1.77$$

$$\text{Prob} > F = 0.1504$$

Thus we fail to reject the null hypothesis of missing variables and conclude that we do not have enough evidence for missing variables.

Classical Assumptions

All explanatory variables were uncorrelated with the error term. The error term has almost '0' population mean (-2.43e-06). The correlation between all pairs of explanatory variables was below 0.2. The large sample size (2,250 observations), in accordance with the Central Limit

Theorem, provides for asymptotic normality. However, the regression showed evidence of high heteroskedasticity. This violates the classical assumption of constant variance. If not corrected for heteroskedasticity, the OLS estimator is no longer the best linear unbiased estimator.

Heteroskedasticity

A major assumption when using the OLS estimator is that error terms have constant variance. Heteroskedasticity is a condition where variance is not constant. It has serious consequences for the OLS estimator. Although the OLS estimator remains unbiased, the confidence intervals and hypotheses tests become unreliable. On plotting error terms with some variables, perfect conical patterns were observed providing adequate evidence of heteroskedasticity. The Breusch-Pagan Test also gave very high estimates:

$$\begin{aligned} \text{chi2}(1) &= 1674.92 \\ \text{Prob} > \text{chi2} &= 0.0000 \end{aligned}$$

Figure 3 & 4: Plotting Error Terms Against Land and Family Wage

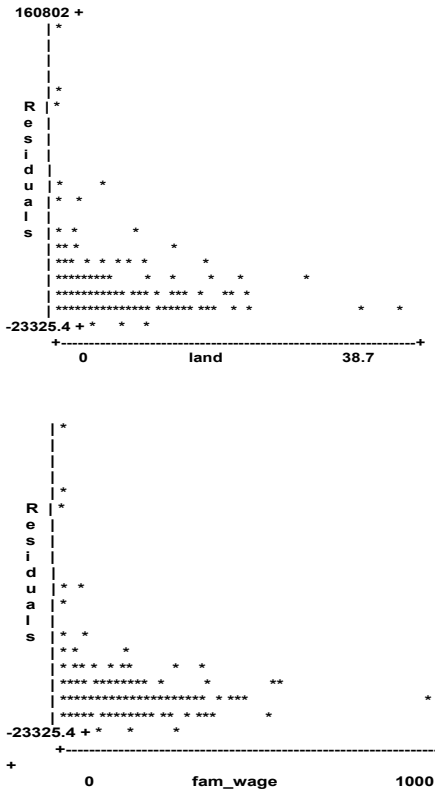


Table 1: Breusch-Pagan/ Cook Weisberg Test for Heteroskedasticity

Breusch-Pagan / Cook-Weisberg test for heteroskedasticity

Ho: Constant variance

Variable	chi2	df	p
social	160.11	1	0.0000
medical	506.52	1	0.0000
fam size	966.33	1	0.0000
land	2.26	1	0.8429
fam wage	79.04	1	0.0000
litigation	378.98	1	0.0000
religious	262.88	1	0.0000
remit md	495.75	1	0.0000
fert exp	1739.15	1	0.0000
livestock ~l	150.68	1	0.0000
farm asset	4936.41	1	0.0000
food cr	22.13	1	0.0000
remit rec	0.2	1	1.0000
simultaneous	7452.29	13	0.0000

The above plots and scores indicate strong heteroskedasticity. The estimates for the Breusch-Pagan Test with the independent variables were also high.

As with heteroskedasticity the estimator loses efficiency and the hypothesis tests will be invalid. The Huber/White/sandwich estimator of variance was used in place of traditional calculation. Therefore, robust estimates were obtained which correct for both heteroskedasticity and autocorrelation.

Result

The R squared and Adjusted R Squared values for the regression were low - around 0.13. A higher value, closer to 1, indicates a goodness of fit of the model. But these measures are just rough approximations to indicate a goodness of fit. Moreover, cross sectional household data usually gives low R-Square values. So reliance on the economic theory is preferred over approximate goodness of fit tests.

The results reveal that the following consumption expenditure variables included in the model were found significant at 95% and 99% confidence level:

- Medical expenses
- Social expenses
- Family size
- Incidence of food credit

Table 2: Regression Results for the OLS Estimator

credit	Coef.	Std. Err.	t	P>t	[95% Conf.Interval]	
medical	0.4313	0.1360643	3.17	0.002	0.164385	0.6981968
social	0.1429	0.0513363	2.78	0.005	0.042237	0.2436411
fert_exp	0.6429	1.100065	0.58	0.559	-1.515	2.800814
livestock ~l	-0.0217	0.0325382	-0.67	0.505	-0.0855	0.042156
fam size	402.9307	140.6803	2.86	0.004	126.97	678.8913
food cr	1381.1210	519.5061	2.66	0.008	362.0491	2400.192
fam wage	-1.3172	2.640636	-0.5	0.618	-6.49708	3.862747
land capita	406.3954	304.8752	1.33	0.183	-191.653	1004.444
remit rec	-0.0624	0.1021403	-0.61	0.542	-0.26272	0.1379965
cons	-451.6040	950.5415	-0.48	0.635	-2316.2	1412.993

Therefore, we reject our null hypothesis in favor of the alternate hypothesis. We can thus conclude that consumption expenditure significantly shapes credit demand in rural north India.

The coefficient for medical expenses shows that it is strongly and positively related. Social expenditure is positively related but has a smaller coefficient. Surprisingly, the estimates for fertilizer, which is a productive expenditure, are not significantly different from zero. The credit demand was found to vary strongly with family size. As expected, the incidence of taking food on credit was strongly associated with demand for credit.

Family daily wage shows a negative relationship with credit demand: the more the family earns, the lesser its demand for credit. Land per capita shows a positive relationship with credit demand. This can be explained by the fact that more land will require more agricultural inputs and hence more credit. Remittances sent from family members working elsewhere have a negative relationship with credit demand.

Truncated Regression

Since the dependent variable also had zero values, truncated regressions were also run using the Tobit Model. The results did not show much variation. The only variation from the above results using OLS were:

Food credit, which was significant in the OLS method, was found insignificant

Fertilizer expenditure, which was insignificant in the OLS estimation was found to be significant.

This variation is reasonable as expenditure on fertilizer is one of the most significant productive expenditures for farmers. Normally most farmers buy fertilizers on credit from cooperative societies. The frequency of observations on *food credit* was very low and therefore it could not be considered very informative even though it was found significant by the OLS estimator.

Limit: lower = 0

upper = +inf

Log pseudo-likelihood = -7902.8698

Number of obs = 815

Wald chi2(9) = 62.63

Prob > chi2 = 0.0000

Table 3: Regression Results for the Tobit Model

credit	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]	
eq1						
medical	11.98673	5.380345	2.23	0.0260	1.441444	22.53201
social	11.23334	2.3772	4.73	0.0000	6.574117	15.89257
fert exp	151.1957	62.39197	2.42	0.0150	28.90966	273.4817
livestock ~l	-5.666222	9.070165	-0.62	0.5320	-23.44342	12.11098
fam size	102340.9	26081.65	3.92	0.0000	51221.79	153460
food cr	37916.18	152514.4	0.25	0.8040	-261006.6	336839
remit rec	-14.05407	9.200623	-1.53	0.1270	-32.08696	3.97882
fam wage	-3585.215	1710.245	-2.1	0.0360	-6937.232	-233.1969
land capita	259031.6	66765.54	3.88	0.0000	128173.6	389889.7
cons	-2416931	457024.9	-5.29	0.0000	-3312683	-1521178
-----+-----						
sigma						
cons	101083.5	10597.33	9.54	0	80313.13	121853.9

Implications of the Explanatory Variables

There is a need for financial institutions to provide products supporting consumption expenditure. A few organizations are already experimenting with consumption microcredit in India. *Cashpor* initiated a marriage loan product for repeat borrowers. But it is not recommended that MFIs start making consumption loans without assessing the risk. There is inadequate evidence to prove how risky these loans will be. It is highly probable that concerns for default of such loans are not misplaced. There is a need for further empirical studies similar to the ones done by Karlan and Zinman to assess the feasibility of consumption loans.

However, the present scenario does signal the paucity of diversity in microfinance products. Huge demand of consumption loans is being ignored by MFIs who are forgoing a market opportunity and defeating their goal of poverty reduction. They need to design specific consumption loans by assessing the risk.

The aim of the study is not to recommend support for wasteful expenditure. The MFIs can do little on the issue of celebrations as conspicuous consumption among the poor. This is of special relevance in very poor societies where the money spent on weddings can be particularly wasteful given its opportunity cost. Although the government of India has constituted strong anti-dowry legislation, no steps have been taken to curb wasteful expenditure on marriage celebrations.

High dependence on loans for medical expenses indicates the importance of health insurance products, which can reduce the vulnerability of poor borrowers with lesser risks to MFIs. At present, very few MFIs in India are offering insurance products and of those

being offered, many are not suited to the needs of the poor. Further innovation and reform remains to be brought in the sector of micro insurance, which can provide safety nets to the otherwise vulnerable poor.

A savings product can be an answer to many such consumption expenses. Stuart Rutherford shows the importance of savings among the poor and how closely savings is related to credit discipline.⁴² Some academicians have observed that facilitating savings may be more important than innovating lending, especially for the most impoverished households.⁴³ The Microfinance Sector Bill, pending in the parliament of India, offers some hope.⁴⁴ The bill allows the acceptance of savings deposits by small microfinance organizations for a very small capital requirement.

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- 23 Dean Karlan is Assistant Professor of Economics at Yale University. His research coordinated through Innovations for Poverty Action and M.I.T. Jameel Poverty Action Lab.
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- 36 Francis Bloch is a Professor of Economics at Ecole Polytechnique. He started his academic career as an Assistant Professor of Economics at Brown University.
- 37 Vijayendra Rao is a senior economist in the Development Research Group of the World Bank. Combining his training in economics (Ph.D, U. of Pennsylvania) with an interest in anthropology and social theory, he calls his

approach to research “participatory econometrics.”

38 Sonalde Desai is an Associate Professor of Sociology, University of Maryland. She is a demographer whose work deals primarily with social inequalities in developing countries with a particular focus on gender and class inequalities.

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Rising Income Inequality in China

The Impact of the Decentralized Fiscal System

Yang Song & Qianqian Wang

ABSTRACT:

This article examines the quantitative effects of the Chinese fiscal system on increasing income inequality in China, from 1978 to 2005. Several critical findings were obtained through econometric analysis. The decentralized fiscal system in China has contributed to rising income inequality over the last three decades. The decline in the share of central government spending on infrastructure plays an important role in the increasing income inequality. A relatively surprising result is that a rise in the share of central government spending on education and healthcare has not had an equalizing impact. Rather, this increase aggravated the income inequality. This research affirms or a rational explanation is that the government expenditures on education and healthcare have not targeted the poor effectively.

China has experienced unprecedented economic growth during the past three decades of market-oriented reforms. Per capita real income has more than quadrupled since 1978. This growth has fueled a remarkable decline in the poverty rate, from 64% at the beginning of the reform, to 10% in 2004.¹ However, the economic well-being of people in a country is not only determined by the poverty rate and income per capita, but also by income inequality. The relationship between these factors has been established in the following abbreviated social welfare function.²

$$W=w(\text{GNP}, \text{INEQ}, \text{POV})$$

In this formula, GNP is a measure of gross national product, INEQ is a measure of income inequality, and POV is a measure of poverty. When such functions are applied, the formula is usually based on the stipulation that social welfare increases strictly if GNP rises, INEQ falls, or POV falls.

The existing literature demonstrates that inequality and GNP have increased markedly in China over the last few years, along with the decline in poverty. This makes the well-being of Chinese people difficult to measure.³

A myriad of factors have contributed to the rising income inequality in China. One is a decentralized fiscal system⁴, which gives the provincial government and local government more power and autonomy with respect to public expenditures and revenues. David Dollar, World Bank country director for China and Mongolia, argues that in a highly decentralized fiscal system local governments rely primarily on local tax collection to provide basic services such as primary education and health care.⁵ However, China's fiscal regime is much more decentralized than the Organization for Economic Co-operation and Development (OECD) and middle-income countries, particularly on the spending side. More than half of all expenditures occur at the sub-provincial level. Furthermore, at this level, inequalities in public spending are quite large. For example, the richest county has about forty-eight times per capita spending than the poorest county.⁶ China's highly decentralized fiscal system has resulted in inadequate resources for local governments in many locations to fund basic social services. By 2003, high-school enrollment was near one hundred percent in the wealthier provinces while less than forty percent in poorer ones. This widens the inequality within the country.

Background: Chinese Fiscal Reform

Since 1980, China has experienced the transformation of regional development policies which paid considerable attention to regional equality in contrast to the current system which tends to emphasize efficiency based on comparative advantage.⁷ With this market-oriented transformation, the decentralized fiscal system started to burgeon for the purpose of giving local governments more incentives and motivation to achieve economic growth.

Admittedly, the decentralized system indeed had an influence on promoting China's economic growth. It increased the efficiency of the use of financial resources. In particular, this mechanism of incentives helped Chinese coastal areas to a large degree.

Nonetheless, the decentralized fiscal system also produces some negative effects. Shaoguang Wang, professor at The Chinese University of Hongkong, claimed that the decentralization had surpassed the bottom line and endowed too much authority to local governments, which would enlarge the inequality among provinces.⁸ In 1994, in order to mitigate the inequality, the central government implemented a new tax reform which separated national and local tax regulations and administrations. Nevertheless, the reform apparently failed to prevent the increasing regional inequality,⁹ since richer provinces still had too much power to control their public spending, while poorer areas could not support basic expenditures. Take two regions for example: per-

capita public spending was 9,259 RMB (Chinese Yuan) in Shanghai in 2005,¹⁰ but only 1,317 RMB in the Sichuan province in the same year. The decentralized fiscal system reduced resource transfers from richer to poorer regions, increasing inequalities in public spending.¹¹ An analysis of public expenditures over eleven years shows that the allocation of resources is skewed toward richer regions. Within regions, allocation of resources is skewed toward the fastest growing provinces in China.¹²

Although the studies mentioned above have found that the rising inequality in China after the 1978 reform may be partly due to the decentralized fiscal system, hitherto, few studies have explored the quantitative relationships between the decentralized fiscal system and inequality. From the theoretical point of view, new growth theory models have begun to take account of public spending as a factor of long-term growth.¹³ Therefore, the disparity in public expenditures should cause income inequality in the long run. This article attempts to scrutinize the quantitative effects of the Chinese fiscal system on the increasing income inequality in China from 1978 to 2005, and it will provide a detailed analysis of the effects.

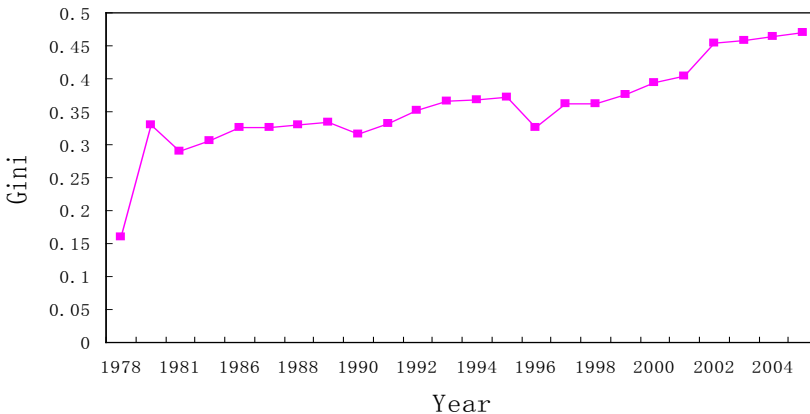
Analytical Approach

The entire analysis will be divided into two steps. First, multiple regressions, a common statistical tool, will be used for an investigation of the overall relationship between the rising income inequality in China and the decentralized fiscal system. The Gini coefficient in year t is the dependent variable of the model, and it will be employed as the measure of income inequality. Two independent variables are used to analyze the discrete fiscal regime. The first independent variable is the coefficient of variation of per-capita government spending among the provinces for each year. The coefficient of variation, which is calculated by dividing the standard deviation by the mean, can give us a sense of how large the fiscal inequality is with respect to provincial government expenditures under the decentralized fiscal system. A greater coefficient of variation represents larger fiscal inequality. This regression estimate would enable us to know to what degree fiscal inequality translated to overall income inequality. Additionally, as suggested by Joachim Braun, Director General of the International Food Policy Research Institute, fiscal decentralization should be approximated by the share of local public expenditures in total expenditures.¹⁴ Thus, the second independent variable is designated as the percentage of central government spending of the total spent by all levels of government for each year. The variable directly reflects to what extent the Chinese fiscal system is decentralized. When the percentage is smaller, the central government has less control on allocation of fiscal resources—that is, the fiscal system is more decentralized. The second procedure will be a detailed analysis of the two independent variables.

Gini Coefficient and Central Government Spending Data

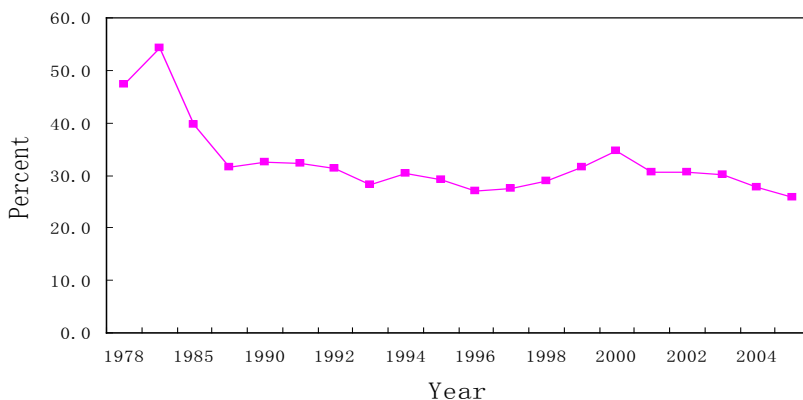
Since the *Chinese Statistics Yearbook* does not publish clear data on the Gini coefficient, there is no official dataset.¹⁵ However, many scholars have tried to calculate the Gini coefficient using different methods and data sources. After searching for different sets of the Gini coefficient, this article integrates the previous results and attempts to obtain a more complete dataset. Figure 1 displays an obviously increasing inequality over time in China, with the Gini coefficient changing from 0.16 in 1978 to 0.47 in 2005. Table 1 shows China's Gini coefficient from 1978-2005.¹⁶

Figure 1: China's Gini Coefficient



Sources of data: The Gini coefficient was reported by the World Bank in 1978. The data in 1980 is from People's Daily, August 31, 2001, "How wide is the gap of China's individual income?" and May 10, 2002, "China is Among Countries with Wide Income Gap." The data from 1981-2001 is calculated by Zhou (2003),¹⁷ who used the method provided by World Bank. The specific paper is listed in references. The data from 2002 to 2005 were presented by Chinese Academy of Social Sciences, "Blue Book of China's Economy: Economy of China Analysis and Forecast 2007."

In addition to the Gini coefficient, the data on government spending from 1978 to 2005 used in this article were calculated by the author using original data from *Chinese Statistics Yearbook*. Figure 2 shows a decline in percentage of central government spending over years, which indicates that the Chinese fiscal system became more and more decentralized.

Figure 2: Percentage of Central Government Spending

Regression Models

The linear regression model is as follows:

$$\text{Model 1: } Y = b_0 + b_1 X_1 + b_2 X_2 + \varepsilon$$

In this equation, Y represents the Gini coefficients of China from 1978-2005; X_1 stands for the coefficient of variation of per-capita government spending among the provinces for each year; and X_2 denotes the percentage of central government spending of total expenditures for each year.

Table 1: Estimates of Model 1

	Coefficient
X_1	0.190** (0.049)
X_2	-0.403** (0.010)
Constant	0.356*** (0.001)
Std. Error of the Estimate	0.050
Adjusted R Squared	0.438

** Significant at the 0.05 level (2-tailed).

*** Significant at the 0.01 level (2-tailed).

Given the results, we obtain the predicted regression equation below:

$$\text{Model 1.1: } Y = 0.356 + 0.19X_1 - 0.403X_2$$

When the confidence level was ninety-five percent, all of the coefficients were statistically significant. The formula shows that the larger the inequality in provincial government spending, the larger the income inequality in China. Specifically speaking, a one unit increase in the coefficient of variation of per-capita government spending led to an increase in the Gini coefficient by 0.19. In addition, the percentage of central government spending was negatively correlated with the Gini coefficient. This is a very important finding, in that it indicates that the decentralized fiscal system increases income inequality. When provincial spending takes a larger share compared to central government expenditure, income inequality worsens.

Next, we conduct an analysis of the variable X_1 to explore which expenditure is most responsible for the rise in inequality with respect to provincial government spending.

$$\text{Model 2: } X_1 = b_0 + b_1E + \epsilon$$

X_1 stands for the coefficient of variation of per-capita government spending among the provinces for each year, and E signifies the coefficient of variation of annual per-capita government spending on education and healthcare.¹⁸ The results given by SPSS are presented below:

Table 2: Estimates of Model 2

	Coefficient
E	0.900*** (0.000)
Constant	0.192** (0.011)
Std. Error of the Estimate	0.065
Adjusted R Square	0.727

** Significant at the 0.05 level (2-tailed).

*** Significant at the 0.01 level (2-tailed).

As can be seen from the table above, Adjusted R Squared for this regression model was 0.727. Also, the coefficient for the independent variable was 0.9. These two numbers are quite high, which demonstrates

that the inequality of provincial government expenditures on education and healthcare explains a large part of the overall fiscal inequality.

The next section discusses the variable X_2 in the original regression model in more detail. Since we know that the percentage of central government spending is negatively correlated to the Gini coefficient, a rational policy recommendation to reduce inequality would be to increase the share of central government spending. However, it remains to be determined how the government should allocate these funds. We select three variables to answer this question. These variables are the percentage of central government spending on infrastructure, on education and healthcare, and on agriculture for each year. They are represented by X_3 , X_4 , and X_5 respectively. A more comprehensive model is constructed below, in which X_1 and X_2 are the same variables as in our initial model, that is, coefficient of variation and share of central government spending.

$$\text{Model 3: } Y = b_0 + b_1 X_1 + b_2 X_2 + b_3 X_3 + b_4 X_4 + b_5 X_5 + \varepsilon$$

Considering a possible multi-collinearity problem, we draw a correlation matrix.

Table 3: Correlations

	X_1	X_2	X_3	X_4	X_5
X_1	1	-0.386* (0.063)	-0.386* (0.062)	0.486** (0.016)	-0.147 (0.494)
X_2		1	0.754*** (0.000)	-0.737*** (0.000)	-0.393* (0.057)
X_3			1	-0.790*** (0.000)	-0.466* (0.022)
X_4				1	0.008 (0.972)
X_5					1

* Significant at the 0.1 level (2-tailed).

** Significant at the 0.05 level (2-tailed).

*** Significant at the 0.01 level (2-tailed).

Table 3 indicates that X_2 was highly related to X_3 , X_4 , and X_5 . Thus, we remove X_2 from the model. In addition, the correlation coefficients between X_3 , X_4 , and X_5 were so large that they require separate models.

We begin with running the following regression model:

$$\text{Model 4: } Y = b_0 + b_1 X_1 + b_3 X_3 + \varepsilon$$

Table 4: Estimates of Model 4

	Coefficient
X_1	0.179* (0.052)
X_3	-0.517*** (0.003)
Constant	0.337*** (0.001)

* Significant at the 0.1 level (2-tailed).

*** Significant at the 0.01 level (2-tailed).

The statistically significant coefficients demonstrate that a decline in the share of central government spending on infrastructure increased the income inequality in China very sharply. In fact, the share of central government spending on infrastructure has dropped from 0.43 in 1978 to 0.18 in 2005. Each percentage point decrease would raise the Gini coefficient by around 0.5. The following equation will test the effects of X_4 and X_5 on income inequality:

$$\text{Model 5: } Y = b_0 + b_1 X_1 + b_4 X_4 + b_5 X_5 + \varepsilon$$

Table 5: Estimates of Model 5

	Coefficient
X_1	0.189* (0.080)
X_4	0.471** (0.033)
X_5	1.078 (0.379)
Constant	0.026 (0.830)

* Significant at the 0.1 level (2-tailed).

** Significant at the 0.05 level (2-tailed).

The coefficient of the percentage of central government spending on agriculture was not statistically significant. Hence, we remove X_5 from our model. The final formula will be as follows:

$$\text{Model 6: } Y = b_0 + b_1 X_1 + b_4 X_4 + \varepsilon$$

Table 6: Estimates of Model 6

	Coefficient
X_1	0.173* (0.099)
X_4	0.488** (0.026)
Constant	0.114* (0.100)

* Significant at the 0.1 level (2-tailed).

** Significant at the 0.05 level (2-tailed).

From this table, we can see that the coefficient of X_4 is positive, demonstrating that an increase in the share of central government spending on education and healthcare raises the inequality, rather than reduces it. In other words, although the central funds spent on education and healthcare rise from 11.3 billion RMB in 1978 to 610.4 billion RMB, with an increase in the share from 0.11 to 0.26, the income inequality still goes up.

Major Findings and Discussion

The decentralized fiscal system has significantly contributed to the rising income inequality in China over the last three decades, which is indicated by the negative coefficient for the variable of the percentage of central government spending of total expenditures, that is, X_2 in the initial regression model. Moreover, the positive sign of X_1 suggests that the fiscal inequality among provinces has been conspicuously translated into overall income inequality. As it turns out, although to some extent the rise in income inequality in China is the natural result of the market forces that have generated the strong growth,¹⁹ it is “artificial” as well, in the sense that government policies exacerbate the problem of higher income inequality, rather than mitigate it.

Furthermore, the inequality in per capita government spending on education and healthcare among provinces has obviously increased, which is a dominant factor responsible for the overall enlarging fiscal inequality. As our model illustrates, fiscal inequalities in education and healthcare have substantially increased. China’s public finance reforms after 1978 have transferred almost all public finance of health services to the provincial level, limiting the central government’s ability to redistribute funds from richer to poorer areas of the country. With

fiscal decentralization, the poorest counties have become less able to finance public health programs.²⁰ A similar situation has occurred in the field of education. For example, many of the more urbanized and coastal provinces have reached an important benchmark in universalizing nine years of compulsory education, as nearly all elementary students go on to secondary school. In contrast, in many of the impoverished western provinces, roughly 10 percent of elementary school children fail to continue on to secondary school.²¹

After analyzing the central government spending, we obtain the third finding that a significant contributor to increasing income inequality is the decline in the share of central government spending on infrastructure from 1978-2005 in China. It has been long recognized that the improvement in infrastructure can promote long-term economic growth and increase people's incomes. The investment in physical infrastructure can improve the productivity of all inputs in the production process and thus strengthen long-term growth performance by facilitating market transactions. Thus, investment on infrastructure in poor areas will surely have an equalizing effect.²²

However, since the introduction of a decentralized budget regime in China, the larger autonomy given to local governments at every level of the administrative hierarchy has produced disparities in the level of infrastructure provision among provinces because the capacity to raise funds to finance infrastructure mainly depends on local government revenues, which are highly unequal.²³ Pranab Bardhan, professor of economics at UC Berkeley, proposed that the largely uneven investment in infrastructure among regions in China under decentralization will worsen economic efficiency and equity at the same time.²⁴

Finally, it is a surprising finding that an increase in the share of central government spending on education and healthcare over the past 30 years did not have an equalizing impact. Rather, the increase worsened inequality. However, after scrutinizing the mechanism of increasing public expenditures, we find an underlying reason for this paradox. In fact, government expenditures do not automatically lead to more pro-poor spending.²⁵ Even higher public funding of social services may not translate into more or better services for the poor. Programs for poor people are too often of low quality and unresponsive to their needs.²⁶ An illustration of this may be that more luxurious hospitals have been built, but poor people still cannot afford to see a doctor in rural areas. More beautiful university buildings have emerged, but poor people have insufficient money to send their children to elementary schools. The allocation of funding to modernize facilities amplifies inequality, rather than alleviating it.

Policy Recommendations

Because the decentralized fiscal system has resulted in rising inequality, the central government should centralize the system to some degree.

As the World Bank recommended, the development of new strategies to combat regional finance disparities is needed, and some finance responsibilities should be recentralized.²⁷ For instance, inequality would decrease if the central government increases the share of central government spending and bears more of the burden in equalizing major public expenditures, including education and healthcare. In particular, public expenditures on education and healthcare should target the poor in order to reduce inequality.

For this purpose, Dollar argued that China would need to devote an increasing amount of resources to equalizing grants—in exchange for higher performance standards for the receiving regions.²⁸ A better definition of fiscal needs in the regions, including a much more detailed assignment of obligatory functions across all levels of government, and eventual establishment of affordable minimum standards will be required for this. In addition, a better definition of revenue capacity, including extra budgetary funds, would be needed to better define the grants system.

Moreover, the government ought to establish some kind of transfer mechanism to equalize regional disparities with regard to government expenditures. Specifically speaking, fiscal revenues of the richest provinces can be transferred by some amount to the poorest provinces each year. An excellent opportunity here is natural resource taxation, which in China is assigned to the regional governments. Many of China's scarce resources such as water, energy, and land are located in the poor regions, whereas most of the consumers of the resources are located in the rich regions. Taxing these scarce resources more would therefore not only be good for a more efficient use of those resources, but would also help in reducing some of the current fiscal disparities. This long-term transfer mechanism would benefit poor areas and reduce regional inequality in China.

Furthermore, a regularized and substantial scheme of intergovernmental grants in compulsory education proposed by Tsang, a professor of economics of education at Columbia University, should be encouraged.²⁹ The scheme allows building a fiscal transfer mechanism among different levels of government to reduce inequality. It is already now apparent to both educators and the government that many lower-level governments do not have the fiscal capacity to finance compulsory education because of their limited revenue sources. The deferred payment to teachers is a clear indication of this difficulty. Education levies on rural residents could be a fluctuating and unreliable source of funding for rural schools, in addition to contributing to the financial burden on rural residents. Therefore, in the near future, ensuring financial adequacy for compulsory education in poor and rural areas should be a top priority.

More investment in infrastructure construction, such as transport services, telecommunication, power, and irrigation in impoverished areas will be a very effective and efficient way to decrease inequality.

Conclusion

Through the scrutiny of the relationship between a decentralized fiscal system and income inequality in China, we discover that the central government gives too much autonomy to local governments and lacks a vital transfer mechanism to equalize regional disparities with regards to allocating public funds. In addition, the insufficient expenditures of the central government do not target the poor effectively and efficiently. In particular, the public investment in infrastructure in impoverished areas has yet to increase.

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Gauging Accessibility in the Digital Age

An Analysis of Online Services Provided by Local Municipalities

Adam L. Kress & Timothy Lindberg

ABSTRACT

Despite the rapid rise of internet use, little attention has been paid to the thousands of municipalities in this country and the online services they provide. We have attempted to fill that gap by performing a content analysis of municipal websites across the country and detailing how local governments are using the internet to better serve their citizens through creation of an accessibility scale. We contend that effective websites serve the dual purpose of promoting efficiency and allowing for greater accessibility.

Scholarship relating international trends in E-government remains scarce even as the internet becomes ubiquitous in our day-to-day lives. General data on the nature of internet usage is available, as is data regarding state and federal websites. For example, from a 2006 Pew survey it is apparent that well over seventy percent of Americans use the internet, and that the number of those using broadband connections exceeds forty percent¹. Additionally, Americans are increasingly using the internet to shop and get information about health care. Studies by Brown University's Taubman Center for Public Policy have investigated the services, information, and ease of use provided by governmental websites, but only on the state and federal levels². We find that little attention has been paid to the thousands of local municipalities in this country and the online services they provide. The purpose of this study is to attempt to fill in that gap. By performing a content analysis on a random sample of municipal government websites across the country, this study will show whether and how these small governmental units are using the internet as a way to provide access for their residents to resources and information.

Promoting Efficiency & Accessibility

We contend that websites which provide useful information, up-to-date events and news, and online services or downloadable forms can serve a double purpose of promoting efficiency in government

resources and accessibility and ease of use for citizens. While the measurements conducted by the Taubman Center in the United States are useful for the types and sizes of governments they are dealing with (State and Federal), our analysis of the United States will be a more refined focus. It will gauge the existence of items and accommodations for disabilities, as does Taubman, but since local governments are responsible mainly for providing basic services such as police and fire, along with voting administration and local permits (for businesses, planning, etc.), it will take the analysis a step further and attempt to quantify how easy accessing vital information is. We attempt to measure how readily information can be accessed, and also provide a weighted scale to gauge the importance of that information, while placing it in convenient, descriptive categories. This latter step is not taken in the literature that is available on the State and Federal level (nor is the international analysis we perform in the second half of our inquiry). Our study also seeks to accommodate the notion that location on a webpage is important and provides a dimension for mapping an item's location, while establishing its presence and ease of use. The Taubman Center's report on State and Federal e-government underscores the need for such a detailed look at how information is presented, finding that though most sites have effective content delivery mechanisms, in the form of fully executable services or access on mobile devices, many fail to present that information at the average reading level or conform to accepted standards for the accommodation of special adaptive technologies for the disabled³. That said, they do find progress on several of their benchmarks, but we expect that the existence of these deficiencies at the state and federal level will only be exacerbated locally given the structural constraints of less funding and oversight.

Moreover, municipal governments have a more immediate purpose than their state and federal counterparts, providing information on city departments, local events and news, and who/how/where to contact for information, etc. These governments can also use their websites to provide vital emergency information or access to forms and online services. This can cut down on time taken by local officials and money spent out of local budgets to answer simple and repetitive inquiries and, more importantly, will lower barriers to information and services, allowing citizens in many cases a greater ability to access the information when they need it. For example, having a fully functional and efficient website could allow an elderly couple to find information on the latest property tax assessment, a working mother to find out about summer recreation leagues, or a citizen unhappy with the parking situation to check if the issue has come up at recent city/county board meetings.

Efficiency in government can sometimes be subjective or oxymoronic as bureaucracy becomes entrenched, and taking this as given, there arises a companion literature around factual sources like the Taubman Center's report on e-government, that seeks to evaluate and streamline

institutional processes as they are digitized. A leader in this movement, who attempts to offer practical advice to practitioners, is the Center for Democracy and Technology, located in Washington D.C. The Center issues a handbook of best practices for e-government whose crux is less about the physical mechanisms of delivery, and much more about how content should be approached and presented. They advocate for projects undertaken from an end user perspective and the removal of inefficiency from processes when they are taken digital.⁴ Further, realizing that for a site to be effective and well traveled, it must maintain its level of resources, both in terms of content as well as human and physical capital backing them up.⁵ Their findings are cogent and to some extent born of common sense, yet it would be easy to see how, within the complex and often under funded structure of local government, these benchmarks might go unachieved.

A Look at the Literature

The literature on digital accessibility is sparse and becoming dated, focusing on the paradigm shift from the paper-trail governments of old to the fully-integrated e-governments we are beginning to see today⁶. In his August 2002 Public Administration Review article, *Reinventing Governments and the E-Government Initiative*, Alfred Tat-Kei Ho traces this paradigmatic shift, situating it historically and describing how the business model of e-commerce and ‘one-stop-shopping’ was beginning and would continue to transform how the business of government was transacted⁷. Some six years hence, this has become somewhat of an academic curio on e-government, providing little basis for new scholarship, however, the same cannot be said of another article which buttressed this in the same issue of the American Public Administration Review. M. Jae Moon’s article, *The Evolution of E-government among Municipalities: Rhetoric or Reality?* provides a deeper, more substantive cut on e-government. The essential finding of this work was that although local governments were making a good faith effort by 2002 to switch to e-government platforms, their success was somewhat oversold, in that the transformation was not as complete as citizens may have been led to believe on the heels of President Clinton’s e-government initiative⁸. In his study, the research revealed that personnel, training, and financial resources were among the major barriers to allowing for a complete transition to an e-government mode and concluded that many municipal sites only ranked within his first two stages of transformation. Moon details five stages in total to measure the extent to which a municipality has embraced e-government, which are (1) one-way communication/information dissemination (2) two-way communication (3) service and financial transaction (4) integration (of internal and external systems – similar to a reliable intra-net, and database structure that collects and maintains inputs from citizens) (5) political participation (such as voting online or participating in public forums)⁹. These categories are still useful, but only when taking a broad-cut at accessibility, and frankly six years hence the crux of their findings still ring true, though on the whole there has likely been a shift from majority competence in category 1

or 2 to majority competence in category 2 or 3 as a large number of municipalities move towards provision of online services (albeit mostly online bill payment for taxes, services or citations). Moon's conceptualization of e-government is a broad one, and he derives the categories above from an umbrella notion that e-government are those things considered technologically innovative that fall within four main goals for municipalities to achieve: (1) the establishment of a secure government intranet and central database for more efficient and cooperative interaction among governmental agencies; (2) Web-based service delivery; (3) the application of e-commerce for more efficient government transaction activities, such as procurement and contract; and (4) digital democracy for more transparent accountability of government.¹⁰ These goals and his stages provide a sturdy bulwark with which to situate our work in, as this inquiry and typology provide the pretext for a deeper look into the rudimentary practical aspects of municipal e-government. Moon's work focuses on the benchmarks, whereas our own seeks to answer from within the semantics of the digital age if information has truly become more accessible to citizens than it was five and ten years ago.

Methodology

As stated in the introduction, we have undertaken a two-stage content analysis, as well as the creation of an accessibility scale. Selection of our sample of municipalities was our first task in this process. For this we relied on the U.S. Census Bureau, which maintains the most complete listing of municipal entities in the country (less non-incorporated areas, such as the large populated areas skirting Las Vegas or Omaha), as well as estimates of their current population. Using their database, we divided states into the four main census regions: Northeast, South, Midwest, and West¹¹. We then further divided these into four main population categories: 0-1,999; 2,000-24,999; 25,000-74,999; and 75,000+. We removed those municipalities below 2,000 residents, since they are unlikely to have the infrastructure necessary, are unlikely to require an accessible website to serve their citizens responsibly, and are very diverse in their actual responsibilities depending on their regional location with the United States.

Our actual content analysis required two main stages. The first and far larger stage was to randomly sample all municipalities in each of the regions and population groups. We decided, for this stage, to perform a sampling that found a percentage of all the municipalities in a given population and region grouping. This led us to sample approximately 400 websites across the country¹². We then proceeded to visit each website, recording the existence as well as the relative location of a variety of different online services and information types¹³.

The second stage was to take a random sample from within our original sample. We chose 15 municipalities from each of the regions and population groups¹⁴. We then proceeded to code the number of mouse clicks it took for us to find vital municipal information (e.g. fire department information, meeting minutes, etc), as well as to actually code the efficiency of the search functions of websites, if available. The major difference between the two stages, besides the sample size, is that the first stage was interested primarily in the main webpage of a website and the location of information upon it. The second stage was more interested in the availability of information anywhere on a website and the effort it took to find it.

After coding all of our information, we then proceeded to create an accessibility scale for our project in order to better compare websites across regions and population groups¹⁵. This scale is based upon a percentage of various indicators and their quality, so it ranges from 0 to 1. We divided all of our measurements from stage one and stage two of our analysis into five separate general functions: Contact, Information, Civic Function, Search, and Service. The Contact category is made up of variables dealing solely with the ability to contact the city or a specific department as well as type of communication available (e-mail, phone, in person). The information category deals with only the services provided that are solely meant for informative purpose. There are only three variables in this category: Events, News, and Meetings/Agenda. Civic Function refers to those variables that pertain to the actual functions that a municipality is typically required to perform, regardless of whether they have an on-line presence or not. These include information on various departments, the city council, housing programs, tax information, etc. Search is simply all those variables which specifically deal with the existence and usefulness of a search function. Finally, Services refers more specifically to variables that are provided due to the online nature of a website or are specifically designed for easier use online. These include broad categories for Residents, Businesses, and Visitors, whether the website allows for Comments, provides Weather information, can be translated, allows online payments, and has either online or downloadable forms.

We then assigned each of these individual variables a relative percentage value within their category. This allowed a perfect score within a category to give a website a 1 score for that category. Then, each category was given a percentage value within the overall scale. Thus, this made the overall scale based upon a 0 to 1 rating.

For the variables in the first stage, where we recorded their existence as well as their location, the following values were assigned: 0, if the variables did not exist; .5 if the variable was found at the bottom of the website; .75 if the variable was found below the immediately viewable section of the website, but before the bottom; 1 if the variable was found

in the immediately viewable section of the website. For the second stage, whereby click counts were recorded, the values were recorded as: 0, if the variable did not exist; .5 if 3 or more clicks were necessary; .75 if 2 clicks were necessary; 1 if 1 or 0 clicks were necessary to access the information. While these values are arbitrarily designated, we have taken into consideration the commonly accepted fact of advertising that location matters, as evidenced variation in rates. Typically the higher an ad is placed, the more it is seen and clicked upon and therefore the more it costs. Likewise for our purposes, as content and links are placed further down on a website the likelihood that they will be seen and clicked upon decreases.

One important note, which must be discussed before we move on to our results, is that both our content analysis and our scale only consider the availability of certain variables that exist among at least a small percentage of municipal websites. It does not consider additional usages of an online presence toward serving citizens. Thus, this study does not make normative assessments compared to some nonexistent standard, but rather compares websites relative to one another. While no website garnered a score of 1 on our scale, a 1 only suggests that the website is a relatively accessible one given its counterparts across the country, not that we regard it as a perfectly accessible website.

Preliminary Findings By Subcategory

Overall we had 443 cases, with 177 of those being used for both the first and second stages of our analysis, from which we derived our accessibility scale. Since not all municipalities actually had a website, most of our analyses utilize only those sites that exist, 395 for the larger sample and 155 for the smaller one. As stated above, these cases are divided into the four main U.S. Census Bureau regions (Northeast, South, Midwest, and West) as well as into three different population groups (2,000-24,999; 25,000-74,999; 75,000+). Much of our analysis will utilize these different independent variables as well as a number of additional demographic variables such as foreign-born population, ethnic breakdowns, household income, and education, among others. In the following sections, we will discuss our findings in relation to each category followed by a comprehensive analysis of each of the variables as they relate to our overall schema.

Contact Subcategory

Within the Contact subcategory of our scale, the variables all deal specifically with the ability of citizens to find information relating to contacting their municipal governments or specific agencies. Most websites do provide this information readily. In our first stage, we found that over sixty percent of all the websites had a "Contact Us" link on

their homepage, most of these near the top of the page. Broken down by region, there are significant discrepancies. In the Northeast, less than forty percent of the websites had a link with contact information, while the other three regions were all above sixty percent. Population also played a part, given steady, but small increases in the availability of this service as the population size increased, with the lowest rate around fifty percent and the highest around seventy percent. One interesting note is that while there was a small difference between the rate in the population size 2 and 3, population 2 actually had by far the highest percentage of contact information links near the top of the page, while the largest municipalities were more likely to have this information at the bottom of the pages (see below).

Table 1: Population

Contact Us	1 (2,000-24,999)	2 (25,000-74,999)	3 (75,000+)	Totals
Percentage '0'	49.63	35.66	30.77	38.99
Percentage '.5'	2.96	7.69	22.22	10.38
Percentage '.75'	4.44	2.10	5.13	3.80

We also assessed the existence of address, phone number, and e-mail contacts directly on the homepages municipal websites. We found that over half the websites had address information, just fewer than fifty percent had phone numbers, and only twenty percent had e-mail addresses to contact the city. In most cases these were either at the top or bottom of the website , rather than in the central body.

In the second stage we recorded how many mouse clicks it took to find the phone number for the fire department, as an indication of how easy one could access a vital service. In most cases this information was relatively easy to find, with 46.8% of all websites having the number within one mouse click of the homepage. In an additional 30.1% of websites we found the information as well, leaving less than a quarter of the websites where we were unable to find the phone number for the fire department.

Combining all of these variables into the Contact category for our scale presents us with the scores across our smaller sample. The best score in this category was .9, and the average was .428. The Northeast had by far the lowest scores across the four regions, while only the smallest category differed significantly among the population variable. In fact, the middle sized municipalities, actually had a greater percentage of high scores (above .6) than the largest size.

Information Subcategory

The Information subcategory consists of only three variables, but is nonetheless an important aspect of website accessibility in our overall scale. The availability of an event calendar, up-to-date news, and agendas and minutes from town meetings are all vital sources of information for citizens. For the most part, the websites in our sample generally provide these sources. Almost eighty percent of all websites have some sort of events calendar, 58.6% near the top of the webpage. Nearly seventy-five percent had up-to-date municipal news as well, and 46.6% had available either minutes, agendas, or both.

The West was by far the strongest region in terms of events, with nearly nine-tenths of all websites having the information available. At the opposite end, 62.75% of websites in the Northeast have information on local events. The Midwest and South fell roughly in between these two, with the Midwest holding a slight advantage. As far as population, the smallest municipalities were much less likely to have events information (61.94%) than either of their larger counterparts whose percentages were almost identical (84.62 and 87.41%). News, was another variable that the West reached out in front of the other regions and the Northeast brought up the rear. Population plays a very significant role in the availability of news. In population one size municipalities barely over half of the websites contain up-to-date news, whereas in the larger sizes, those percentages rise to 81.82 and 90.6%.

The availability of agendas or minutes was split almost evenly, with 47.6% of all websites providing this information. This varied drastically between regions, however, with the Northeast websites rarely providing this information and nearly two-thirds of the West offering it.

The population category provides a bit less of a dramatic variation, with the second and third categories comparatively similar, averaging around fifty-five percent, while the smallest municipalities only offered the information less than one-third of the time.

Looking at the overall scores for this category we find that numerous websites garnered a perfect score, and the mean score was .560. It should not be surprising to find a number of sites receiving full scores, given that there are only three variables in the category. Still, since all three variables are fundamentally important, the mean score is encouraging.

Civic Function Subcategory

This category deals with those variables we coded that are functions typically provided by municipalities regardless of online presence, such as elected officials, municipal departments, and city directories. This category holds the most variables second only to the Services category. Thus, we will not delve into the findings for all the individual variables, but instead focus on the most important ones.

While most citizens are unlikely to know who all of their elected

officials or department heads are at local level, the ability to access this information easily is critical to their ability to get representation and services, therefore we have weighted it as a strong indicator of website accessibility within the metrics of our scale. Over three-quarters of all the websites in our sample did have links to officials directly off their homepage. The differences between regions in this case are not as extreme as in some of our other analyses, although the Midwest region is an outlier. While the Northeast, South, and West have an average of 81.6% links for officials, the Midwest is only at 65.2%. It was not readily apparent why there was this large discrepancy, or why the Northeast was not in last place as it has been in most of our previous analyses. Population again is important, but mostly between the smallest size and the two larger categories. About sixty-five percent of websites in the smallest population size had links to officials, while over eighty percent of the large municipalities did.

Our analysis showed that on most websites citizens do generally have access to municipal department information through direct links off the city's homepage (eighty-one percent of the total). Compared to previous variables, the variation among regions is relatively small. While the Northeast has the smallest percentage, the difference between it and the highest region (West) is less than seven percentage points. Across all regions at least three-fourths of all websites contained a link to departments. The difference in population is striking in this case. While even among the smallest municipalities 65.2% of the websites had links to departments, this rises to 84.9% in the second size category and to 95.7% in the highest.

Directories are easy ways for citizens to access necessary information quickly. While this variable was more difficult to code given the different configurations that a directory can take, nearly half of the cases in our sample did have one. Broken down by region, the Midwest and West regions were the strongest, while the South was actually the weakest in this variable. Only 40.6% of all websites in the South had a directory, while the Midwest had 54.5% and the West 59.5%. Approximately three-quarters of the websites among the smallest municipalities did not have directories, while the middle group's percentage was 51.8% and the largest 65%.

In the category of Civic Functions, the mean score was .583, with some perfect scores at the top. Given the large number of variables in this category, a perfect score is reasonably difficult. At the same time, however, we expected that most municipalities would be able to easily provide this information on their websites, since these functions are those available regardless of online presence.

Nearly sixty percent of the entire smaller sample (including those municipalities without a website at all) scored above a .6 on the Civic Function score. The West was easily the best region, where 64.4% of

all the websites scored above .6 and only 13.3% scored below .3. The population gap occurred mostly between the smallest cities and its larger brethren. While 46.7% of the smallest size scored below .3 and only thirty percent scored over .6, less than ten percent of the second and third categories scored below .3 and about seventy-five scored above .6.

Search Subcategory

Using search engines is no longer something only librarians do, rather they are the method most users prefer to cull the global data cache that is the internet. Thus underscoring the necessity of search on a municipal website is no longer using a search command as a last resort, but rather it has often become a first response. To assess the quality of the search experience for users of municipal websites, we coded two types of variables, across both stages of our study. The first was the simple existence of a search function, regardless of its efficiency. The second set, which was only recorded for our smaller second sample, was utilizing the search function to find five different types of information.

In terms of search functions, exactly sixty percent of our larger sample did have some sort of service available. The vast majority of these were easily found near the top of the homepages. While the Northeast, South, and Midwest regions were all relatively even in this variable, with an average across the three of 53.5%, the West is over seventy-five. The West also had the highest percentage of search functions located in the top portion of the page, at almost ninety-five percent. The variation among different population sizes is dramatic, with the lowest grouping having just over a thirty percent rate compared to approximately seventy percent and eighty percent at the larger two groupings.

While the scores in this category had only a mean of .445, this was due to the dichotomous measure. Since all of the variables dealt with the availability of a search function, the only way for a website to get a medium score would be to have a poor search engine that was able to find some, but not all of the information we looked for. Thus, while 54.2% of our sample scored below a .3, only 11.3% scored between .3 and .6. Across regions, the Northeast fared very poorly, with only 14.3% of the websites receiving a score above .6. This is evident when looking at the means as well, with the Northeast receiving a mean score of .27, compared to the next lowest region, the South, at .46. Among populations, the smallest grouping had a mean score of .14, with that rising to .57 and .63 in the next two categories.

Service Subcategory

The largest category of variables in our scale is that of Services. This is both because we felt that this is the most important component of measuring accessibility, and because there are numerous ways that these

services are implemented serving many different purposes. Services in our study are thus broadly interpreted as specifically provided due to the medium of the internet, such as online or downloadable forms, online bill payments, and web page translations.

In our first larger sample we coded the existence of any type of online or downloadable form or service. While obviously very broad, this simplified the difficulty of classifying the innumerable variety of different types of these services that are offered across the country. Since each municipality may have different types of services offered, this allowed us to capture the effort on the part of the municipality to allow online access to this service. In terms of this variable, approximately sixty-five percent of all of our websites did have some sort of form or service on their homepage. These services were typically located near the top of the pages, indicating that the municipality also considered these offerings as important.

Across regions there is a large variation. The Northeast was very weak in offering services at only 27.5%. This amount increases to 62.8% in the South, 68.8% in the Midwest, and 79.3% in the West. While this variable does not indicate the particular forms and services available or the overall amount offered, it was surprising to find such a low percentage in the Northeast, especially compared to the other regions.

When looking at the population groups, we find that as population increases, so does the availability of forms and services. While just under half of the smallest websites offered something, this rose to nearly seventy percent in the second category and then to over eighty percent in the largest. Given the resources available to larger municipalities, this discrepancy should not be surprising.

While population differences were not surprising, the difference between the various regions was, so we decided to investigate this variable by breaking it down by both region and population. Here we find that in the Northeast the difference between population groups is not as large. While almost half of the largest municipalities did offer some form or service, the second group was actually worse than the smallest and combined together less than one-fourth of all websites had forms or services online.

In the South we find a large variation between the smallest and larger two categories, with just less than thirty-five percent of all websites in population one municipalities offering services or forms. The Midwest was relatively steady in increasing from the smallest (60.4%) to the largest (eighty percent). The West was, like the Midwest, a steady increase across populations, but with a more dramatic result. While the smallest municipalities offered services on approximately fifty-five percent of the websites, the middle category rose to 75.6% and the largest all the way to 93.8%. Only three of forty-eight websites in the largest population category in the West did not offer some sort of forms

or services on their homepage.

Given the increasing racial, ethnic, and lingual diversity of our country, the ability to translate information into other languages is of ever increasing importance. At the same time, the technology of translation has also improved making this service easier and cheaper to provide than ever before. No longer must pages be translated, hard coded and duplicated in their entirety; rather, software makes it as easy as clicking on the flag of a nationality. Further, in its most basic iteration this kind of service can be obtained for free from third party sites, like Altavista's Babelfish platform, providing text translation to anyone who is capable of copying a couple of lines of code into their site.¹⁶ Thus, given the relative ease of adding such a feature, we wanted to know how cultural trends mapped onto municipal website offerings through translation features. In this regard we were disappointed in the results. Less than 10% of the websites in our study offered even a minimum translation, often using rudimentary translation software, meaning that the meaning of the words might not be captured, resulting in poor quality translation or even misunderstanding. Among regions, we found that only the West varied, offering translations on approximately fifteen percent of their websites (generally English/Spanish translation only), compared to approximately five percent across the other three regions.

While not as important as our previous two variables, an applet displaying current weather information for a municipality can allow for a more comprehensive browsing for residents. Nearly one-quarter of the websites in our sample did offer some sort of weather information, almost all provided by one of the major online weather sites such as Weather.com or Weatherunderground.com.

Online bill payment is an increasingly popular service available from both private and public entities. With the increasing technological financial networking, a person rarely has to send a check in for a bill payment if they do not want to. This is also true of municipal websites. Nearly half of our smaller sample offered some sort of online bill payment service. Regional variation mainly consisted of the South far ahead of the other three regions. While the average across the Northeast, Midwest, and West was 37.2% offering online payments, the South had a rate of 63.9%. Across populations, nearly none (12.8%) of the smallest population offered online payments, while the second category was much higher (42.4%), and the largest category, not surprisingly, the highest (66.7%).

Of course, the importance of online bill payments does not stop at their simple existence, but also the extent of their existence as well. How many bills can be paid serves a double purpose by allowing greater citizen freedom and reducing administrative costs at city hall. Thus, while 45.5% of all websites in our smaller sample offered bill payment,

twenty percent also offered payment of at least three different bills, and an additional 12.9% two or three bills. This indicates that when a website offers online payments, they are likely to offer it for a number of different municipal bills. Generally these included property taxes, parking or traffic fines, permit fees, and court fees, among others.

How Many Bills Can I Pay Online?

Table 2: Number of Bills

# of Bills	Frequency	Percentage
None	86	55.48
1	18	11.61
2-3	20	12.90
3+	31	20.00
Total	155	100.00

A regional breakdown with how many bills are available also reveals variation. The Northeast and South were most likely to offer an ability to pay three or more bills online, while the West was most likely to allow for just one bill to be paid. In total, 58.3% of all websites in the South offered online payments for at least two bills, compared to thirty-five percent in the Midwest, the next highest region. The differences among population, disregarding the overall availability of online payments, are relatively small. This further indicates that if online payments are allowed it is likely to be for at least two different bills. This makes sense given that the cost of the infrastructure for payment and electronic recording of the payments would be the same no matter how many bills can be paid.

Service category scores averaged only .37 across our sample, with a maximum score of .95. The Northeast was the main culprit of this finding, with an average of just .23, compared to the other three regions, which were all around .42. In fact, nearly sixty-two percent of the Northeast's websites scored below a .3. As we have seen previously, the largest difference in population is between the smallest category and the two larger ones. The mean score rises from only .16 to .41 and then finally to .55.

Comprehensive Findings

Combining all of our categories together into one scale offers an opportunity to both assess overall accessibility of municipal websites as well as compare them between regions, populations, and other demographic variables. By doing this we were able to generally conclude that smaller cities are disproportionately less accessible than their larger counterparts, ostensibly due to lack of resources, training and personnel as Moon alludes in his study¹⁷. Also, the Northeast has much lower scores on average than the other three regions, which are fairly equivalent, with a slight numerical edge to the West region. Overall, 25.4% of our smaller sample (including municipalities without websites) scored between 0 and .3, 40.1% scored between .3 and .6, and 34.5% scored above .6. The maximum score achieved was .886, and the mean across all 177 cases was .458. As stated this does include municipalities without websites. If these are removed from the analyses, the overall mean score is nearly .5. As the below two graphs show, the mean scores vary greatly by population and between the Northeast and the other three regions.

Table 3: Population Var. Stats.

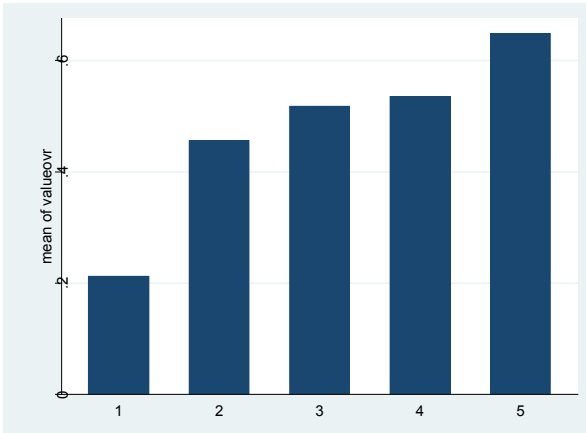
Variable	Obs	Mean	Std. Dev.	Min	Max
Population 1	60	0.2438333	0.2122664	0	725
Population 2	60	0.5237604	0.1954693	0	0.8375
Population 3	57	0.6140351	0.1849829	0.165	0.885625

Table 4: Region Var. Stats.

Variable	Obs	Mean	Std. Dev.	Min	Max
Northeast	42	0.3187351	0.2032303	0	0.72
South	45	0.4700694	0.2786507	0	0.89
Midwest	45	0.4941806	0.2476545	0	0.87
West	45	0.5395	0.2256687	0	0.85

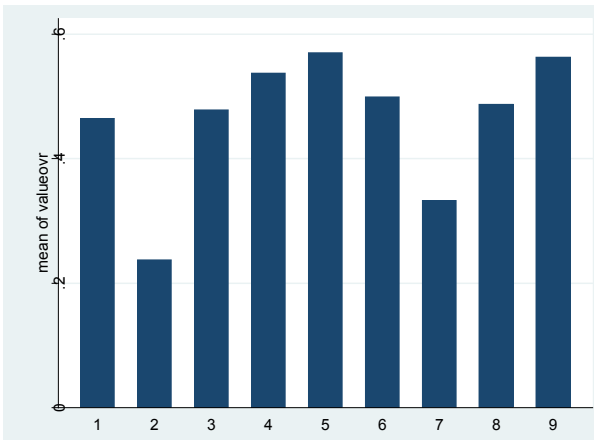
To investigate these variations between population groups as well as between regions, we subdivided the four main census regions into the nine sub-regions (as defined by the U.S. Census Bureau), while parsing population into five, rather than just three categories. The graphs below detail how these refinements affected our data:

Figure 1: Population Categories



- 1 = 0-9,999
- 2 = 10,000-24,999
- 3 = 25,000-49,999
- 4 = 50,000-99,999
- 5 = 100,000+

Figure 2: Sub-regions



- Sub-region categories:
- 1 = New England
 - 2 = NY, PA, NJ
 - 3 = IL, IN, MI, OH, WI
 - 4 = IA, KS, MN, MO, NE, ND, SD
 - 5 = DE, DC, FL, GA, MD, NC, SC, VA, WV
 - 6 = AL, KY, MS, TN
 - 7 = AR, LA, OK, TX
 - 8 = AZ, CO, ID, MT, NV, NM, UT, WY
 - 9 = AK, CA, HI, OR, WA

These sub-divisions reveal that most variation occurs in population scores that are between the very small municipalities in our study, middle large, and largest populations in our study. The mean score for all cities under 10,000 residents was 212, jumping up to .456 for those between ten and twenty-five thousand residents. In the third and fourth new population categories, the mean scores rise minimally, and then jump to .649 for the largest category (over 100,000). Breaking down population into five categories illustrates that quality of website accessibility rises quickly with population and then appears to level off before jumping again for those cities with the most significant overall populations.

In the sub-regions, we see that while the Northeast was the worst region overall in terms of accessibility, and this is entirely due to the poor scores by the three Middle Atlantic states of New York, New Jersey, and Pennsylvania, as removing them from the dataset increases the score considerably. Likewise, by contrast, the West is the best overall region in the study, but closer examination reveals that this results from higher than average scores in the coastal states, thereby raising the overall Western mean. Surprisingly, this sub-region was closely trailed by the lower Atlantic Southern states spanning from Delaware to Florida. Finally, the South Central states of Arkansas, Oklahoma, Texas, and Louisiana fared nearly as poorly as their Middle Atlantic counterparts. The resultant conclusion is that some of the most populous and largest states have some of the least accessible websites—a counter intuitive finding which only became apparent after a second analytical parsing of our data. While these larger states would presumably have greater resources, especially if they are also heavily populated, there is also the difference in municipal structures. For instance in New York, Pennsylvania, and a number of other densely populated Northeastern states, all areas of the state are covered by a census designated municipality, meaning that there are actually very rural areas with relatively larger populations because they are so large geographically. This phenomenon is not prevalent in the middle of the country or on the West Coast where only incorporated municipalities are included in the census counts we used for this study. Further inquiry would find it prudent to investigate this possible difference by examining the geographical size as well as population of some of these municipalities, in addition to polling larger sample sizes from a specified grouping of states.

Moving to our larger samples, regression analysis on our overall scores and region illustrates that while all regions are significant, they do not explain a particularly large amount of variation in the overall scores (r-squared of .105). Adding population to this model leaves us again with all significant variables, but also with a much better overall model (r-squared of .452, see below).

Table 5: Regression of Overall Value by Region and Population

Valueovr	Coef.	Std. Err.	t	P> t	95% Conf.	
MW	0.1624019	0.040605	4	0.000*	0.0822536	0.2425502
S	0.1382908	0.040605	3.41	0.001*	0.0581424	0.2184391
W	0.2077213	0.040605	5.12	0.000*	0.127573	0.2878697
population	0.1826097	0.0175045	10.43	0.000*	0.1480584	0.2171611
_cons	-0.0334408	0.044628	-0.75	0.455	-0.1215297	0.0546482

Number of jobs = 177
 F(4, 172) = 35.44
 Prob > F = 0.0000
 R-squared = 0.4518
 Adj R-squared = 0.439

Adding a number of additional demographic variables to our model allows us to draw some interesting conclusions (refer to data table below). Our model improved slightly yielding an r-squared of .53, but the only significant variable added was the percentage of High School graduates in a municipality. This variable, while significant, has only a marginal impact on overall influence on total accessibility score. More interestingly, we find that the Per Capita Income of the municipality, the percentage of residents who speak a language other than English at home, the percentage of the population over sixty-five, and the percentage of white residents have no significant effect. This indicates that while certain groups may be less likely to have internet access and poverty is still a barrier to access, the wealth in a particular community plays no role in the accessibility of their website and the services provided by it. Similar regressions run on each of the individual categories finding nearly the exact same results, with the one minor exception of Contact, whose p-value was .07, thus, failing conventional measures of significance threshold. Contact significance notwithstanding, the patterns seen in the regression below do hold exactly across all other categories of our accessibility score.

Table 6: Regression of Overall Value by Region and Population

Valueovr	Coef.	Std. Err.	t	P> t	95% Conf.	
South	0.1774977	0.0448776	3.96	0	0.0888092	0.2661862
Midwest	0.1719499	0.0437668	3.93	0	0.0854564	0.2584433
West	0.1973867	0.041043	4.81	0	0.1162761	0.2784973
population	0.1663448	0.0250589	6.64	0	0.1168227	0.215867
hsgrad	0.0072769	0.0024424	2.98	0.003	0.0024501	0.0121037
percapita	-1.51E-06	3.33E-06	-0.45	0.65	-8.09E-06	5.07E-06
speakother	0.001622	0.0014221	1.14	0.256	-0.0011885	0.0044324
white	0.000085	0.0009911	0.09	0.932	-0.0018737	0.0020438
Over65	-0.000321	0.0009479	-0.34	0.735	-0.0021942	0.0015523
_cons	-0.5925326	0.1800587	-3.29	0.001	-0.9483706	-0.2366945

Number of obs = 157

F(9, 147) = 18.30

Prob > F = 0.0000

R-squared = 0.5283

Adj R-squared = 0.4994

Here we will calculate new regressions to account for our population and sub-region breakdowns. First we performed a regression analysis with only the sub-regions and the five-category population variable, using the New England sub-region as the constant (see below).

Table 7: Regression of Overall Value by Sub-region and Population

Valueovr	Coef.	Std. Err.	t	P> t	95% Conf.	
ENC	0.1198342	0.0423951	2.83	0.005	0.0361384	0.20353
WNC	0.290197	0.0597929	4.85	0	0.1721548	0.4082392
SATL	0.2095244	0.0503483	4.16	0	0.1101275	0.3089213
ESC	0.1555155	0.0639303	2.43	0.016	0.0293052	0.2817258
WSC	0.0315885	0.0533672	0.59	0.555	-0.0737683	0.1369452
MTN	0.2054447	0.0561365	3.66	0	0.0946209	0.3162685
PAC	0.2129046	0.0430902	4.94	0	0.1278365	0.2979727
popcat5	0.1034534	0.0094833	10.91	0	0.0847316	0.1221752
_cons	0.0231539	0.0389757	0.59	0.553	-0.0537914	0.1000992

Number of obs = 177

F(8, 168) = 21.57

Prob > F = 0.0000

R-squared = 0.5067

Adj R-squared = 0.4832

Compared to our previous region and population breakdown, the explanatory power of this model is relatively higher, with an r-squared above .5. Given the additional number of variables introduced here, however, we would expect this result regardless. This time around all of our variables are significant except for the West South Central, the states of Arkansas, Oklahoma, Texas, and Louisiana. As discussed above, this makes sense from our preliminary investigation of these variables. Adding these into our larger model, while introducing many variables, does strengthen our overall findings (see below).

Table 8: Additional Regression Variables

Valuecovr	Coef	Std. Err.	t	P> t	95% Conf.	
ENC	0.119588	0.0454954	2.63	0.01	0.0296576	0.2095185
WNC	0.2918274	0.0578264	5.05	0	0.1775224	0.4061324
SATL	0.2565603	0.0510815	5.02	0	0.1555878	0.3575328
ESC	0.2580622	0.0716027	3.6	0	0.1165257	0.3995987
WSC	0.0152067	0.05755	0.26	0.792	-0.0985521	0.1289654
MTN	0.1776061	0.0564576	3.15	0.002	0.0660068	0.2892053
PAC	0.2037355	0.0428876	4.75	0	0.1189599	0.288511
popcat5	0.0845559	0.0132042	6.4	0	0.0584552	0.1106566
hsgrad	0.0076868	0.0024364	3.15	0.002	0.0028707	0.0125028
percapita	-9.88E-07	3.18E-06	-0.31	0.756	-7.27E-06	5.30E-06
speakother	0.0017515	0.0014237	1.23	0.221	-0.0010627	0.0045656
white	-0.0001452	0.00095	-0.15	0.879	-0.0020231	0.0017327
Over65	-0.0003942	0.0008901	-0.44	0.659	-0.0021536	0.0013653
_cons	-0.5445432	0.1742066	-3.13	0.002	-0.8888961	-0.2001904

Number of obs = 157
 F(13, 143) = 16.33
 Prob > F = 0.0000
 R-squared = 0.5975
 Adj R-squared = 0.5609

Again, as we would expect after adding additional variables, our r-squared increased to almost .6. Just as our previous model indicated, only the percentage of high school graduates was a significant additional variable, joining population and eight of our nine sub-region variables. Income, foreign language speakers, race, and age are not found to be significant explanations of the variance in mean accessibility scores.

Conclusions

This study, while insightful and of salient results, is meant as a first iteration exploratory study to help guide more substantive research

to be done on the quality of accessibility available through municipal websites in the United States. With thousands of localities of varying sizes scattered throughout the country, it is important to grasp how these entities are handling the intricacies of providing services via their online presence. Our scale is rooted in subjective decisions, as there is little previous scholarship with which to form its basis, yet it was useful in ordering our data and helping us draw general conclusions to inform future studies.

That said, we primarily find that U.S. municipal websites are generally of much higher quality in terms of accessibility the larger the population of the municipality. This is an intuitive finding, which most likely correlates to the fact that these municipalities have greater resources and infrastructure to create and maintain a viable web presence with online services, bill payments, language translations, and vast amounts of information. Still, given the increasing ease of website creation and the prevalence of both internet and computer usage, we believe that smaller municipalities should investigate more ways to use their websites to engage and allow access for citizens. While a city of 5,000 people may seem small, requiring them to mail in or drop off bills can both decrease free time and increase the workload of the city's employees. Allowing citizens to e-mail city hall with questions reduces the resource costs of the interruption of continual phone calls, and information can be more accurately provided.

While we originally found the Northeast as the lowest scoring region, upon further evaluation this was principally the fault of the three populous Middle Atlantic states of New York, New Jersey, and Pennsylvania. From this, it is clear that cities in these states need to ensure that their websites provide more accessibility. The sub-region scored particularly low on the Contact, Search, and Services categories, and the region as a whole was very poor on the Contact scores. Since contact and search do not require many resources for implementation, these would be good starts for websites in the region. Service categories, especially language translation and ability to pay bills online should be focused upon, given the diversity of many areas of the Northeast, and the population density.

In regards to translation more generally, municipalities should provide more services in other languages. They do not necessarily need to allow full website translation, but putting some basic translation to point visitors in the correct direction or providing vitally important information in other major languages would be fairly easy solutions. Obviously cities face the tense position of needing to provide all of their citizens with the proper information, while also desiring broad English language acquisition and usage for administrative reasons. This tension, however, should not unduly affect the existence of certain websites in other languages, particularly Spanish on the West coast.

Finally, we believe that while the largest municipalities' websites are generally effective, user-friendly, and accessible according to our scale, there is a great deal of room for improvement. Although we did not specifically code for it, many websites provide streaming community television, including live or archived city meetings. This is just one of many ways municipalities are using technology to interact with their citizens. However, we also find concern about the lack of conformity across websites. While it would be unreasonable to expect that every municipal website across the United States would use similar templates (not to mention it might stifle innovation), there is such extreme variation, even among the larger municipalities of website design and setup that it was difficult for us to code information, even after hours of repetitive searches. Further initiatives like the E-government acts, should be pushed by state and the federal governments to provide best practice guidelines, and, more importantly, funding for a GUI software platform that would allow for the smaller municipalities to provide for at least a minimum baseline of services (e.g.. something analogous to what the DirectGov services provided by the commonwealth in the United Kingdom).

Despite our concerns, we are excited about the vast amounts of information already provided, even by small cities. We were frequently able to find the information we were looking for, and many websites had FAQs or a set of the most frequently used links, providing easy access to the major services provided. The availability of online payments will most certainly increase as well, and was surprisingly already present among numerous websites, especially among the larger population categories. If nothing else, many municipalities may just need to spend some time understanding how their websites compare to other municipal sites. Through more broadly shared principles and innovations, municipal websites can continue to provide citizens with increasing access to their local governments with decreasing resources spent on the part of both the citizen and the city.

Authors' Note:

A revised version of this paper, tracking global trends against the domestic findings detailed here was presented at the 2008 International Conference on Public Administration in Minneapolis MN, September 24-26 2008 and is included in and is available for purchases from UESTC Press – See: Proceedings of 2008 International Conference on Public Administration (4th), Volume 1. UESTC Press; 2008. ISBN: 978-7-81114-983-8

Appendices for this paper including the complete accessibility scale can be accessed at the following URL: http://www.lightlink.com/adamg/icpa/global_accessibility_appendices.pdf

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Endnotes

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7 Alfred Tat-Kei Ho, "Reinventing Local Governments and the E-Government Initiative," *Public Administration Review* 62, no. 4, (Summer 2002): 434-444, <http://www.jstor.org/stable/3110358>

8 M. Jae Moon, "The Evolution of E-Government among Municipalities: Rhetoric or Reality?" *Public Administration Review* 62, no. 4, (Summer 2002): 424-433.

9 *Ibid.*, 428.

10 *Ibid.*, 425.

11 See Appendix A for a listing of which states are located within each region as well as the population estimates of the whole region.

12 For more detailed information regarding our sampling procedures refer to Appendix B.

13 Refer to Appendix C for a complete listing.

14 With the exception of the largest population category in the NE, because we had originally only selected 12 cases.

15 For a complete listing of the breakdown of the scale, refer to Appendix D.

16 *AltaVista*, "Free Translator," http://www.altavista.com/help/free/free_searchbox_transl.

17 M. Jae Moon, "The Evolution of E-Government among Municipalities: Rhetoric or Reality?" *Public Administration Review* 62, no. 4, (Summer 2002): 424-433.

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Thinking Outside the Border

Redefining Wiretap Regulations to Reflect Modern Threats and Technologies

Kathleen L. Lee

ABSTRACT:

The United States' electronic surveillance laws, which were created during the Cold War, distinguish between domestic communications, which are constitutionally protected, and foreign communications, which are surveillable. However, this paradigm no longer works; it fails to effectively serve the fundamental values of national security and privacy. National borders no longer define security threats; electronic communications are prolific; and no effective oversight of surveillance programs exists. This article proposes a new structure for wiretap regulations—an association-based paradigm—with the goal of enhancing the effectiveness of wiretapping while respecting civil liberties and ensuring appropriate oversight of wiretap programs.

Wiretap laws are currently based on a distinction between domestic and foreign communications, reflecting Cold War era fears and 1960s technologies. In a world where threats come from non-State actors and wiretapping covers a broad range of mobile electronic media, the borders of the nation cease to be an effective distinguishing characteristic in surveillance. The current wiretap law regime is inefficient and ineffective—it fails to serve either of the main values that a good surveillance law would balance: security or civil liberties. The only way to remedy this disparity between the current wiretap laws and the current environment is to encourage a paradigm shift.

Rather than dividing the world of communications into domestic and foreign for the purposes of surveillance, this article argues that wiretap regulation should be modeled on an association-based paradigm, focusing on the threats presented by an individual or group, rather than on their nationalities or geographic locations. For the government to be able to conduct surveillance under this approach, it must first seek a warrant based on a showing of probable cause that an individual is a threat to national security. This warrant would cover not only the communications of that individual but any associates of that person. This approach thus prevents suspicionless, generalized communications surveillance while permitting officials to easily follow nebulous groups who threaten national security.

This article is not the first to argue for a change in the legal regime controlling surveillance law, though it is unique in promoting an association-based approach. However, other suggestions have failed to strike the proper balance between security and privacy. Some have suggested permitting government data mining of consumer information,¹ but this allows for the amassing of large files of information on every citizen and visitor to the country, and does nothing to protect the citizens from entirely foreign threats. Some have suggested not permitting the government to do any surveillance unless Congress approves the technology and a court approves the specific action,² but this is too restrictive to allow the government to effectively protect our national interests. Some have proposed more judicial oversight,³ but without addressing changes in national security threats, this is just another piecemeal attempt at change.

The ideal surveillance law must strike a balance between giving the government the tools it needs to keep the nation safe and preventing the government from routinely spying on citizens, serving both of the competing values at stake. Finding the right balance is not a one-time event however; it must be continually evaluated as new technologies and new threats change the nature and goals of government surveillance. A paradigm shift that recalculates the balance between security and civil liberties is needed; an association-based approach would do just that.

Balancing Values: Security and Privacy

The current legal regime surrounding wiretaps was designed to balance the competing values of privacy and protection. This is because surveillance law in the United States is about balancing the need for a strong, knowledgeable, effective government capable of protecting its citizens and the need to limit government intrusion on civil liberties and individual rights.

The first core value served by surveillance law is that of security. The goal of surveillance is to enhance the government's knowledge, often about threats to its population. The source of these threats varies dramatically—from a robbery down the street to international nuclear warfare. Americans in particular believe that we have a strong nation, capable of preventing harm to citizens, and value a strong government that will be able to protect the interests of the nation as a whole.⁴

The second core value that surveillance law must serve is that of limited government intrusion. Because of the American colonists' experience with British surveillance, including such things as generalized searches and writs of assistance, Americans have a historic mistrust for government monitoring and control. The Fourth Amendment prohibition against generalized searches and seizures is fundamental to the protection of other freedoms, such as the First Amendment-protected

activity of speech. Government surveillance—particularly wiretaps—can easily run afoul of Fourth Amendment search limitations and First Amendment speech rights. Wiretapping in particular emphasizes the nexus of these two rights. Supreme Court Justice Warren Brandies, in a famous dissenting opinion, argued that “the evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails... [w]henver a telephone line is tapped, the privacy of the persons at both ends of the line is invaded.”⁵

Compounding the difficulty of maintaining the delicate balance between these two values is the fact that our legal system tips the scale depending on the purpose of the underlying surveillance. These core values tend to have different weights when the surveillance is for general law enforcement purposes than when the surveillance is for national security purposes. When considering surveillance for law enforcement purposes, the balance is shifted more heavily toward a protection of civil liberties. The Supreme Court has highlighted the main concern: Americans have “a deep-seated uneasiness and apprehension that [surveillance] will be used to intrude upon cherished privacy of law-abiding citizens.”⁶ When considering surveillance for national security purposes, however, the protection of the nation trumps most concerns about individual privacy. Surveillance for intelligence—which will protect citizens from threats wherever they may come from—strongly implicates the value of having a strong government. Surveillance for law enforcement, to prosecute citizens for violating the laws of the government, is significantly less palatable. As the Supreme Court has noted, surveillance in both instances may make citizens safer, “[b]ut a recognition of these elementary truths does not make the employment by government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision.”⁷

One way our system reduces this tension between the need for government surveillance and the desire to avoid overzealous government spying is through oversight. Congress can, and has, limited the executive branch’s power to conduct surveillance, and congressional committees routinely review surveillance policy with an eye toward protecting civil liberties. The judiciary also provides oversight of executive surveillance programs by reviewing warrant applications and excluding evidence gathered through illegal surveillance. Supreme Court Justice Lewis Powell has characterized the role of the court as “examin[ing] and balanc[ing] the basic values at stake... the duty of government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression.”⁸

Current Wiretap Laws: The Domestic/Foreign Distinction

The Fourth Amendment, a natural place to begin any surveillance law summary, guarantees “the right of the people to be secure in their... papers... against unreasonable searches and seizures.” In *Katz v. U.S.*, the Supreme Court held that a wiretap is a search and thus a warrant is required: “[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.”⁹ As applied in modern wiretap law however, the Fourth Amendment serves as neither the ceiling nor the floor for privacy protections. In some instances, wiretapping is restrained beyond what the Fourth Amendment demands; in other instances, wiretapping is unfettered by the Fourth Amendment. This leaves wiretap regulation in what George Washington University law professor Daniel Solove has called a state of “profound complexity.”¹⁰

Domestic Communications

Surveillance of domestic communications is controlled by two different legal structures: one controls surveillance for law enforcement purposes and the other controls surveillance for national security purposes. Though the Fourth Amendment requires warrants in both situations,¹¹ Congress has created additional requirements for surveillance of communications for law enforcement purposes, and has granted the executive branch greater latitude to surveil for national security purposes.

First, wiretaps on domestic communications for law enforcement purposes are regulated by the Electronic Communications Privacy Act (“ECPA”).¹² Since 1968, Congress has statutorily imposed greater restrictions on the government’s ability to wiretap than the Fourth Amendment alone would provide. The primary feature of ECPA is that it requires law enforcement agents to seek “super search warrants” for wiretapping domestic communications. To obtain a warrant under ECPA, the government must show probable cause that the sought communication will reveal criminal activity and that the alternatives to wiretapping are unlikely to succeed or are too dangerous. If issued, super search warrants require law enforcement to follow a defined minimization procedure intended to minimize the surveillance of non-suspect communications and to protect the privacy of those communicating with the surveilled. Surveillance is only permitted for thirty days, with the possibility for renewal upon a continued showing of probable cause. After the surveillance is complete, super search warrants require that notice be given to the subject of the surveillance, which must contain 1) a statement that the warrant was sought, 2)

the date of judgment on the warrant and the period during which the warrant would have been effective, and 3) whether during the specified period communications were surveilled. Because of the onerous super search warrant requirements, ECPA creates a procedural limit on the government's ability to use wiretaps for general law enforcement purposes. This set of wiretap regulations was originally enacted as part of legislation that regulated law enforcement, so ECPA's super search warrant requirement only applies to domestic wiretaps for law enforcement activities; the statute specifically provides an exception for any area regulated by the Act.

Second, wiretaps on domestic communications for national security purposes are regulated by the Foreign Intelligence Surveillance Act ("FISA").¹³ Because national security cases demand more speed and secrecy than ordinary search warrant requests, FISA was created in 1978 to provide a unique process for dealing with domestic wiretap warrants for national security surveillance. Thus if "a significant purpose" of the surveillance is national security then the FISA rules, rather than the ECPA rules, apply to domestic surveillance.¹⁴ If the government is interested in surveilling a U.S. citizen or legal resident for national security purposes, it must seek a warrant before the Foreign Intelligence Surveillance Court ("FISC"). The FISC, comprised of eleven federal district court judges, was created by FISA to grant warrants quickly and without immediate public disclosure. FISA warrants can only be sought with the approval of the Attorney General. Unlike the heightened showing of probable cause required under ECPA, FISA warrants for U.S. citizens and legal residents only require probable cause that the target is an agent of a foreign power and that the facilities targeted are being used by such a person. Officials must further show that the warrant is not sought on the basis of a First Amendment protected activity and that appropriate minimization procedures will be followed. FISA does not require that the target of surveillance be notified after surveillance is complete. If the government is able to make a satisfactory showing of these elements, the FISC has no discretion and must issue a warrant.

Table 1: Summary of Wiretap Surveillance Laws

Who is communicating?	U.S. Person	Non-U.S. Person
Where is the communication?		
Domestic Communication	Surveillance is subject to the Fourth Amendment. ECPA requires a “super search warrant” for law enforcement surveillance; FISA regulates surveillance for national security.	If the person is acting on behalf of a foreign power, the Fourth Amendment does not apply.
Foreign Communication	The Fourth Amendment does not apply. Updates to FISA in 2008 require a warrant from the FISC to surveil for national security purposes.	No U.S. laws or regulations limit surveillance.

Foreign Communications

Because foreign communications are, by definition, outside U.S. borders, they are afforded much less protection. Usually, the Fourth Amendment does not apply at all, as the laws of the United States generally only apply within the nation’s borders. The limits of the Fourth Amendment on wiretapping therefore do not apply to communications by non-citizens that take place fully outside the nation’s borders.

Until very recently, there was no warrant required for surveilling the communications of U.S. citizens outside the country. The only limitation, found in a 1981 Executive Order issued by President Ronald Reagan,¹⁵ was that the Attorney General should avoid such surveillance unless it would lead to “significant information that cannot reasonably be acquired by other means.”¹⁶ However, when American citizens are outside the borders, a warrant is now required to surveil their communications. On July 10, 2008, President George W. Bush signed into law the FISA Amendments Act of 2008,¹⁷ which requires—among other things— a warrant from the FISC in order for the government to wiretap communications of Americans outside the country. This provision will remain in effect until 2012.

When considering the communications of foreigners in the U.S., the law further subdivides the group into two categories: those acting on behalf of foreign powers and those who are not. This distinction stems from the *Keith Case*, in which the Supreme Court created a clear distinction between electronic surveillance of domestic persons and domestic surveillance involving the activities of foreign powers and agents.¹⁸

Surveillance within the country of those acting on behalf of a foreign power is beyond the reaches of the Fourth Amendment. In FISA, Congress specifically authorizes warrantless surveillance for up to one year of foreign powers or agents of a foreign power located within the country.¹⁹ Today FISA defines “foreign powers” broadly, encompassing foreign nations, companies, and political organizations. A foreign power is defined by the statute:

[A] foreign government or any component thereof, whether or not recognized by the United States; a faction of a foreign nation or nations, not substantially composed of United States persons; an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; a group engaged in international terrorism or activities in preparation therefore; a foreign-based political organization, not substantially composed of United States persons; or an entity that is directed and controlled by a foreign government or governments.²⁰

Originally, FISA defined agents of a foreign power as including any non-U.S. person acting on behalf of a foreign power or committing acts of terrorism within the United States. However, since 2004, FISA also includes what is known as the “Lone Wolf” provision, which permits warrantless surveillance of any non-U.S. person who “engages in international terrorism or activities in preparation thereof,”²¹ and the warrantless surveillance of any U.S. citizen or legal resident who “knowingly engages in sabotage or international terrorism, or activities that are in preparation therefore.”²² In effect, the Lone Wolf provision expands FISA’s warrantless surveillance privilege to cover landlords who rent space to an identified threat group, merchants who deal with the members of such a group, and the like.

For foreigners in the U.S. who are not agents of foreign powers, surveillance law is unclear. ECPA and FISA warrant provisions expressly apply only to U.S. citizens and legal residents. FISA’s

warrantless wiretapping permissions only apply to foreign powers or agents of foreign powers. Thus, the surveillance of non-citizen, non-resident aliens located in the U.S. does not seem to be controlled by either statute. There have not been any cases that have considered this issue, but it is likely that, because the targets of surveillance are foreign, their communications would be fully surveillable without a warrant.

It is easy to agree with George Washington University law professor Orin Kerr, who described current wiretap regulations as “famously complex, if not entirely impenetrable.”²³ However, surveillance law does divide the world into two simple categories: domestic and foreign. By definition, these categories are mutually exclusive. Because people can move across borders, it is common for Americans to leave the nation’s borders and for foreigners to visit and communicate while in the U.S., leading to additional complexities in the law.

The Effectiveness of Current Wiretap Laws

The world today looks significantly different than it did when ECPA and FISA were enacted. Since the late 1970s, when the last major revisions to the wiretap laws in the U.S. were made, the world has changed. In short, geopolitics has fractured, technology has evolved, and oversight has been reduced.

The threats from which the government seeks to protect the nation have changed, with the end of the Cold War and the events of September 11. Threats increasingly come from non-state actors, who are just as likely to be located within the U.S. as without. In fact, all of the September 11 hijackers were living in the U.S. for extended periods before the attack. Gone are the days when registered diplomats and card-carrying members of politically active groups were easily identifiable targets for surveillance. The current national enemy in the War on Terror is comprised of nebulous, interconnected groups of individuals with webs of associations that purposely limit contact within the group and obfuscate leadership structures. These new threats do not come from an easily definable category of individuals, nor is association with these threats mutually exclusive from American citizenship.

Technological innovations have also transformed and spread telecommunications, rendering traditional wiretapping technology useless. First, there are simply more communications traveling on telecommunications networks. The increase in law-abiding uses of communications technology has made the search for nefarious communications more difficult. Second, the move to fiber-optics has effectively eliminated government access to communications without cooperation from telecommunications providers, who are often prohibited by law from sharing subscriber information without a warrant.²⁴ Further frustrating surveillance efforts is the fact that

entirely foreign communications that happen to cross into the U.S. for transmission only—known as pass-through communications because they simply pass through the U.S. instead of being intended for or communicated by someone within the U.S.—fall under the domestic wiretap laws as currently written and are thus made inaccessible for surveillance. The commoditization of mobile communications technologies has reduced the difficulty of avoiding surveillance. Judge Richard Posner has characterized the task of the intelligence community as “cast[ing] a wide net with a fine mesh to catch all the clues that may enable the next attack to be prevented.”²⁵ In addition to making tracking potential threats more difficult, the ease with which one can change phone numbers or email addresses makes the current warrant-seeking process, which requires a warrant for each identified facility, inefficient and piecemeal.

In addition to its ineffectiveness in allowing the government to surveil modern enemies and using contemporary technologies, the current legal regime fails to adequately protect civil liberties. Syracuse University law professor William C. Banks argued that “the virtual disappearance of effective oversight of our national security surveillance” made the other branches of government “observers of the system, not even participants, much less overseers.”²⁶ Judicial review of wiretaps, in the rare instances when FISA calls for it, is severely limited: between 1979 and 2005, FISC courts issued 22,984 warrants, forty percent of which were issued post-September 11, and during that time only five applications were denied.²⁷ Congressional review of wiretap activity is ineffective at best. This became particularly apparent in December, 2005 when the *New York Times* ran a cover story that led: “President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying.”²⁸ The oversight that Congress and the judiciary was expected to provide has slowly eroded.

Americans need a surveillance law that will give the government enough access to the right information to keep the nation safe while limiting the intrusion of the government on their own communications. Our current legal framework is not working to achieving these goals. New threats to national security and new technologies have limited the government’s effectiveness, and undemanding oversight procedures have reduced assurances of civil liberties. President George W. Bush has argued:

“Today we face a dynamic threat from enemies who understand how to use modern technology against us. Whether foreign terrorists, hostile nations, or other actors, they change their tactics frequently and seek to exploit the very openness

and freedoms we hold dear. Our tools to deter them must also be dynamic and flexible enough to meet the challenges they pose.”²⁹

Privacy experts, however, argue “Congress appears poised to grant the twenty-first century equivalent of eighteenth century general warrants—allowing the executive to conduct national security surveillance at will.”³⁰ However, as former Assistant Attorney General Jack Goldsmith explained, the real problem for the U.S.’s surveillance regime comes when changes in the enemy and the changes in technology collide with inefficient and deferential oversight. This is particularly poignant in the case of wiretapping:

We were at war with terrorists who were armed with disposable cell phones and encrypted emails buried in a global multibillion-communications-per-day system. It seemed crazy to require the Commander in Chief and his subordinates to get a judge’s permission to listen to each communication under a legal regime that was designed before technological revolutions brought us high-speed fiber-optic networks, the public Internet, email, and ten-dollar cell phones.³¹

The problem, quite simply, is an outdated law.

Redefining Wiretap Regulation: Replacing Borders with Associations

Defining an Association-Based Approach

Borders are no longer logical or effective dividing lines in wiretap regulations. Shifts in how and with whom ordinary citizens communicate, as well as shifts in the perceived threats to national security, demand a restructuring of wiretap law. I propose that instead of considering borders, the U.S. wiretap regime should consider purpose and association.

First, the U.S. must maintain a distinction between wiretaps for law enforcement purposes, which should continue to be regulated under a strengthened ECPA, and wiretaps for national security purposes. ECPA should be made to clearly control any time law enforcement is the goal of surveillance. This is a shift in the U.S.’s current policy, which permits the use of national security warrant processes for law enforcement, so long as national security need be only “a significant purpose” — as opposed to the “primary purpose” — of the surveillance. However, by permitting

law enforcement officials to bypass the strict ECPA requirements by simply pointing to any national security threat imaginable, no matter how attenuated from the actual threat perceived from the individual, civil liberties are weakened. Sharing information collected under national security surveillance with law enforcement should still be permitted, but law enforcement should never be a significant purpose of national security surveillance. A stronger, clearer statement to that effect should be in ECPA. Furthermore, ECPA's protections against wiretaps for law enforcement should be applied to everyone. If the U.S. stops considering borders as relevant for national security surveillance, they should also cease to matter for law enforcement purposes. ECPA should be modified to clearly cover surveillance of anyone for law enforcement purposes.

Second, the U.S. must restructure the way it thinks about national security wiretaps. Rather than making the surveillability of communications dependent on national borders and identities that have little significance to the threats the nation faces or telecommunications technologies those threats employ, we should restructure the law so that it is based on associations. Not only will this make for more efficient and directed surveillance, but this approach would also protect civil liberties of Americans.

To make an association-based regime work, warrants would have to be obtainable for individuals and for identifiable groups of individuals. The government would need to seek warrants, with limited exceptions for exigent circumstances, before beginning any surveillance for national security purposes. However, once a warrant for a group or individual is granted, it would be able to encompass all the communications of that individual or of each identifiable member of the group. Furthermore, these warrants would be expandable, encompassing new communications facilities (such as email addresses, telephone numbers, or IP addresses) that become associated with the target individual or group.

The process for law enforcement would be as follows: The FBI has identified a group, Group X, which is believed to present a threat to national security. With approval from the Attorney General or the Director of Homeland Security, the FBI requests a warrant from a specialized court. To succeed, the FBI must show that Group X presents a legitimate threat to national security.

The court will consider (1) whether Group X poses a legitimate threat to the security of the territory, population or interests of the U.S., (2) whether a wiretap is a reasonable method to obtain desired or relevant information, and (3) if the information could be reasonably obtained by other means. The court will not be required to consider whether Group X was located inside the U.S. or whether known members were U.S. citizens.

If the FBI can make such a showing, the court will issue a warrant

to wiretap the communications of Group X. The warrant will be valid for one year, renewable upon a showing that the group still presents a threat, or valid until Group X can be shown not to be a threat.

Upon receiving the warrant, the FBI will be able to wiretap the communications all known members of Group X, as well as the communications of anyone with a first degree of relationship to those members. The identity of members will not be required if a phone number or email address can be directly linked to the group. If someone with a first degree of relationship is later discovered to be a member of Group X, he or she automatically becomes covered by the warrant. These warrants will not be made public until after they expire.

The FBI has also identified an individual, Joe Doe, who is believed to present a threat to national security, though he is not part of an identified group. With approval from the Attorney General or the Director of Homeland Security, the FBI requests a warrant from the specialized court.

To succeed, the FBI would have to show that Joe Doe presents a legitimate threat to national security; again, the court will not be able to consider Joe's location or nationality. If the FBI can make such a showing, a warrant for all of his communications will be issued, but, unlike the group warrant, surveillance of those with a first degree of relation to Joe will not be permitted.

If, based on its surveillance, the FBI discovers that Joe Doe is a member of Group X, he will then also be covered under the warrant for that group. If the FBI discovers that Joe is a member of another group that presents a legitimate threat, it will have to obtain another group warrant to access the communications of the other members.

Note that the court in this process takes a prominent role, very different from the one the FISC has today. This is because an association-based system would require a court with discretionary oversight of warrant applications. Discretionary oversight would be required to ensure that no warrants are issued against groups on the basis of First Amendment protected activities, particularly political leanings, or on the basis of membership in a cognizable minority group. The definition of a group would become of paramount importance; however, the principles of criminal conspiracy law could easily be imported for this use. Conspiracy is generally defined as “[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective,” and often the law requires “action or conduct that furthers the agreement.”³² To ensure that discretion is appropriately exercised, the court should be comprised of federal judges who do not risk losing their positions over an unpopular decision, sitting en banc. This approach would also have to permit reapplication for a warrant, restricted only to the finding of new or remaining indications of probable cause for the subject individual or group.

Also note that, like today's wiretap laws concerning national security, no warrant can be sought without prior approval from the Attorney General or the Director of Homeland Security. These officials are in the best position to assess the threat to national security that any one group presents. Because, as the Department of Defense's Technology and Privacy Action Committee has noted, "the requirements for obtaining a warrant help to impose a discipline and careful internal process for assembling and reviewing [wiretap] warrant applications,"³³ placing these officials in charge of certifying the legitimacy of each application will function as an additional layer of protection for civil liberties because they will be reluctant to sign improper warrant requests.

Those who most value security may argue that requiring the government to obtain a warrant for any wiretapping would seriously restrict its effectiveness, making the U.S. more susceptible to terrorist threats. However, because warrants could cover all identifiable members of groups that pose threats, the government would actually need to seek fewer warrants. Spending less time filling out warrant paperwork for a new e-mail address or a new member of a group should permit the government to spend more time doing the actual surveillance and analyzing the information collected. Assuming surveillance is effective, this will increase the government's ability to monitor threats to national security.

Those who most value privacy may argue that the consideration of associations runs afoul of the First Amendment protected freedom of association. However, this argument is contrary to the plain language of the Constitution.³⁴ Under this proposal, associations are not being banned or limited—they are simply being used as an indicator for suspicion. This is done every day in law enforcement. Additionally, speech, another First Amendment-protected activity, is a fundamental indicator for suspicion. For example, if someone says that he or she plans to rob a bank, he or she is a target of suspicion without this being seen as a limit on free speech. It is also important to note that groups posing a threat to national security would have to be certified by the FISC, so political groups or those groups that are unable to threaten national security will likely not be surveilled.

The Benefits of an Association-Based Approach

An association-based paradigm for surveillance would be significantly more responsive to the modern threats to national security. The security value is enhanced because more effective surveillance would be able to occur. Instead of thinking of security in terms of borders and nationality, which are no longer the hard and fast dividing lines that they were in the Cold War era, law enforcement will be free to think in terms of relationships, regardless of the nationality of those identified with a particular threat. The privacy value would also be served, as this

proposal would actually increase protections for most communications. ECPA would control all surveillance for law enforcement. Furthermore, the government would have to show probable cause that a target is a threat to be able to surveil for national security purposes. This means that the government would have less need to cast a wide net in seeking to identify threats, surveilling more targeted communications associated with identified threats.

An association-based paradigm for surveillance would also encompass technological developments more effectively. The security value would be served because more communications would be surveillable. For example, this approach would specifically solve the problem of pass-through communications, allowing them to be surveilled whenever one end of the communication involves a known member of a group that threatens national security. Additionally, with expanding warrants, this approach takes into consideration the ease with which new media and new identifiers, such as phone numbers, can be obtained. The privacy value is served by the consideration of the user of the technology, not the location of the technology, which is a direct response to a mobile communications environment. Finally, the privacy value is served by enhancing public perception of privacy: average citizens would no longer need to worry about being subject to a warrantless wiretap unless they are associated with suspect individuals.

The proposed association-based considerations provide for significantly enhanced oversight procedures, benefiting both the security and the privacy values. The security value would actually be much better served by this process, even though it may be difficult to see generally how security can be enhanced by additional oversight. Specifically, an association-based approach would be an extension of "basket warrants," which have been strongly advocated by the George W. Bush Administration and members of the intelligence community. Basket warrants are those that are for any phone number, e-mail address, or other points of contact associated with a single individual. Association-based warrants would focus on those groups who pose the most significant threats, but would allow law enforcement officials to track individuals and their associates as the web of the group becomes clearer. It will avoid the piecemeal pace of the warrant process that currently exists. Each new phone number, each new e-mail address, and each new individual would not need a separate warrant application, alleviating the strain on both executive and judicial resources. Additionally, privacy rights would be enhanced by greater oversight. All wiretaps would be subject to a warranting process, reviewed at the discretion of a specialized court. Though probable cause will be shown for a group rather than each individual phone number, privacy will be

enhanced because the showing of probable cause will be required for any surveillance. Another benefit may be that by no longer considering the location of the communication or the nationality of the communicator, ethnic and racial profiling will be reduced.

The Practicality of an Association-Based Approach

It may seem like a major undertaking to shift the entirety of wiretap law from a border-based regime to an association-based regime. However, Congress and the George W. Bush Administration have been working together to pass changes to FISA that do exactly that. The problem with this incremental approach is that each time a small change is made to the law, the balance between security and privacy values is thrown off-kilter. A paradigm shift, as proposed here, is simply the logical leap down a path Congress has already started taking.

First, an association-based approach would function similarly to the “basket warrants” that Congress approved in The Protect America Act.³⁵ The Act contained a provision that permitted the government to seek, after FISC approval, warrants that expand as new phone numbers or e-mail addresses of the surveillance target are discovered—basket warrants. The Act specifically stated that a FISC warrant “is not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed.”³⁶ The Protect America Act was allowed to sunset in February of 2008. However, its provisions can be seen as a congressional attempt to redefine surveillance laws in a way that responds to new technologies and new threats. Basket warrants provide several security benefits, particularly speed and flexibility. However, under the proposed association-based regime, basket warrants would be required for every group that is considered a threat, adding an additional layer of judicial oversight where it had not been previously and protecting civil liberties concerns. Furthermore, it is important to note that just because this approach would permit basket warrants, it would not preclude individual surveillance warrants in cases where one individual operates as a threat to national security.

Second, this approach reflects the concerns Congress sought to address with FISA’s Lone Wolf provision,³⁷ which was enacted as a part of the Intelligence Reform and Terrorist Prevention Act of 2004. Section 6001 of the Act updates FISA so that wiretapping any non-U.S. person who “engages in international terrorism or activities in preparation thereof” is not within the definition of electronic surveillance and thus not limited by ECPA.³⁸ It is called the Lone Wolf provision because it permits warrantless wiretapping of those individuals suspected of terrorism but who are not confirmed as foreign powers or agents of foreign powers. By adopting this provision, Congress was attempting to alter the definition of “agent of a foreign power” to include threats

associated with nebulous groups that do not fall squarely within the definition of a foreign power. An association-based approach would remedy this problem by not restricting threats to those working for other states (other bordered entities). Instead, it would consider only if the association is a threat.

Third, an association-based approach would eliminate the need for tortured reasoning that recent FISA changes have required. One of the best examples is a provision of the Protect America Act, which redefines the term “electronic surveillance” for the purposes of FISA.³⁹ Government officials cannot, under FISA, conduct electronic surveillance on the communications of U.S. citizens or legal residents without first obtaining certification from the FISC. However, according to the Protect America Act, “[n]othing in the definition of electronic surveillance... shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States.” This tortured reasoning, that surveilling electronic communications directed at someone outside the U.S. does not fall within the definition of electronic surveillance, is bad policy. An association-based approach would reflect the goals of the provision, because it would not look at the location of either the sender or recipient of the communication. The communications sought would remain surveillable under an association-based approach, so long as one of the individuals communicating was part of an identified and warranted group.

Finally, the proposed association-based approach is consistent with the most recent FISA updates Congress has enacted, the FISA Amendments Act of 2008.⁴⁰ That statute requires that an official seek a warrant from the FISC to wiretap communications of Americans outside the country. The result is that the communications of citizens can only be surveilled under warrant, regardless of whether the citizen is inside or outside the border. While this regulation is a positive step towards relying less on borders in our surveillance regime, it does not go far enough. The law fails to address the problem of foreign nationals, either inside or outside the border; it creates a paradoxical situation in which the communications of a citizen abroad with a non-citizen within the country require a warrant to be surveilled while the communications of a non-citizen abroad with a citizen within the country do not require a warrant.

While some fine-tuning to this proposed system may be required, taking the dramatic step of redefining our legal framework for wiretaps based on associations would ultimately serve both core values: security would be enhanced because the government would be able to surveil in a way that captures the realities of current enemies and modern technologies, while privacy would be enhanced because all wiretap surveillance would be subject to a stringent warranting process and more oversight.

Conclusion

Wiretap surveillance is as old as wired communications itself. However, such electronic surveillance has also been viewed with suspicion since its inception. Supreme Court Justice Louis Brandeis argued, “as a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.”⁴¹

In the U.S., surveillance law has always been a delicate balancing act between security and privacy. Wiretap law, as it currently exists, does not serve either of these values well. A complete overhaul of the system is necessary. Instead of relying on laws based on out-dated technologies and former security threats, a new law should be enacted that reflects the reality of today’s world. The important considerations should be the associations between people, not their nationality or their geographic location. Borders have become insignificant to national security threats—our wiretap law needs to travel beyond them as well.

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- 14 *Ibid.*, § 1804(a)(7)(B). Note that this provision formerly required national security to be the "primary purpose" of surveillance for FISA to apply. A provision of the Patriot Act updated the language of FISA so that national security need be only "a significant purpose" of the surveillance. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)*, Public Law 107-56 (115 Stat. 272), *U.S. Code 50* (2001) §1804(a)(7)(B), § 1823(a)(7)(B).
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32 Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, Minnesota: Thompson/West, 2005), 329.

33 Department of Defense Technology and Privacy Advisory Committee, *Safeguarding Privacy in the Fight Against Terrorism: Report of the Technology and Privacy Advisory Committee* (2004): 28.

34 "Congress shall make no law ... abridging ... the right of the people peaceably to assemble." U.S. Constitution, *First Amendment*.

35 *Protect America Act*, Public Law 110-131, *U.S. Code 50* (2007) §§ 1805a - 1805c (expired Feb. 17, 2008).

36 *Protect America Act*, § 1805b (b).

37 *FISA*, §§ 1801 (b)(1)(C), (b)(2)(C).

38 *Ibid.*, § 1801 (b)(1)(C).

39 *Protect America Act*, § 1805b (a)(2).

40 *FISA Amendments Act of 2008*, Public Law 110-261, (122 Stat. 2436).

41 *Olmstead v. US*, 277 U.S. 438, 476 (1928) (Brandis, J. dissenting). ault, eventually decrease the numbers of women and children trafficked for sex.

Navigating the Strait

Improving Crisis Communication in a U.S.-China Confrontation over Taiwan

Devin Hayes Ellis

ABSTRACT

The prospect of an armed conflict between the United States and China over the political future of Taiwan has been a topic of debate for decades. Recent studies have shown how a military standoff in the Taiwan Strait is one of the few events that can provoke an actual shooting war between the two countries. The implications of such a conflict, which include the possibility of a nuclear exchange, suggest that both governments should do everything in their power to avoid escalation. The importance of communication and miscommunication in the management and outcome of past standoffs in the Strait has, in the author's opinion, not received sufficient attention from policy makers. The paper shows how poor crisis communication between the U.S. and China has led to escalation in the past and suggests concrete steps, which can be taken to address this concern.

The United States and China are often billed as the future, even current, competitors for dominance in the Asia-Pacific international security equation. However, due to increasing economic interdependence and the vast superiority of the U.S. military, it is difficult to envision a scenario in which the two countries would engage in armed conflict. One significant exception is the ongoing tension over Taiwan's status--in particular the possibility of China taking military action to determine the island's political future. Considering U.S.'s longstanding commitment to guarantee Taiwan's security and the status of China and U.S. as nuclear powers, such action could have dire consequences. Although the prospect of a conflict is remote, U.S. and China have already engaged in three military standoffs in the Taiwan Strait since 1950. Therefore, it is extremely important to prevent similar escalation in the future.

A defining feature of past crises in the Strait has been lack of reliable communication and signaling between the three main actors--especially between U.S. and China--which has led to unintentional escalation. This policy analysis focuses on the causes and results of miscommunication between U.S. and China, and proposes improving conflict management practices and building long term trust between

proximity to each other, in a standoff, developing more reliable methods of communication between command decision makers on both sides is crucial.

Two fundamental forms of crisis communication are examined in this analysis: 1) direct communication between the two governments, i.e. phone calls, diplomatic demarches, face to face conversations; and 2) signaling, indirect communication through public statements, military maneuvers and posturing in non-governmental venues such as the United Nations. While both forms of communication are vital to successful crisis management, both have been severely mismanaged in previous U.S.-China confrontations.

Addressing these deficits requires better communication infrastructure and channels, and more opportunities for training and interaction between likely crisis decision makers. As part of a broader framework of security agreements, similar measures were taken during the Cold War to improve U.S.-U.S.S.R security relationship. While such a process would be highly beneficial for U.S.-China relations, the minimum measures recommended here should be undertaken regardless of other developments in the bilateral security relationship.

Finally, there are core policy priorities to be addressed. The centrality of Taiwan's status to Chinese national security policy has not changed perceptibly in the last fifty years. For the U.S., on the other hand, the problem has taken a different dimension after the end of the Cold War and the acceptance of a "One China Policy." Taiwan has become a difficult proposition for U.S. foreign policy makers, who need to balance their long-standing commitment to protect the Island from coercion by Beijing with the growing importance of the U.S.-China relationship. Uneven perceptions of the priority of the Taiwan issue remain a significant unresolved problem in building a stable security dynamic between the two countries.

A Taiwan Strait crisis sets itself apart from other potential U.S.-China crises because of the risk that raw emotion and complex historical commitments over the island's identity and security will break down normal patterns of behavior.¹ In such cases, all precautions must be taken to avoid accidentally escalating a military showdown into what could become the first limited nuclear war in history. Effective crisis communication between the two countries reduces the risk of accidents in high-stake military confrontations, improves the negotiation process between the two parties by increasing their understanding of each other's goals and concerns, and serves as a starting point for long-term confidence building measures.

Communication as a Component of Successful Crisis Management

Academic literature on negotiation theory and crisis bargaining identifies effective communication as an important component of achieving desirable resolutions to confrontation—especially those with high stake outcomes like a military showdown between two nuclear powers. Good communication, including signaling, helps parties engaged in a crisis make better choices by understanding what crisis scholar Phil Williams calls “the relative values and interests at stake.”

² In his work on the game-theoretic analysis of crisis bargaining, Stanford Professor James Fearon has explored the essential dilemma of why states often fail to find a negotiated compromise to war, even though rational behavior would dictate that it is in their best interests to do so.³

Part of the answer lies in the problem of asymmetric information: in short, neither party knows enough about the nature of the other’s intentions to act in the most rational manner. The importance of this barrier and communication’s role in creating and resolving it is the subject of rich literature. It was first studied in a quantifiable way in early applications of game theory. The work of Nobel Prize winning economist and Arms Control expert Thomas Schelling is particularly important.⁴

Williams and others have drawn attention to the importance of clear communication in negotiation scenarios where the two parties engage in coercive bargaining—as the U.S. and China have clearly done in their Taiwan Straits confrontations. Under these circumstances, Williams in his classic work *Crisis Negotiation* suggests that, “the importance of communication has been recognized... as an essential part of the bargaining process.”⁵ Quantitative analysis of the impact of communication on negotiated settlements, including the work of scholars like Johns Hopkins’ William Zartman, focus on the importance of finding a zone of agreement between the two parties. Without overcoming the problem of asymmetric information, understanding the parameters of an acceptable solution is much more difficult.⁶

The work of Michael Brecher and Jonathan Willkenfeld in their International Crisis Behavior Project (ICB) specifically underscores the impact of communication on the escalation to violence during a crisis.⁷ The ICB analysis shows how communication between crisis actors can be linked in various ways to escalation and de-escalation in historical crises from 1918 to the present.⁸ In particular, the ICB data shows a strong correlation between one crisis actor’s perception that the other is escalating violence and that actor’s willingness to escalate in response.⁹ The finding reinforces the analysis’ emphasis on misinterpretation:

both Washington and Beijing misinterpreted the belligerent intent of the other during historical crises in the Strait, leading to escalation in rhetoric and the commitment of forces.

Finally, the important aspect of inter-cultural communication has significant bearing on crisis communication between Washington and Beijing. Scholars such as Raymond Cohen and T.P. Bernstein link the theory of intercultural communication with the study of crisis. High context cultures like China and low context cultures like the U.S. communicate differently during negotiations, particularly in how they interpret signals and frame their intentions in public statements.¹⁰ UCLA professor Barry O'Neill has used game theory to model how cultural communication differences can impede negotiation, based on the premise that parties negotiate with each other using their own internal cultural norms rather than adjusting to the norms of the other party.¹¹ Firsthand accounts of previous straits crises show how important this problem is to the U.S. and China specifically.

The Four Crises in the Taiwan Strait

The United States and China have been involved in four crises in the Taiwan Strait.¹² The first began in August of 1954 and lasted through April of 1955. The crisis centered on attempts by the People's Liberation Army (PLA) to reclaim the offshore islands of Qemoy and Matsu, which were occupied by Taiwanese forces despite the island's proximity to the mainland. Throughout the crisis U.S. and PLA forces were in close proximity to one another. President Eisenhower made a series of statements implying the possible use of nuclear weapons if Beijing attempted an assault on Taiwan or on U.S. troops. The second crisis also occurred during the Eisenhower administration, in July through October of 1958. It was also precipitated by PLA assaults on Qemoy and Matsu. The crisis was resolved by stronger threats of nuclear force by Eisenhower and Secretary of State Dulles, and clear indications from the Soviet Union that it was not prepared to offer material support to the PLA. Chinese Premier Zhou Enlai affected a diplomatic drawdown of the crisis through new side talks between China and the U.S. in Warsaw.

The third crisis took place in April of 1962 when Taiwanese leader Chiang Kai-shek threatened to invade mainland China, touching off a series of defensive military maneuvers by the PLA. The crisis quickly wound down when President Kennedy announced at a press conference that the U.S. maintained a defensive posture only with regard to Taiwan and would not support any such invasion.

The fourth crisis began in the Taiwan Strait in May 1995 with a series of high profile military exercises by the PLA, which were launched in the wake of a speech given by Taiwanese President Lee Tung-hui at his

alma mater, Cornell. The exercises, which included massive amphibious landing drills and test firing of short range missiles into the Strait, provoked a showdown with the U.S. and resulted in heated rhetoric on both sides. The genesis of the confrontation was the perception by Beijing that their request to deny Lee a visa had been agreed to by the State Department and then ignored by the White House. The crisis abated after a moderate U.S. show of force and some diplomatic initiatives. But tensions remained high in the run up to Taiwan's first open presidential election. The second phase of the crisis began when China announced more military exercises on a much larger scale, which included a series of new missile test-fires into the sea-lanes around Taiwan. President Clinton responded by amassing a large U.S. Naval force in and around the Taiwan Strait and placing the U.S. military throughout the Pacific on high alert. This move apparently unforeseen by the Chinese led to further tensions as Chinese officials seemed to threaten the use of nuclear weapons in the event that a conflict broke out. Diplomatic efforts and a series of ameliorative gestures by Washington brought down tensions, and the crisis resolved itself when the PLA exercises ended after the Taiwanese election.¹³

Studies of crises in the Taiwan Strait and general trends of U.S.-China crises have grown over the last few years, but the literature remains small compared to its equivalent in U.S.-Soviet relations. Therefore, this analysis relies heavily on a select number of sources: excellent firsthand accounts of U.S. diplomats involved in U.S.-China crises and policies, compiled from both the State Department Oral History project and the Record of United States Diplomacy and edited by Georgetown historian Nancy Tucker;¹⁴ memoirs and accounts from participants, including former Chinese foreign minister Qian Qichen;¹⁵ a number of scholarly books and articles that directly address U.S.-China crisis management and a handful of more general works on U.S.-China security policy.¹⁶

A few simulations of U.S.-China confrontations in the Taiwan Strait have been published, including some war-games analyzed by Professor You Ji and a series of books and monographs by Michael Swaine, of the Carnegie Endowment for International Peace.¹⁷ Swaine's work also identifies "maintenance of clear lines of communication" and "features of crisis signaling" as key aspects affecting the U.S.-China crisis management relationship.¹⁸

All four crises were successfully defused through a combination of diplomatic action and fortuitous timing, but it is possible to imagine other outcomes. Each crisis featured protracted periods of heightened tension, which were prone to sudden and rapid escalation, and all involved massive and sustained commitments of U.S. and Chinese armed forces to the comparatively small area around the Taiwan Strait. Each crisis except 1962 involved the threat—explicit or implied—

nuclear weapons being deployed by one side or the other if the showdown became a shooting war.¹⁹ All four crises escalated, as will become clear, partly due to miscommunication or lack of communication between Washington and Beijing.

Assessing Specific Communication Problems-No “Red Phone”

The most noticeable problem in U.S.-China communication is Beijing’s unwillingness to talk directly with Washington during a crisis—the tendency of Chinese officials to become unreachable during such events. As incongruous as it may sound, the fact that top U.S. officials have no idea what phone number to call to reach their counterparts in Beijing during a military standoff is a serious communication deficit. In April, 2008 after over two years of negotiations, a hotline between the Pentagon and the Chinese Defense Ministry was tested for the first time. The hotline represents a positive step, but until it has to operate during a crisis, the reliability of this channel remains in question.²⁰

This problem is further compounded by the lack of transparency in decision making at the top of China’s chain of command. Simply identifying the appropriate actors to communicate with in a particular crisis can be very difficult. In the 1950s, the government in Beijing was still shrouded in mystery to western countries, but even during the 1995-1996 crisis, U.S. decision makers were uncertain who they should be or could be communicating with directly in order to manage tensions in the Strait²¹

For the U.S., direct communication during a U.S.-China crisis is crucial in avoiding escalation. Evidence suggests that, in part, Chinese military and political elites may be reluctant to communicate in an armed showdown with the U.S. because they do not wish to surrender their tactical advantage. In an actual shooting war between the U.S. and China, especially in the event of nuclear escalation, China’s chances of victory, however it might be defined by the scenario, would probably be determined by its ability to strike first.²² Given this predisposition, it is incumbent on Washington to proactively seek de-escalation.

The Significance of Taiwan

Some scholars suggest that the Taiwan issue is becoming less important to China’s overall foreign policy with the ascent of a broader geopolitical-economic strategy.²³ However, in the context of a Straits crisis, the perspective of Chinese decision makers is crucial. Territorial integrity, in a broad historical sense, is central to China’s national security. As scholar Steve Tsang puts it, “the Taiwan issue is

viewed through the prism of morality, the future of the Chinese state and national honor.”²⁴ Allen Whiting, one of the deans of U.S. “China Watchers,” further emphasizes the willingness of Chinese leaders to take risks and use force with regard to Taiwan in ways that would not normally be expected.²⁵

Historically it has been difficult for U.S. decision makers to understand this set of motivating factors. Diplomatic accounts from the 1954 crisis indicate that neither Washington nor U.S. diplomats on the ground understood the significance of the PLA’s strategy until well into the event.²⁶ The same lack of understanding was apparent at the beginning of the 1995 crisis when U.S. decision makers got the wrong idea about Chinese exercises in the Strait, inferring a far more hostile intent than was actually meant.²⁷ Washington’s failure to develop an accurate sense of Chinese attitudes on Taiwan policy led to an ironic mix of misinterpretations—simple posturing was viewed with undue alarm and highly belligerent signals were dismissed as bluffs.

Chinese decision makers have frequently misjudged U.S. intentions regarding Taiwanese independence. These misjudgments resulted from many of the communication dynamics discussed above, and were further reinforced by the general reluctance of Chinese diplomats to question Beijing’s assumptions in their reports from the “front lines.”²⁸ A case in point is the famous reneging on the commitment to keep Lee from attending his Cornell event. The conversation, which took place between Secretary Christopher and Foreign Minister Qian, gave Beijing the impression that the Secretary of State had made a promise to deny Lee a visa. However, Winston Lord, who was at the time Assistant Secretary of State for East Asian and Pacific Affairs, had a different take on the situation. He remembers Christopher stating that “our policy was to not allow visits to the U.S. by high level Taiwan officials.” Christopher, however, also said that “we were having a difficult time convincing the U.S. Congress that this was the right course.” In a State Department oral history, Lord wonders which part of the conversation Qian chose to report back to his superiors.²⁹

Understanding the PLA’s Relationship to Chinese Decision Making

During a crisis, visible military maneuvers are one of the most important tools of signaling. Unfortunately, in a U.S.-China crisis, this key strategy is clouded by U.S. uncertainty about the PLA’s command and control. In many previous crises, the PLA seemed to have its own agenda, which was not always in tandem with that of the political leadership.³⁰ Certainly, studies of the PLA’s evolution suggest that its relationship with top political leadership in Beijing is complex

and ever evolving, but the concern over independent military action is probably overstated.³¹ The crucial point is that U.S. decision makers need to develop a more sophisticated understanding of how to parse PLA actions and motives within the larger Chinese policy-making process. Andrew Scobell, a leading expert on the history of the PLA and Chinese national security, points out that although the PLA may take a more hawkish line on military confrontation with the U.S. than its civilian masters in Beijing, the risk of unauthorized actions that provoke escalation is minimal.³²

The Effect of Washington's Internal Political Dynamics

Chinese accusations of American arrogance in foreign policy are hardly novel, nor should they be taken at face value. However, when it comes to crises in the Strait, there is some truth to the adage that “where there’s smoke, there’s fire.” From the Chinese perspective, Washington’s strategies for handling confrontations with China have a tendency to be politically tone deaf. The best recent example is the 1995-1996 crisis, which, as noted earlier, was in part provoked by poor management of Beijing’s objections to President Lee’s speech. The Clinton administration’s handling of the situation was complicated by lapses in communication between the State Department and the White House as well as by considerable political pressure from Congress. However, such snags do not excuse the ham-handed way in which the decision was communicated to Chinese leaders.³³

Once escalation started, the approach adopted by Secretary Christopher and President Clinton of sending strongly worded letters to Beijing failed to produce results.³⁴ From the Chinese perspective, it is not difficult to understand why. The Clinton administration’s strategy reinforced a persistent problem in communications between Washington and Beijing: the U.S.’s failure to acknowledge Beijing’s desire to avoid being pushed around derails attempts to reach compromise.³⁵ On an ironic note, while the letters themselves had no noticeable effect in deterring aggressive Chinese posturing, former Foreign Minister Qian recalls that he agreed to deliver them because the gesture made by Warren Christopher of offering to meet him in person was seen as suitably deferential.³⁶

U.S. and Chinese Failure to Correctly Interpret Crisis Signaling

Perhaps the most dramatic communication breakdown in U.S.-China Straits’ crises has been the failure of both sides to accurately interpret signals from each other. Signals in this context

include military maneuvers, public and diplomatic statements and indirect communication through third parties or other actions on the geopolitical stage. In the 1954 crisis, for example, the PLA actions were poorly understood by the Eisenhower administration, and these types of problems have occurred repeatedly.³⁷ During the 1995-1996 crisis, the Clinton administration failed to perceive the seriousness of Chinese indignation over the Lee speech and was surprised at the scope and aggressiveness of the exercises conducted in the Strait—particularly the testing of short-range missiles. In response, the U.S. decided to commit U.S. naval forces to the area, which placed the two countries in a standoff. It is unclear how seriously Chinese leaders took US willingness to resolve the crisis with force initially. Tensions ultimately, eased as attention on the Cornell speech diminished. However, a fascinating thing then happened; during the Taiwanese elections in 1996 the Chinese government, intent on making another show of strength based on U.S. signals up to that point, assumed they could escalate without provoking further response. Beijing issued statements declaring its intent to conduct massive exercises in the Strait and in Southern China and continued to do so in the months leading up to their commencement. When the exercises began, Washington reacted in a way that took the Chinese by surprise. The U.S. issued strong statements defending Taiwan from aggression, and tasked two aircraft carrier battle groups to the South China Sea, committing a much larger number of U.S. forces to the Strait than during the previous phase of the crisis. Beijing was taken aback by what it perceived as an over-dramatic U.S. reaction to clearly defined exercises, while U.S. decision makers felt that the return to military maneuvers in the Strait meant a further escalation towards a Chinese invasion of Taiwan.³⁸

The record now shows that the PLA did not see the second set of exercises as risky at all. Instead it viewed them as predictable and part of a now well-rehearsed choreography with the U.S. Clearly that was not Washington's perspective.³⁹ War games and simulated negotiations based on a U.S.-China showdown in the Strait reveal similar types of misperceptions about the meaning of military gestures. Given the massive forces, which have historically been committed to these showdowns and which presumably would be committed in a future crisis, the U.S. clearly needs to improve its ability to accurately identify messages coming from military maneuvers.⁴⁰

Mixed signals sent through public or diplomatic statements also represent serious challenges to crisis negotiation in the Taiwan Straits. In the 1958 crisis, as in 1954, Eisenhower used strong language on the need to resort to nuclear weapons to deter Chinese attacks on American forces. However, the record suggests that U.S. decision makers agreed there was never much danger of the crisis actually escalating to war—much less nuclear war.⁴¹ The same cannot be said of their Chinese

counterparts. The genesis of the Chinese nuclear weapons program was based in part on the desire not to be held hostage by threats again, and there is evidence to suggest that Mao himself took the U.S. statements very seriously and believed a nuclear war was in the offing.⁴² Furthermore, China scholar Richard Betts and others have suggested that the U.S.'s willingness to issue nuclear threats over Taiwan may have been important in shaping Beijing's future willingness to do the same.⁴³

Conversely, in 1996, a famous threat from a senior PLA figure to former U.S. Ambassador Chas Freeman may have been interpreted in the same way. The threat, that the U.S. "values Los Angeles and San Francisco more" than it does Taiwan, combined with highly belligerent statements from the Chinese Defense Ministry about engulfing the enemy forces in a sea of fire raised serious concerns in the U.S. that China could respond with nuclear force.⁴⁴ It is not clear whether these threats were serious.

Two aspects of communication are essential to understanding how mixed signals are generated and transmitted: broader cultural differences and specific functional differences in the way the two governments manage crises. The cultural aspect of communication is described as differences between high context and low context cultures. Low context cultures like the U.S. tend to communicate literally, whereas high context cultures attach much more importance to nuance and are prone to more types of symbolic signaling. As O'Neill, Cohen and others have shown, when two communication cultures are involved in a negotiation, the likelihood of signals being misunderstood increases significantly.⁴⁵

Xia Liping, a leading Chinese scholar of PRC Foreign Policy, has defined the problem of negotiation between the U.S. and China as one of functional differences in conflict negotiation techniques. He has explored the contrast of moderation versus brinkmanship and law versus morality based approaches used by the two governments. In general, he contends that the Chinese government attempts to maintain a position of moral superiority and establish the "rightness" and importance of its position in crisis management. One of the most important doctrines of foreign policy the PRC has inherited from Mao is the concept of acting "on just grounds, to our advantage, and with restraint"—encapsulated in the Chinese phrase *youli, youli, youjie*. Implementing this doctrine involves taking strong stances on issues of "moral" importance to China's national security but with the understanding that only action with a high certainty of success will be taken. U.S. decision makers by contrast have been trained to view crisis management as a carefully calibrated game of controlled escalation and place value on following recognized principles of international law rather than "self evident truths."⁴⁶

These differences in approach lead Beijing and Washington to

interpret the use of threats very differently. During the 1995-1996 crisis, there is evidence that Chinese leaders felt that a certain amount of verbal threats and military posturing were part of the normal course of a showdown over Taiwan. Andrew Scobell points out that while Beijing intended to show that China was “deadly earnest” in its willingness to use force over Taiwan, there was also an aspect of political theater which was taken for granted.⁴⁷ The perspective from the Potomac was clearly not the same. If Chinese leaders assumed their actions were understood as part of a scripted show of force, they were wrong. Specifically, the perceived threats of nuclear force produced profound alarm in Washington and contributed to the nature of the Clinton administration’s response.

Proposing Solutions

The following policy recommendations are targeted specifically at addressing the communication problems identified above. While these recommendations could be pursued as part of a larger program of diplomatic initiatives aimed at addressing U.S.-China security issues, they can also be pursued as stand-alone initiatives.

Improve Direct Communication between Decision Makers- “The Red Phone”

As discussed earlier in this analysis, the lack of a “red phone” connecting China and the U.S. is a major crisis communication deficit. The establishment of the link between PLA Headquarters and the Pentagon in April of 2008 was an important step in building a relationship between the U.S. and Chinese militaries. As previously noted, however it remains to be seen whether the hotline will function as intended during a crisis. The tele-text hotline between the White House and the Kremlin, while contrary to popular depiction there has never been an actual phone, red or otherwise, was set up in 1963 in the wake of the Cuban Missile Crisis; however, it was not actually tested until the 1967 War in the Middle East. Ongoing improvements to this communication system over the years have also helped expand the general transparency between the U.S. and Soviet militaries.⁴⁸

Connecting the two military commands is only a half step towards the goal of establishing a reliable means of direct communication between the President of the United States and the President of the PRC, under the current joint President/General Secretary/Chair of the Central Military Committee arrangement. A truism of inter-state crisis management is that no assurance of intent is better than that from one ultimate decision maker to another—especially if they have an established relationship. Historically, this has not been the pattern

of communication between Washington and Beijing. Since the Chinese government shows no sign of seeking a new status quo, it is incumbent on the U.S. to take the first step.

There is no guarantee of success in establishing these lines of communication, and past crisis behavior by Beijing indicates that there is even less guarantee that those lines would be open when they are needed. A key element of improving communication is building trust among Chinese leaders that the U.S. does not desire conflict in the Strait, and that in the event such a conflict occurs, it will negotiate in good faith to end it peacefully. Wang Jisi, Dean of the School of International Studies at Peking University, has developed extensive instructional curricula at the elite training program, the Central Party School. He has described the extent to which crisis management thinking among Chinese elites is still based largely on interpretations of a doctrine promulgated by Mao Zedong, which treats establishing trust with the adversary as unimportant.⁴⁹ Creating an environment and tools to overcome this disparity in attitudes is essential to a stable long-term security relationship.

Managing Back Channels

The practice of using former officials and high level academics on private business to relay statements from Chinese officials to their counterparts in Washington can produce valuable information. This practice should continue in the future, especially since different diplomatic styles can make public communication difficult. Speaking unofficially allows policymakers on both sides to be more honest about intentions and options than they might otherwise be. Nevertheless, this practice needs to be much more carefully managed than in the past.

The 1995-1996 crisis produced several classic examples of back channel messages, which may have been more harmful than informative. General Xiong Guangkai's infamous comments to Chas Freeman about Los Angeles had a significant impact on some top U.S. actors, but others were more skeptical of their seriousness. Winston Lord, representative of other experienced China watchers in the Clinton administration, felt the threats were neither as important nor as indicative of actual opinion among top leaders as Freeman. The government of China is not monolithic, and the source of the messages should be examined very carefully before they are given too much weight in decision-making.⁵⁰

Another example of mismanagement, which reduced the effectiveness of back channels, is the use of side talks in Warsaw. During the 1954-1955 crisis, the U.S. attempted to create a back channel by approaching Chinese representatives at the Warsaw talks with the Soviet Union. Although, the connection was established, it proved irrelevant to the eventual resolution of the crisis because the Chinese leadership did not view it as useful. However, in 1958, once Eisenhower made his nuclear

threats clear, Zhou Enlai activated the established channel and used it to make conciliatory statements about Beijing's intentions.⁵¹

The examples from these three crises highlight important features of back channel communication in crisis management. To maximize the effectiveness of a back channel for U.S.-China communication:

1. The channel should be available at short notice, under most conditions, not one-off or chance meetings.
2. Both Washington and Beijing should acknowledge or at least be aware of its existence and potential usefulness.
3. The parties involved should be known commodities to both their counterparts and their "home" government—the veracity of their reporting and their messages should not be in doubt.
4. Channels should remain "open" during non crisis periods as well. The Warsaw side talks and a pair of quasi-official individuals who met regularly for personal or professional business are an excellent example of this.

The second and third criteria reinforce each other. For back channels to work, it is important to establish them through persons who are not only trusted by their home government and respective intermediaries, but are known quantities and whose personal biases can be both accounted for and minimized in the process. Ad hoc communications can result in the kind of gray area for message interpretation that occurred with Ambassador Freeman in 1996.

If properly managed, however, back channels can be a remarkably effective tool for bridging the communication gap between two countries. The U.S. and the Soviet Union established a multitude of different kinds of back channels over the course of several decades, some of which helped resolve major crises such as the Cuban Missile Crisis, and the confrontation in the Middle East during the Seven Day's War. Over the course of time, these channels—including some set up through third party governments like France—helped facilitate the pre-negotiations that eventually led to détente between the superpowers.⁵²

Train Participants to Understanding Signaling-Build Institutional Memory

One of the major problems encountered in previous Straits crises was the apparent difficulty U.S. and Chinese policy makers had in understanding the meaning of actions such as troop deployments, diplomatic demarches, missile launches, and third party messages taken by their counterparts. This problem is apparent from historical analyses of previous crises, but it has also manifested in crisis simulations done between U.S. and Chinese participants. In order to improve the ability of policy makers on both sides to interact predictably with each other and

accurately interpret signals sent by their counterparts, concerted effort should be made to develop regular, comprehensive engagements which would involve current or prospective policy makers and members of the expert academic community from both China and the U.S. Historical reluctance on the part of the Chinese government to engage in this kind of exercise is a hurdle that must be confronted. Some groundbreaking work is already being done. For example, the projects undertaken by the Carnegie Endowment for International Peace and the China Foundation for International and Strategic Studies, in partnership with a host of other organizations has led to the Swaine and Tuosheng collection of case studies.

Although there have been a number of foreign policy crises between the U.S. and China, even in the last decade, there has been minimal focus on changing the culture of diplomatic/military relations with China. Compare this effort to that expended on studying and understanding U.S. interactions with the Soviet Union during the Cold War. There were countless attempts to convene informal groups for study and training purposes, which later evolved into a parallel crisis management system. One of Henry Kissinger's early ideas about establishing permanent diplomatic and academic channels for communication and conflict resolution around the globe evolved into the Nuclear Risk Reduction Centers in the 1980's, designed to create numerous, string negotiating environments.⁵³ This is not to suggest that focusing on China as a major geo-strategic adversary is an appropriate approach. But within the more limited sphere of crisis interactions, especially, involving substantial military force, the inherent dangers should be treated more seriously than they have been in the past.

One of the most important ways in which regular simulated crisis interactions can help Chinese and U.S. experts and policy makers bridge their communication gap is by advancing their understanding of the key political and cultural elements of the two countries' approaches to national security threats. Returning to the concept of cultural communication barriers discussed above, a number of Chinese and American experts have pointed to the ways in which Beijing's pattern of public communication in a crisis can obscure the ability of U.S. actors to understand PRC's real motives and goals. Alastair Iain Johnston has described it as a dual set of priorities, one "symbolic," which sets the tone for public declarations and is largely unchanged from situation to situation, and the other "pragmatic," which establishes the parameters of what is acceptable to Beijing within a given situation, but which is less than transparent to outside parties.⁵⁴ Widespread and often reinforced perceptions among Chinese elites that the U.S. maintains an unduly self-righteous and aggressive foreign policy do nothing to help mitigate miscommunications. Regular exercises should be designed to help overcome this deficit of understanding. For example, allow current and potential crisis actors to observe the behavior of their counterparts,

and then, through post-simulation analysis, take note of and learn from the differences in the intent of actions and their perceptions.

Numerous studies of long-term negotiation between parties have shown the value of extensive training and exercises to achieving desirable crisis resolution.⁵⁵ Chinese decision makers might also particularly benefit where interaction makes up for deficits in the breadth of perspectives and interpretation offered at CCP leadership academies. The difficulty in establishing a regular program of carefully designed interactions to start could be more than made up for if it does create cultural changes that significantly diminish the risks arising from misunderstandings and unknowns in this relationship.

Clarify the U.S. Stance on the Use of Force in the Taiwan Strait

The final, and most controversial, recommendation of this analysis is that the U.S. should consider clarifying its public stance on the use of military force in defense of Taiwan. Richard Bush of the Brookings Institution coined the term “dual-deterrence” to describe how the U.S. has traditionally managed the three-way relationship between Taipei, Beijing and Washington. He refers to the reliance on “strategic ambiguity:” the U.S. remains vague about the parameters for using military force in the Strait in order to simultaneously discourage Taipei from taking U.S. support for granted and Beijing from pushing the envelope on military threats to the island.⁵⁶ The utility of this policy approach is self-evident, but it also has significant detriments, which are highlighted in analysis.

Many of the communication failures identified here are the result of a lack of trust between the U.S. and China vis-à-vis issues of national security. Furthermore, implementing these policy recommendations will require a significant investment in creating a relationship of trust between the two countries. Doing so in an environment where a visceral national security issue like Taiwan’s status is clouded by poorly defined parameters on potential use of force will be difficult. Moreover, from a larger perspective, Taiwan remains a point of friction, which clouds other parts of the security relationship between U.S. and China.

The same ambiguity that provides a management mechanism during non-crisis periods can actually complicate the situation during a crisis and fuel escalation, as appears to have been the case in 1995-1996. As discussed above, the lull between the first and second round of Chinese exercises gave Beijing the perception that the parameters of U.S. reaction to aggressive displays of force were established, although that was far from the case. Chinese confusion over the U.S. reaction to the second round of exercises was enhanced by the lack of a clearly articulated threshold for the use of force. Scholars have studied the danger of unintended consequences when one party perceives a crisis

as being less threatening than the other party and the difference in perception is not understood by either side.⁵⁷

Articulating a clearer policy would be a controversial and complex process. Moreover, it is beyond the scope of this analysis to hypothesize what that policy should be. The argument at hand is that whatever the position taken by the U.S., reducing ambiguity about the threshold for use of military force related to Taiwan would enhance the ability of the U.S. and China to implement trust building measures and reduce the possibility of an accidental war.

Conclusion

In 1962 the United States and China experienced a textbook case of potential military escalation being defused by clear communication before it had even begun. In response to the rumors that Chiang Kai-shek planned an invasion of the Mainland around Easter, China began to move forces into the central coastal region and issued warnings about the dire consequences of such an action. President Kennedy called a press conference at the White House and announced firmly that the United States would have nothing to do with any attempt to invade the mainland. The crisis between Taiwan and Beijing wound down rapidly since Chiang had no hope of enacting an invasion plan without U.S. support, and the possibility of a military showdown between China and the U.S. was averted immediately and completely.

In this case, the only communication tool that was needed was a public statement and clear signals on all sides. With the complicated politics of today's cross-Straits relationship, contemporary decision makers should not bank on such an easy resolution. The causes and relative benefits of a military showdown over Taiwan are so varied and complex, and the potential costs of an actual conflict so dire, that responsible policy must minimize the chances of such an outcome. As all the other factors in a Straits crisis are in constant flux, one variable remains predictable: the importance of effective communication between U.S. and China. The challenges and obstacles presented in this analysis are rooted in history and culture, but they are far from intractable. Good intentions, persistent effort and patient application of lessons learned can go a long way towards improving the dynamics between Washington and Beijing, and as a result, reducing the possibility of war.

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Endnotes

**For purposes of this paper “China” refers to the People’s Republic of China and/or the government in Beijing. “The U.S.” refers to the government in Washington D.C. In referring to the government of the Republic of China I will use the term “Taiwan” or “Taipei” for the sake of simplicity and conformity with modern standard parlance.

1 For a quick and recent snapshot of this argument from quantitative and qualitative perspectives see the respective chapters by Wilkenfeld (pp. 103-132) and Wang and Xu (pp. 133-148) in Michael Swaine and Tuosheng Zhang, et al. *Managing Sino-American Crises* (Washington D.C., Carnegie Endowment for Peace, 2006). For the most compelling presentation of the unique dangers of a Taiwan Strait crisis, see Richard C. Bush and Michael E. O’Hanlon. *A War Like No Other: The Truth About China’s Challenge to America* (New Jersey, John Wiley & Sons, 2007)

2 Phil Williams, *Crisis Management* (New York, John Wiley and Sons, 1976), 182.

3 James Fearon, “Rationalist Explanations for War” in *International Organization* 49(1995).

4 Tom Schelling’s famous book *The Strategy of Conflict* (Cambridge, Harvard University Press, 1960) is an excellent groundwork, along with works like Herbert Simon’s *Models of Man: Social and Rational – Mathematical Essays on Rational Human Behavior in Social Settings* (New York, Wiley, 1957) and *Models of Bounded Rationality* (Cambridge, MIT Press, 1982). Graham Allison and Philip Zelikow’s classic in its latest edition is a very useful primer on decision making theory and its aspects – *Essence of Decision: Explaining the Cuban Missile Crisis*, 2nd Ed. (New York, Longman, 1999).

5 Williams, pp. 154-55.

6 See for example: P.T. Hopmann, *The Negotiated Process and the Resolution of International Conflicts* (Columbia, University of South Carolina Press, 1996); T.C. Morgan, “A Spatial model of Crisis Bargaining,” *American Journal of Political Science*, 33:941-72; Zartman, I. William, “Toward the Resolution of International Conflicts,” in I.W. Zartman and J.L. Rasmussen, ed. *Peacemaking in International Conflict: Methods and Techniques* (Washington, D.C., United States Institute of Peace Press).

7 Michael Brecher, and Jonathan Wilkenfeld, *A Study of Crisis* (Ann Arbor, University of Michigan Press, 2000).

8 Ibid, pp. 21.

9 Ibid, pp. 171-84.

10 Raymond Cohen, “Negotiating Across Cultures” in Chester A Crocker, et al, Ed. *Turbulent Peace: The Challenges of Managing International Conflict* (Washington D.C., United States Institute of Peace Press, 2001) and “Conflict Resolution Across Cultures: Bridging the Gap.” In *Culture and World Politics*, ed. D. Jacquin-Berdal, et al (London, MacMillan, 1998). T.P. Bernstein, *The Negotiations to Normalize US-China Relations*, Pew Case Studies No. 426 (Pittsburgh, University of Pittsburgh, Graduate School of Public and International Affairs, 1988).

11 Barry O’Neill, *Honor Symbols and War* (Ann Arbor, University of Michigan Press, 1999).

12 The definition of which of the Taiwan Strait confrontations constitute crises between the U.S. and China is somewhat ambiguous in this context. Classic quantitative definitions of crises and crisis management – including the work of the ICB Project – would place only the two 1950s crisis as those where the U.S. and China were main actors, with the U.S. as a secondary player in the 1995-1996 crisis – the 1964 crisis barely registers the U.S. as an actor at all. However, for purposes of this analysis, it was clearly the actions of the U.S. and China that either escalated or defused the possibility of military conflict between those two powers in all four of these crises, even if the main actors were often China and Taiwan.

13 While the focus of this paper is on the effects of inadequate crisis communication in the particular context of the Taiwan Strait, it is worth bearing in mind that many similar characteristics are prevalent in other crises between the U.S. and China. Especially in the case of the Belgrade embassy bombing and the spy plane collision, failures of the kind highlighted here contributed to the difficulty in resolving the crises—and in the case of the Belgrade bombing, still cloud U.S.-China relations.

14 Nancy Bernkopf, Tucker eds. *China Confidential: American Diplomats and Sino-American Relations, 1945-1996* (New York, Columbia University Press, 2001).

15 Qian Qichen, *Ten Episodes in China's Diplomacy* (New York, Harper Collins, 2005).

16 Richard C. Bush and Michael E. O'Hanlon, *A War Like No Other: The Truth About China's Challenge to America* (New Jersey, John Wiley & Sons, 2007). McGeorge Bundy, *Danger and Survival: Choices About the Bomb in the First Fifty Years* (New York, Random House, 1988): 273. James Mann, *About Face: A History of America's Curious Relationship with China, From Nixon to Clinton* (New York, Vintage Books, 2000). Ross, Robert S., "The 1995-96 Taiwan Strait Confrontation: Coercion, Credibility and the Use of Force," *International Security* 25 (Fall 2000): 87. Andrew Scobell, *China's Use of Military Force: Beyond The Great Wall and The Long March* (Cambridge, Cambridge University Press, 2003); and also "Show of Force: Chinese Soldiers, Statesmen and the 1995-1996 Taiwan Strait Crisis," *Political Science Quarterly* 115 (Summer 2000): 227. Steve Tsang, eds, *If China Attacks Taiwan: Military Strategy, Politics and Economics* (New York, Routledge, 2006). Allen S. Whiting, "Chinese Foreign Policy: Retrospect and Prospect," in Samuel S. Kim, ed., *China and the World: Chinese Foreign Policy Faces the New Millennium*, (Boulder, Westview Press, 1998), 289. For general background on the PLA, the doctrine, organization and history of which play an important role in determining China's actions during Strait crises, see Scobell, but also Li Xiaobing, "PLA Attacks and Amphibious Operations During the Taiwan Strait Crises of 1954-55 and 1958" in Mark Ryan et al, Ed. *Chinese Warfighting: The PLA Experience Since 1949* (Armonk, M.E. Sharpe, 2003), 143. David Shambaugh, *Modernizing China's Military: Progress, Problems and Prospects* (Berkeley, University of California Press, 2002). John Lewis, Wilson and Xue Litai, *Imagined Enemies: China Prepares for Uncertain War* (Stanford, Stanford University Press, 2006).

17 See You Ji, "Making Sense of War Games in the Taiwan Strait," *Journal of Contemporary China* 6 (1997): 287 and Michael D. Swaine and Tounsheng Zhang (eds.), *Managing Sino-American Crises: Cases Studies and Analysis*

(Washington, D.C., Carnegie Endowment for International Peace, 2006).

18 Ibid Swaine, pp. 32-40.

19 See sources cited in previous section, especially Bundy, Halperin and Scobell. Analysis of the comparable dimensions of the crises (as well as excellent summaries) is aided by the invaluable data set of the International Crisis Behavior Project (ICB) located in CIDCM at the University of Maryland: <http://www.cidcm.umd.edu/icb/dataviewer/>

20 *U.S. and China Defense Chiefs Open Hotline*, Washington, AFP, April 10 2008.

21 Bundy, pp. 522; Bush and O'Hanlon, pp136-140; Scobell, pp. 173-76; Mann, pp. 327-30; Swaine et al,

22 Bush and O'Hanlon, pp. 143.

23 See, for example, Yu Maochun. "Political and Military Factors Determining China's Use of Force", in Tsang, Steve, ed, *If China Attacks Taiwan: Military Strategy, Politics and Economics* (New York, Routledge, 2006), pp. 19-21.

24 Tsang, pp. 3.

25 Whiting, "China's Use of Force, 150-1996, and Taiwan" *International Security*, vol. 26, no. 2, fall 2001, pp. 103-131.

26 Bundy, pp. 520-21; Tucker, pp. 101 and 130-31; Mann, pp. 329

27 Ibid Mann, Bush, Scobell.

28 Tsang, pp. 3; Chen Youwei, Tiananmen Shijian You Meiguo waijiao neimu (Tapei: Zhezhong chubenshe).

29 Winston Lord (Tucker, pp. 480)

30 Scobell, pp 130-45;

31 Ibid; Li Xiaobing; see Wilson and Xue and Shambaugh on the evolution of command and control in the PLA and its relationship to mission capabilities.

32 Ibid.

33 Mann, pp. 325-340

34 Mann, pp. 334.

35 See Bernstein case study.

36 See Qian, pp. 248

37 Ibid notes for 12.

38 Bush and O'Hanlon, pp. 150-16; Scobell, pp. 177-182; Mann, pp. 328-330.

39 Scobell, pp. 182-83.

40 See Swaine et al. and You Ji.

41 Tucker, pp. 101; Bundy, pp. 525-27.

42 Leng Shao Chuan, *China's Nuclear Policy: An Overall View* (Baltimore, University of Maryland School of Law, Occasional Papers in Contemporary Asian Studies, 1984). Also for Bundy's very interesting thoughts on the irony of this situation, and how it forever changed U.S.-China relations, see *Danger and Survival*, pp. 526.

43 See Betts' argument in the context offered by Bush and O'Hanlon, pp. 154.

44 See Scobell, pp. 178-82; Bush and O'Hanlon, intro.

45 Cohen, Raymond, "Negotiating Across Cultures" in Chester A Crocker, et al, Ed. *Turbulent Peace: The Challenges of Managing International Conflict* (Washington D.C., United States Institute of Peace Press, 2001)

46 See Xia Liping, "Crisis Management in China and the U.S.", in Swaine et al, pp. 156-162.

47 See Scobell, pp. 177, Tucker, pp. 482-88)

48 The evolution and functions of the most famous "phone" in the world

– which is not actually a phone at all – are well laid out in Jamgotch, Nish, “Security Communications: Risk Reduction and Confidence Building in Super-Power Relations” in Jamgotch, ed. *US-Soviet Cooperation: A New Future* (New York, Praeger, 1989).

49 See Wang and Xu in Swaine, et al.

50 Winston Lord, in high form as always, described the episode in the following way: “Chas Freeman likes to think that these discussions were of fundamental importance. I think that’s baloney. It was vague, at least the way we heard it at the time. It seems to have gotten more precise since then. We all felt there was enough there so we had to respond and take note of it. We didn’t want to inflate its importance.” (Tucker, pp. 484).

51 See Tucker, pp. 94-102 and Bundy, also for the Chinese perspective, see Gong Li, *Liangci Taiwan Haixia Weiji de Chengyin yu Zhong Mei Zhijian de Jiaoliang* [Causes of the Two Taiwan Straits Crises and the Struggle Between China and the United States], Jiang Chiabin and Robert Ross, ed. *From Confrontation to Détente: Sino-US relations during the Cold War Revisited* (Beijing: Shijie Zhishi Chubanshe, 2000), an insightful article which I never would have read without cribbing from Professor Wang’s bibliography.

52 For details on the use of back channels in the Cuban Missile Crisis see Graham and Zelikow; a first class study of the entire détente process from pre-negotiations to outcomes is Raymond Garthoff’s monumental *Détente and Confrontation: American Soviet Relations from Nixon to Reagan* (Washington, D.C. Brookings Institution, 1985).

53 Ibid Jamgotch, pp. 176-78.

54 See Wang and Xu, pp. 140; Alastair Iain Johnston, *Cultural Realism: Strategic Culture and Grand Strategy in Chinese History* (Princeton, Princeton University Press, 1995).

55 For an excellent summary of the many general and specific studies done in this field see Ward, George F. and J. Michael Lekson, “Dealing with Conflict: The Contributions of Training”: 355, in I. William Zartman, ed. *Peacemaking in International Conflict: Methods and Techniques* (Washington, DC, United States Institute of Peace, 2007); a particularly interesting recent study of the application of training techniques to long term conflicts is Dalia Dassa Kaye’s *Talking to the Enemy: Track Two Diplomacy in the Middle East and South Asia* (Santa Monica, RAND Corporation, 2007).

56 Richard C. Bush, “The U.S. Policy of Dual Deterrence,” in Steve Tsang, ed., pp. 46-51.

57 See for example, Wilkenfeld’s discussion of “crisis” and “near crisis” in Swaine et al, pp. 110- 111 based in part on work being done by Patrick James.

Gender Equality and Harmful Practices in the SADC Gender Protocol

The Challenges of Cultural Transformation

Dunia Zongwe

ABSTRACT

This paper evaluates the manner in which the SADC Gender Protocol mediates the tension between international human rights norms and local religions and customs. In the process, the paper compares the SADC Gender Protocol with the African Women's Protocol. The paper argues that, although the Gender Protocol is more gender-sensitive and more geared towards short-term implementation than the Women's Protocol, the Gender Protocol only touches the surface of the tension between international norms and local values. As a result, the implementation of the Gender Protocol will be ineffective in the short term and only a few SADC countries will attain the specific targets of the Gender Protocol by 2015. The paper reaches this conclusion by postulating that the effective implementation of the Gender Protocol depends on: (1) how the Protocol defines the relationship between global standards and local values, (2) its approach to the elimination of discriminatory and harmful practices, (3) how SADC organs interpret the Gender Protocol, and (4) the institutional capacity of SADC states to enforce it.

August 16-17, 2008, in Johannesburg, South Africa, the leaders of the Southern African Development Community (SADC)¹ signed the SADC Gender and Development Protocol (Gender Protocol).² Human rights and gender activists have celebrated the adoption of the Gender Protocol, which explicitly addresses the adverse effects of gender stereotypes in the southern African region where women are the majority of those who live in poor rural areas.³

From Bas-Uele in the north of the Democratic Republic of the Congo (DRC) to the Cape in South Africa, the commonplaces of harmful practices against women are family relations, reproduction, domestic violence, property and its inheritance, employment and politics.⁴

The preamble of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Women's Protocol) states that:

...despite the ratification of the African Charter on Human and Peoples' Rights [African Charter] and other international human rights instruments by the majority of states parties... women in Africa still continue to be victims of discrimination and harmful practices.

The above statement echoes the voices of scholars who claim that existing international human rights and women's rights instruments inadequately respond to the needs and interests of women.⁵ It also translates the growing concern that the problem with international human rights law dealing with women's rights is not the lack of normative standards, but the lack of effective implementation.⁶

This paper evaluates the way in which the Gender Protocol reconciles international women's rights standards with local cultural and religious norms. It assumes that local norms and values shape the local interpretations of these international women's rights standards. Local interpretations in turn partly determine the implementation of these standards.

Thus, the basic question is: How does the Gender Protocol tackle discrimination and harmful cultural and religious practices affecting women in southern Africa? To answer this question, the paper also compares the provisions of the Gender Protocol with those of the Women's Protocol.

Southern African women and The Law - The Plight of Women in Southern Africa

Most southern African women, like most African women in general, live a 'rough and tough' life.⁷ In a sense, the various substantive articles of the Gender Protocol mirror the various forms of discriminatory and harmful practices against the southern African woman, which in turn mirror the various perceptions of women in the sub-region. The southern African woman is variously subjected to sexual, gender-based violence, and other forms of abuses.⁸ She has to submit to a virginity test in Nongoma, in the KwaZulu-Natal province of South Africa. She is pressured to engage in unsafe sexual intercourse and to give birth⁹ or otherwise expose herself to HIV and AIDS¹⁰ in a village in the northern region of Ohangwena, Namibia. She fights to enroll for classes and, when she is in class, the teaching material and curricula are sometimes biased against her in Matete, in the Malanje province, Angola. She was once

told that she could not pass on her citizenship to her children born of a foreign father in Mochudi, Botswana.¹¹ She is excluded from political participation and decision-making process;¹² she is instead required to dance in a short traditional skirt to cheer up King Mswati III, his thirteen wives, his 23 children, and the rest of his court in Mbabane, Swaziland.

Throughout these random snapshots of women's plight in Southern Africa runs a common thread: the tension between global human rights norms and local culture and religion.¹³ Effectively, certain aspects of local culture and religion create subconscious perceptions of women as property. Customary and religious perceptions of women as property tolerate all manner of abuses,¹⁴ underpinned by several contributing factors. The ambivalence of the state in protecting and restricting religious and cultural rights, the uneven distribution of power within traditional southern African communities, the power of the extended family over individuals, women's sense of self in a patriarchal society,¹⁵ the acceptance of male promiscuity, and the almost universal institution of *lobolo* (i.e. bride wealth),¹⁶ amongst others, underpin the widespread discrimination and harmful practices affecting women in southern Africa.

Insofar as it attempts to resolve discrimination and harmful practices affecting women in southern Africa, the Gender Protocol is the regional offspring of the Women's Protocol.¹⁷ However, whilst the Gender Protocol is more gender-sensitive and has more appropriate theoretical foundations than the Women's Protocol, both protocols struggle to mediate the strain between human rights standards and cultural and religious norms.

The Women's Protocol and the Gender Protocol

The Women's Protocol

The Women's Protocol, known as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, is a protocol to the African Charter, which is Africa's human rights treaty. It came into force on November 25, 2005, following years of lobbying by African women's rights advocates like the non-governmental organization (NGO) Women in Law and Development in Africa (WILDAF).¹⁸ The Women's Protocol applies to the twenty-one African states that have ratified it.¹⁹ In the SADC region, eight states (Lesotho, Malawi, Mozambique, Namibia, Seychelles, South Africa, Tanzania and Zambia) have ratified the Women's Protocol.

African states adopted the Women's Protocol to promote, realize, and protect the rights of women in order to enable them to enjoy fully all their human rights.²⁰ The Protocol also aims to correct the scant elaboration of women's rights in article 18(3) of the African Charter on

Human and Peoples' Rights (African Charter),²¹ which stipulates that:

[t]he state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

The three categories of human rights feature the Women's Protocol. First, the civil and political rights in the Women's Protocol are the elimination of discrimination against women²² and harmful practices,²³ dignity,²⁴ life, integrity, and security of the person.²⁵ These rights also include marriage,²⁶ separation, divorce and annulment of marriage,²⁷ access to justice and equal protection before the law, and participation in the political and decision-making process.²⁸ Second, the socio-economic rights in the Women's Protocol are education and training,²⁹ economic and social welfare,³⁰ food security,³¹ adequate housing,³² health, and reproduction.³³ Thirdly, the group rights are the right of women to live in a positive cultural context,³⁴ peace,³⁵ a healthy and sustainable environment,³⁶ and sustainable development.³⁷ Group rights also protects certain vulnerable groups like women in armed conflicts,³⁸ widows,³⁹ elderly women,⁴⁰ women with disabilities,⁴¹ and women in distress.⁴²

There are rights in the Women's Protocol that apply equally to women and men, and these include dignity, life, integrity and security of the person, access to justice and equal protection before the law, peace, healthy and sustainable environment, and sustainable development.

Article 2 (on the elimination of discrimination against women) and Article 5 (on the elimination of harmful practices) are the most relevant. These two general provisions contain features that are essential for a proper understanding of the Women's Protocol as a whole.

Article 2 enjoins all state parties to combat all forms of discrimination against women. Article 5 of the Protocol, on the other hand, lays down that states must prohibit and condemn all forms of harmful practices that negatively affect the human rights of women.

Article 5 must be read together with Article 17 of the Women's Protocol and Article 29(7) of the African Charter, which obliges individuals to preserve and strengthen positive African cultural values. The effect of Articles 17 and 29(7) is to impose a duty on state parties to preserve the positive African cultural values and maintain a positive cultural context for women. These provisions are fundamental for the effectiveness of the Women's Protocol in responding to African women's plight because they directly address harmful practices while recognizing the evolving and dynamic nature of culture and religion in Africa.

The Gender Protocol

The Gender Protocol, or the SADC Gender and Development Protocol, is a protocol to the SADC Treaty, which is the constitution of SADC. The Gender Protocol is the codification of a precedent instrument of SADC, namely the SADC Declaration on Gender and Development (SDGD). The SDGD set the deadline of 2005 for the achievement of thirty percent of women in all areas of decision-making.

SADC member states signed the Gender Protocol at the 28th SADC Heads of State and Government Summit in Johannesburg on August 16-17, 2008. The signing of the Gender Protocol is the culmination of several months of vigorous and intense lobbying by African women's rights advocates, especially Gender Links, a Southern African NGO committed to gender equality.⁴³ However, four SADC member states (Botswana, Madagascar, Malawi, and Mauritius) have not yet signed the Protocol.

Unlike the Women's Protocol, the Gender Protocol does not apply to all African states that have acceded to it. It only applies to SADC member states that have ratified it. Article 40 of the Protocol exhorts SADC member states to ratify the Protocol in accordance with their constitutional procedures whilst Article 41 states that the Protocol will enter into force thirty days after two-thirds of the member states ratify it.

The Gender Protocol proceeds from the premise that the greatest challenge for SADC is to shift from an era of commitments to an era of implementation.⁴⁴ One of the objectives of the Gender Protocol is to set "realistic, measurable targets, time frames and indicators for achieving gender equality and equity."⁴⁵ Most obligations that the Gender Protocol lays down have a 2015 time frame. On the 2015 time frame, two points bear mentioning. First, the 2015 time frame seems to suggest that after the year 2015 the Gender Protocol will lapse.⁴⁶ The fact that the Gender Protocol does not have any termination clause reinforces this inference. Second, the language of the commitments of SADC member states to domesticate the Gender Protocol⁴⁷ and to ensure fifty percent of female representation in decision-making positions⁴⁸ is watered down by the inclusion of the phrase that "state parties shall endeavor, by 2015." The verb "endeavor" is not as robust as the verb "ensure," which is employed in most obligations that the Gender Protocol creates.

In adopting the Gender Protocol, SADC states intend to promote, realize and protect "gender equality and equity through the development and implementation of gender responsive legislation, policies, programs and projects".⁴⁹ The Gender Protocol contextualizes, regionalizes and particularizes Article 18(3) of the African Charter. If the Women's Protocol palliated the scant elaboration of women's rights in Article 18(3) of the African Charter, the Gender Protocol goes the extra mile of modernizing article 18(3) by incorporating the latest insights of African feminist jurisprudence.⁵⁰

To eliminate discrimination against women and gender stereotypes, the Protocol provides a bill of thirty-one detailed substantive rights, each dealing with a specific facet of women's identity and adversity as well as addressing stereotypes. Like the Women's Protocol, the Gender Protocol provides for the three generations of human rights. First, civil and political rights in the Gender Protocol include affirmative action measures with particular reference to women;⁵¹ equal access to justice;⁵² and equitable representation on, and participation in, the judiciary.⁵³

The Gender Protocol places representation and participation at the core of governance rights. It tries to persuade SADC member states to endeavor that by 2015 women occupy at least fifty percent of decision-making positions in the public and private sectors (representation clause).⁵⁴ As the table below illustrates, female representation in government is one of the few policy areas where SADC's progress on gender issues has been the most impressive. As of 2005, no SADC member states had less than ten percent women in parliament and, as a region, southern Africa was second only to the Scandinavian countries.⁵⁵

Table 1: Percentage of Women in Parliament in SADC (2005)

Country	Percentage
Angola	15.1
Botswana	11.1
DRC	12
Lesotho	11.7
Malawi	13.6
Mauritius	17.1
Mozambique	36
Namibia	26.9
South Africa	32.8
Swaziland	10.8
Tanzania	21.4
Zambia	12
Zimbabwe	16

Adapted from Gender Links, Rationale for a SADC Protocol on Accelerating Gender Equality⁵⁶

The Gender Protocol also obliges member states to adopt specific legislative measures and other strategies to enable women to have equal opportunities with men to participate in all electoral processes (participation clause).⁵⁷ However, it is disappointing that the Gender Protocol did not add to the participation clause a commitment that

SADC states confront patriarchal cultural norms given that patriarchy is the principal barrier to women's effective participation.⁵⁸

To augment female representation and participation, SADC states should introduce electoral systems based on proportional representation since first-past-the-post electoral systems are the least conducive to women's participation.⁵⁹ Moreover, SADC states should ensure that participation is substantive; otherwise, efforts to increase female representation might turn out to be empty exercises in head counting.

Second, the Gender Protocol sacralizes a number of socio-economic rights. It protects, among others, women's and gender rights relating to marriage and family,⁶⁰ the girl and boy child,⁶¹ women in armed conflicts and conflict resolution,⁶² education,⁶³ economic and social welfare,⁶⁴ health, and HIV and AIDS.⁶⁵ Finally, the Gender Protocol protects vulnerable groups like widows, widowers,⁶⁶ and women with disabilities.⁶⁷

Insofar as they both cover the three generations of human rights, the Gender Protocol and the Women's Protocol are comprehensive in scope. Unlike the Women's Protocol, however, the Gender Protocol extends its protective scope to both women and men. In that sense, the Gender Protocol is more inclusive than the Women's Protocol. For instance, while both protocols protect vulnerable groups, the Women's Protocol only protects widows whereas the Gender Protocol protects both widows and widowers.

Furthermore, the Gender Protocol does not simply duplicate the rights entrenched in the Women's Protocol. In some respects, the Gender Protocol leaves out areas that the Women's Protocol covers. For example, the Gender Protocol does not specifically provide for certain civil and political rights such as dignity,⁶⁸ life, integrity and security of the person,⁶⁹ and healthy and sustainable environment.⁷⁰ It also omits food security,⁷¹ adequate housing,⁷² positive cultural context,⁷³ and women in distress.⁷⁴ These omissions in the Gender Protocol may result from the fact that implementation preoccupies the Gender Protocol more than standard-setting.

In other respects, the Gender Protocol covers areas that the Women's Protocol leaves out, like the rights relating to the media, information, and communication.⁷⁵ These differences in scope notwithstanding, both the Gender Protocol and the Women's Protocol do not encompass marital rape, even if six SADC countries have enacted laws against marital rape.⁷⁶

The Two Protocols: Conceptual Unity and Difference

Both the Gender Protocol and the Women's Protocol can be seen and evaluated through the lens of discrimination. The

fundamental question is whether sexual differences should be ignored or emphasized.⁷⁷ The two protocols respond both ways: both define special treatment on the basis of sexual differences and equality on the basis of human similarities, as long as equal treatment does not create the false impression that women and men suffer the same sort or degree of discrimination.

Yet the two protocols fundamentally differ in that they have diverging conceptual focuses. The Gender Protocol zeroes in on discrimination in general and the twin concepts of gender equality and equity, whereas the Women's Protocol concentrates on discrimination against women and the concept of harmful practice.

Discrimination

Drawing from the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁷⁸ the Gender Protocol and the Women's Protocol define discrimination in a similar fashion. Article 1 of the Gender Protocol defines discrimination as:⁷⁹

any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, by any person of human rights, and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The definition of discrimination in the two protocols differs in the sense that the Gender Protocol's definition is gender-neutral while the Women's Protocol defines discrimination against women only as:⁸⁰

any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

On balance, however, both definitions are satisfactory given that scholars often define the goal of reconciling international human rights norms and local values as one of ensuring equality and eliminating discrimination.⁸¹ In addition, the principles of non-discrimination and equality are the normative bases of both protocols.⁸²

Gender Equality and Equity Versus Harmful Practices

The Gender Protocol underscores gender equality and inequity. It understands "gender equality" to mean the "equal enjoyment of rights

and the access to opportunities and outcomes, including resources, by women, men, girls and boys.”⁸³ On the other hand, the Gender Protocol understands “gender equity” to mean the “just and fair distribution of benefits, rewards and opportunities between women, men, girls, and boys.”⁸⁴ The Gender Protocol’s understanding of gender equality and equity demonstrates greater gender-sensitivity than the Women’s Protocol. It also complies with the obligation imposed on SADC member states by Article 6(2) of the SADC Treaty not to discriminate against any person on the grounds of gender, among others.

An obvious example of the Gender Protocol’s gender-sensitivity is its definition of gender mainstreaming. Gender mainstreaming is

the process of identifying gender gaps and making women’s, men’s, girls’ and boys’ concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programs in all spheres so that they benefit equally.⁸⁵

At a philosophical level of abstraction, the Gender Protocol’s conceptual distinction between equality and equity is accurate. One readily assumes that an equal society is of necessity a just society. The philosophy of law not only shows that it is not necessarily the case but most importantly that equality and equity are two distinct foundations of human rights.⁸⁶

The Women’s Protocol stresses the concept of harmful practices, which it defines as:⁸⁷

[a]ll behavior, attitudes and/or practices which negatively impact the fundamental rights of women and girls, such as their right to life, health, dignity, education, and physical integrity.

“Harmful practice” includes female genital mutilation (FGM), which is criminalized in another provision of the Women’s Protocol.⁸⁸ Article 5 of the Women’s Protocol lays down that African states must prohibit and condemn all forms of harmful practices which negatively affect the human rights of women.

To insist on the concept of harmful practices, as opposed to equality, is another way of militating for justice. This philosophical approach posits that human rights violations precede and substantiate human rights provisions,⁸⁹ and more so where these violations reach an ‘intolerable level.’⁹⁰ Furthermore, the concept of “harmful practices” implies a necessary distinction between the positive African values like ubuntu⁹¹ and harmful cultural practices that violate women’s rights.

Positive African values are based on the principles of equality, peace, freedom, dignity, justice, solidarity, and democracy.⁹² The distinction between positive African values and harmful practices is necessary to avoid falling into the trap of generally concluding from uncharacteristic instances of harmful practices like FGM that entire African cultures are barbaric and violative of women's rights.

The Gender Protocol does not have the same emphasis on harmful practices. Unlike the Women's Protocol, the Gender Protocol does not have a definition of 'harmful practices' in spite of the fact that the Gender Protocol sometimes uses the terms "harmful practices" and "practices."

In the final analysis gender equality, equity, and harmful practices, can be envisioned as two sides of the same coin. Thus envisioned, gender equality and equity would be the absence of harmful practices.

Evaluating the Gender Protocol

Having set the background against which the Gender Protocol must be seen, this section goes on to fulfill the very purpose of this paper, which is to evaluate the Protocol. This section evaluates the Gender Protocol by using four criteria, namely (1) the relationship between the international norms in the Gender Protocol and local values, (2) the Gender Protocol's approach to the elimination of discriminatory and harmful practices, (3) the likely interpretation of the Gender Protocol by SADC institutions, and (4) the capacity of SADC states to enforce the Protocol.

Global Women's Rights and Local Self-Determination

The first criterion for the determination of the Gender Protocol's effectiveness is the relationship between the global women's rights in the Gender Protocol and the values such as religion and culture of the various societies where women live in southern Africa. This criterion is a pertinent one, especially in light of criticisms that the Women's Protocol did not adequately address the influence of religion and culture on the protection of women's rights.⁹³

Legal scholars have approached the tension between global women's rights and local values in different ways, each suggesting the use of the institutions of the state, society or culture, broadly defined, as a solution to the tension. Those who insist on the role of the state in reconciling the global women's rights norms and the local values include Stephanie Kodish, who argues that the increased representation of women in African state legislatures will promote gender justice.⁹⁴ Fareda Banda argues that, although reconciling global standards and local values requires the coming together of cultural, legal, socio-economic and political forces, state law is the most constant factor.⁹⁵ With her "critical

pragmatism” and engagement with culture, Celestine Nyamu adopts a more sophisticated theory on how to use state law and culture to mediate the conflict between international women’s rights and local realities.⁹⁶ A critical pragmatic approach challenges the constitutional framework that shields customary and religious laws from scrutiny so as to secure space for more voice and inclusiveness in the shaping and articulation of local or community norms.⁹⁷ Critical pragmatism is fitting because virtually every national constitution in the SADC region exhibits contradictions between customary law and state law when it comes to women’s rights.⁹⁸ Similar to the above legal scholars, the Gender Protocol identifies the state as the key actor in effecting social change by mainly entrusting the state with the obligation to take legislative and other measures to implement the Gender Protocol.⁹⁹

Another group of scholars instead stress the importance of social and economic institutions in reconciling local values and the global human rights norms promoting gender justice. Hope Lewis, who advocates the restructuring of the cross-cultural engagement with FGM, maintains that the protection of women’s rights entails the liberation of local women from within through their own activism.¹⁰⁰ Similarly, Abdullahi An-Na’im puts forth two mechanisms: an internal discourse and a cross-cultural dialogue, which consist in using both internal and external value frameworks to transform local culture so as to conform to international human rights norms.¹⁰¹ Frances Raday criticizes positivist approaches that rely on the role of state law and argues that women will be able to exercise their rights if states establish the educational and economic infrastructures that will augment women’s autonomy.¹⁰² In showing how global trade rules adversely affect local culture and women’s rights, Uche Eweluka proves that the international community, not necessarily the state, has a central role to play in protecting global women’s rights.¹⁰³ Even if the Gender Protocol has provisions on education and the economic empowerment of women, it does not emphasize internal cultural processes and women’s own local activism as much as Lewis and An-Na’im do. As previously explained, the Gender Protocol is lacking in the way it speaks to culture and religion.

Finally, other scholars focus on the influence of religious norms and authorities. Madhavi Sunder and Lisa Hajjar show that many of these scholars believe the state is instrumental in either expanding or diminishing the influence of religion, which in turn determines the reconciliation between women’s rights and local values.¹⁰⁴ On this account also, the Gender Protocol leaves much to be desired as it enjoins SADC states to take on harmful religious norms inadequately.

These scholars are all right in the sense that they capture one or more dimensions of the problem of reconciling global women’s rights and local values. This author agrees with Banda that the convergence of several crucial factors is a precondition for the effective implementation

of international women's rights instruments. The convergence of factors implies the use of several approaches.¹⁰⁵ The Gender Protocol appears to have adopted this view and fuses legal and non-legal implementation strategies to promote and realize gender equality and equity through the integration of several approaches. This is apparent from the Gender Protocol's provision on the reduction of gender-based violence in which it calls for the combination of institutional, sociological and anthropological approaches.¹⁰⁶

Even though the Gender Protocol encourages the integration of approaches, it is evident from its emphasis on legal mechanisms that the Protocol has a predilection for the state as a catalyst for social transformation. The limitation of statist legal strategies for social transformation in the SADC context is that most southern African women live in rural areas where customary and religious laws regulate their lives and where people often ignore state laws.

The provisions of the Gender Protocol do not delve into culture and religion, nor do they attempt to use the positive aspects of culture and religion to effect the desired change. The failure of the Gender Protocol to engage local cultures and religions compounds its implementation. This neglect of the cultural and religious impact on human rights is one of the reasons for the conclusion that the implementation of the Gender Protocol will be difficult and ineffective in the short term. However, this author submits that, as a partial solution to the Gender Protocol's defective formulation of the challenges of cultural transformation, SADC organs and member states must read into the Gender Protocol the provisions of the Women's Protocol and the African Charter on culture and harmful practices.

Eliminating Discrimination and the Benefit of Multidisciplinarity: The Protocol's Approach to Cultural Transformation

The provisions of the Gender Protocol cover many practices that have so far affected southern African women's ability to enjoy their human rights. However, the success of the Protocol in responding appropriately to discriminatory and harmful practices against women relates to the approach that the Protocol adopts for that purpose.

The approach preferred in this paper affirms the supremacy of international human rights norms while at the same time affirming the positive aspects of culture and religion compatible with those norms. In other words, this approach means affirming international women's and gender rights while challenging harmful practices incompatible with those rights. In many ways, this approach resembles what scholars in the universalism versus cultural relativism debate referred to as weak cultural relativism. With weak cultural relativism, there is a presumption

of universality, but the relativity of human nature, local communities, and norms, serves as a check on potential excesses of universalism.¹⁰⁷ Applied to the Gender Protocol, weak cultural relativism entails confronting harmful local cultural and religious practices as a means to uphold the supremacy of international women's and gender rights.

The affirmation of international human rights norms in the Gender Protocol is reflected in the following provisions. The preamble and article 2, which list the legal instruments and normative principles on which the Protocol is based, are the most obvious examples of the primacy of international human rights norms in the Protocol. The preamble mentions the Women's Protocol and recognizes that "social, cultural, and religious practices, attitudes and mindsets continue to militate against the attainment of gender equality and equity." Further, Article 2 of the Gender Protocol mentions the many United Nations' (UN) plans of action reaffirming the principle of affirmative action as a means to redress structural discrimination and regional instruments with the intention of harmonizing them.

However, unlike the Women's Protocol, the approach of the Gender Protocol to the formulation of cultural transformation is surprisingly superficial. Though the Gender Protocol acknowledges in its preamble that 'social, cultural and religious practices, attitudes and mindsets' hamper the attainment of gender equality and equity, there are only seven provisions in the Gender Protocol that expressly mention culture or religion. The Gender Protocol addresses culture or religion in a few provisions relating to equality in customary courts,¹⁰⁸ the registration of customary marriages,¹⁰⁹ gender-based violence,¹¹⁰ and HIV, and AIDS.¹¹¹ In contrast, the Women's Protocol embodies several provisions that reflect a compromise between international human rights norms and local cultural and religious values. These provisions include the Preamble, which recognizes the crucial role of women in the preservation of positive African values; the provision on the form of marriage,¹¹² and the provision on the right of women to live in a positive cultural context and to participate in the determination of cultural policies.¹¹³

Where implementation is concerned, on the other hand, the Gender Protocol deploys a commendable range of implementation strategies capable of bringing about social change. The Gender Protocol introduces five primary techniques for its own implementation. It first creates an obligation on SADC member states to take legislative and other measures to eliminate all practices which negatively impact the human rights enshrined in the Gender Protocol.¹¹⁴ Then it creates four obligations on SADC member states to domesticate the Gender Protocol;¹¹⁵ to put in place relevant policies, strategies, and programs;¹¹⁶ to provide appropriate remedies;¹¹⁷ and to report on progress achieved in implementing the Gender Protocol to the SADC Executive Secretary.¹¹⁸ Put another way, the Gender Protocol's overall implementation strategy is to oblige SADC

member states to come with up with their own strategies to implement the Gender Protocol. This strategy places the Gender Protocol in the schizophrenic position of attempting to undo the 'paradox of non-compliance with the law by creating more law.'¹¹⁹

Other strategies resorted to by the Gender Protocol include affirmative action,¹²⁰ institutional arrangements to monitor compliance,¹²¹ gender sensitive budgets and planning, public awareness campaigns, and gender sensitization.¹²² The Gender Protocol also imposes many legal duties, like the duty to put in place mechanisms for relevant gender purposes and the duty to establish counseling services, to train service providers, and to provide support services to the survivors of gender-based violence.¹²³

Notwithstanding these effective strategies, with the Gender Protocol's deficient formulation of the challenges that harmful cultural and religious practices pose, it is difficult to see how the Gender Protocol can direct those strategies meaningfully. The Gender Protocol fails to bring harmful cultural and religious practices under a common focus, which the Women's Protocol does more aptly. It therefore follows from the Gender Protocol's deficient and imprecise approach to cultural transformation that the Protocol is unlikely to be a clear and effective guide for SADC member states to engage local cultures and religious norms.

The Potential Benefits of Multidisciplinary Approaches

Over and above the approach adopted by the Gender Protocol, which underestimates the challenges of social change, the Protocol, like state law in general, is very limited in its capacity to affect cultural transformation and to abolish discriminatory and harmful practices against women. Social change or cultural transformation, and the protection of women's rights necessitate a multidisciplinary approach. When one looks at the provisions of Article 25 of the Gender Protocol, it appears that the drafters of the Protocol were aware of this necessity. Article 25 envisages a wide range of institutional, legislative and other approaches or measures, and provides that state parties utilize cross-sector structures to reduce current levels of gender-based violence.

A multidisciplinary approach has considerable advantages for state parties to the Protocol. It forces one to look beyond the narrow sphere of state law. Positivist approaches have been discredited as distortions of social reality.¹²⁴ Second, the approach is relevant to social and cultural contexts of women in southern Africa. It is a truism that for change to be effective there needs to be a 'constellation of factors,' that is, the coming together of cultural, legal, socio-economic, and political forces.¹²⁵ In addition, a commitment to multidisciplinary research helps jurists appreciate the complex socio-legal realities of life. Fourth, it allows the understanding of difference, especially given the universalist pressures

of global human rights. In this regard, it also challenges the hegemonic paradigms of human rights interpretation. Some scholars have already indicated that human rights de-legitimize other liberating and effective strategies for social change.¹²⁶

However, multidisciplinary approaches are a real challenge for legal researchers. Legal researchers seeking to analyze issues from a variety of perspectives will often find it difficult to carry out reliable studies without the participation of experts from other disciplines. Though this challenge does not detract in any way from the heuristic value of multidisciplinary, the search for multidisciplinary, three-dimensional analyses occasionally undermines the independence of purely legal research.

Cultural and Religious Norms and SADC Institutions

The Gender Protocol creates three institutional mechanisms for its implementation, namely a committee of ministers responsible for gender or women's affairs, a committee of senior officials responsible for gender or women's affairs, and the SADC Secretariat.¹²⁷ Thus, the interpretation of the cultural and religious rights by these three organs will have an impact on the effectiveness of the Gender Protocol in protecting women's rights in Southern Africa. Therefore, at this stage it is uncertain whether the interpretation of culture and religion by these three organs will be restrictive or expansive. This paper submits that the interpretation of culture and religion by the African Commission can enlighten and inform the two committees and the SADC Secretariat.

The Gender Protocol will not successfully address discrimination and harmful practices against women if the aforementioned three organs and mechanisms construe religious and cultural rights too broadly or too narrowly. In essence, the issue concerns the extent to which SADC governments will define the scope of these rights. At any rate, article 27(2) of the African Charter is the general limitation clause. In *Media Rights Agenda and Others v Nigeria*,¹²⁸ the African Commission on Human and Peoples' Rights (African Commission) stated that:

[t]he only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in article 27(2), that is that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

Unfortunately, the doctrines of subsidiarity and margin of appreciation might undermine gender rights-protective interpretations of harmful and discriminatory practices against women. The African Commission held that both doctrines establish the primary competence

of states to protect human rights within their domestic order and that states are better situated than the Commission in advancing and limiting human rights.¹²⁹ This position is potentially prejudicial to gender rights as it confers some discretion on African countries to restrict the application of the Gender Protocol in the name of religion, shari'a or culture.

Gender Rights and Enforcement Mechanisms in SADC Member States

Assuming that three mechanisms created by the Gender Protocol do not give too much leeway to state parties in advancing and limiting human rights, the effectiveness of the Gender Protocol depends ultimately on the extent to which the 15 SADC states will enforce the Protocol.

Generally speaking, most sub-Saharan African states are weak and cash-starved. Many of Africa's problems stem from the inability to create capable states that ensure transparency and accountability, enforce laws fairly, share resources effectively, limit market interventions, create predictable policy frameworks, and work with the private sector and the civil society.¹³⁰ Internal problems, coupled with the impact of the unfolding global financial crisis and the globalization forces minimizing the role of the state in ensuring social welfare, have resulted in states lacking the institutional capacity and the political will to enforce most of its legal obligations. Internal problems include infrastructural decay and inadequacy, deepening and pervasive poverty, immense inequalities, widespread unemployment, chronic instability, and pathological corruption. Religion and culture are also problems for national constitutions because, though these constitutions provide for equality between women and men, religion and culture often impede their effective enforcement.¹³¹

Most sub-Saharan African states have weak enforcement mechanisms and can hardly enforce the law effectively or create private rights of action in remote areas.¹³² The Fund for Peace ranks countries in terms of institutional capacity and as of October 2008 had a list of thirty-two failed states. Of these thirty-two failed states, three are located in the SADC region.¹³³ In descending order of state failure, these SADC countries are Zimbabwe, the Democratic Republic of the Congo (DRC), and Malawi.¹³⁴

The DRC and Zimbabwe will probably face the greatest difficulties enforcing the Gender Protocol because of the daunting challenges that these two SADC countries are currently weathering. The DRC is painstakingly trying to quell the myriad of militias operating in its eastern province of North Kivu where armed men have brutalized and raped thousands of Congolese women. Since late August 2008, the resurgence

of armed hostilities in North Kivu has displaced about 250,000 people.¹³⁵ In Zimbabwe, the severe economic decline has intensified the poverty of women and their vulnerability to sexual exploitation. Zimbabwean women shoulder the heavy burden of multiple economic roles, ploughing the field and struggling to sell their products in the streets of Harare and other towns, in markets hard hit by high food and fuel prices, coupled with the world's highest inflation rate.

Because of all these problems, most SADC member states will not effectively enforce the provisions of the Gender Protocol by 2015. In all likelihood, some SADC states will not report on progress towards implementing the Gender Protocol to the SADC Executive Secretary, others will restrict or modify the application of the Gender Protocol, and still others will fail to domesticate it altogether.

A few SADC states have however made great strides in realizing the rights of women in some areas. For instance, of the fifteen SADC member states, four (Angola, Mozambique, Namibia and South Africa) have attained thirty percent of female representation in government.¹³⁶ For these SADC countries, the Gender Protocol's target of fifty percent female representation and participation of women in government by the year 2015 is attainable.

Conclusion

The success of the Gender Protocol in responding to discriminatory and harmful practices against women in Southern Africa hinges on at least four criteria, namely (1) the degree to which the Gender Protocol addresses the influence of religious norms and cultural practices; (2) the type and number of strategies that the Gender Protocol adopts; (3) the manner in which SADC institutions interpret the rights in the Gender Protocol; and (4) the reality of weak enforcement mechanisms to enforce the Gender Protocol. Taking these criteria and the foregoing discussion into account, the paper reaches the following conclusions. First, the Gender Protocol is fairly comprehensive, it is more inclusive than the Women's Protocol, it is patently gender-sensitive, and most importantly it creates the legal framework on the basis of which women's rights can be implemented in practice. Another strength of the Gender Protocol is its drawing up of a plan of action for reaching specific targets by 2015. A third notable achievement is the fact that the Gender Protocol merges legal and non-legal implementation strategies for the realization of gender equality and equity. These strategies are efficient in addressing the negative aspects of culture and religion and offer better prospects of the Gender Protocol's implementation. However, the major weakness of the Gender Protocol lies in its formulation of the cultural and religious challenges. Though the Gender Protocol adopts effective strategies for social transformation, it does not offer much guidance to SADC

states in implementing the Gender Protocol and transforming harmful cultural and religious practices. To bridge the gaps in the formulation of the challenges of cultural transformation in the Gender Protocol, this paper proposes that SADC states read into the Gender Protocol the provisions of the Women's Protocol and the African Charter on culture and harmful practices. Such reconstructive interpretation of the Gender Protocol may partially supplement the little implementation guidance that the Gender Protocol provides and how that guidance impacts the implementation of the Gender Protocol. Whatever the Gender Protocol's formulation, however, it is improbable that state parties will effectively implement the Protocol by 2015. Only a few SADC countries – like Angola, Mozambique, Namibia and South Africa – will be able to reach most of the Gender Protocol's targets by 2015, especially the target of 50 percent female representation in decision-making positions. On the one hand, the mechanisms set up by the Gender Protocol will allow states a margin of discretion in determining the scope of women's rights and gender rights under the Gender Protocol. On the other hand, states generally lack the institutional capacity and the political will to enforce their obligations under international and regional treaties like the Gender Protocol. For these reasons, the implementation of the Gender Protocol will be patchy, irregular and below expectations by 2015.

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Endnotes

1 SADC member states are Angola, Botswana, the Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, the Kingdom of Swaziland, Tanzania,

- Zambia, and Zimbabwe. SADC welcomed back Seychelles at the 28th SADC Heads of State and Government Summit in August 2008.
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- 4 See generally Cynthia G. Bowman and Akua Kuenyehia, *Women and Law in Sub-Saharan Africa* (Ghana: Sedco Publishing 2003).
- 5 Fareda Banda, "Blazing a Trail: The African Protocol on Women's Rights Comes into Force," *Journal of African Law* 50 (2006): 84.
- 6 Frans Viljoen, *International Human Rights in Africa* (Oxford: Oxford University Press, 2007), 268.
- 7 This is but an extrapolation. It reflects the situation of most women in Southern Africa, and there are, of course, several exceptions to it.
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- 10 Gender Protocol art. 27. Cynthia G. Bowman and Akua Kuenyehia, 2003, 221ff.
- 11 *Attorney-General, Botswana v. Dow*, Appeal Court 1994 (6) BCLR 1.
- 12 Gender Protocol arts. 12 and 13.
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- 14 A. K. Wing and T. M. Smith, "*The New African Union and the Women's Rights*," *Transnational Law and Contemporary Problems* 13, (2003): 42.
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- 17 African Commission on Human & Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6 (Sept. 13, 2000), reprinted in 1 Afr. Hum. Rts. L.J. 40 (2001). [hereinafter Women's Protocol].
- 18 For an historical overview of the process leading up to the adoption of the Women's Protocol, see Fareda Banda, 2006.
- 19 Of the 53 African states, only 21 ratified or acceded to the Women's Protocol: Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Togo, and Zambia.
- 20 Women's Protocol preamble.
- 21 Christof Heyns and Magnus Killander, *The African Regional Human Rights System in International Protection of Human Rights: Achievements and Challenges*, ed. Felipe Gomez Isa and Koen de Feyter. (Bilbao: University of

- Deusto, 2006). Women's Protocol preamble.
- 22 Women's Protocol Art. 2.
- 23 Women's Protocol Art. 5.
- 24 Women's Protocol Art. 3.
- 25 Women's Protocol Art. 4.
- 26 Women's Protocol Art. 6.
- 27 Women's Protocol Art. 7.
- 28 Women's Protocol Art. 9.
- 29 Women's Protocol Art. 12.
- 30 Women's Protocol Art. 13.
- 31 Women's Protocol Art. 15.
- 32 Women's Protocol Art. 16.
- 33 Women's Protocol Art. 14.
- 34 Women's Protocol Art. 17.
- 35 Women's Protocol Art. 10.
- 36 Women's Protocol Art. 18.
- 37 Women's Protocol Art. 19.
- 38 Women's Protocol Art. 11.
- 39 Women's Protocol Art. 20.
- 40 Women's Protocol Art. 22.
- 41 Women's Protocol Art. 23.
- 42 Women's Protocol Art. 24.
- 43 For an historical overview of the process leading up to the adoption of the Protocol, see Gender Links, *SADC Gender and Development Protocol Campaign*, http://www.genderlink.org.za/print_version.php?p_id=265. (last visited Oct. 4, 2008).
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- 45 Gender Protocol Art. 3(d).
- 46 *See also* Gender Links 2005.
- 47 Gender Protocol Art. 4(1).
- 48 Gender Protocol Art. 12(1).
- 49 Gender Protocol Art. 3.1.
- 50 Documents in Gender Links, 2008.
- 51 Gender Protocol Art. 5.
- 52 Gender Protocol Art. 7.
- 53 Gender Protocol Art. 7(f).
- 54 Gender Protocol Art. 12.1.
- 55 *Ibid*.
- 56 Gender Links 2005, 5.
- 57 Gender Protocol Art. 13.1.
- 58 Southern Africa Gender Protocol Alliance 2008.
- 59 Gender Links 2005, 6.
- 60 Gender Protocol Art. 8.
- 61 Gender Protocol Art.11.
- 62 Gender Protocol Art. 28.
- 63 Gender Protocol Art. 14.
- 64 Gender Protocol Arts. 15-27.
- 65 Gender Protocol Arts. 26-27.

- 66 Gender Protocol Art. 10.
 67 Gender Protocol Art. 9.
 68 Women's Protocol Art. 3.
 69 Women's Protocol Art. 4.
 70 Women's Protocol Art. 18.
 71 Women's Protocol Art. 15.
 72 Women's Protocol Art. 16.
 73 Women's Protocol Art. 17.
 74 Women's Protocol Art. 24.
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 77 Michael Freeman, *Lloyd's Jurisprudence* (London: Sweet & Maxwell, 2001), 1127.
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 79 Gender Protocol Art. 1 sv 'discrimination'.
 80 Women's Protocol Art. 1(f), sv 'discrimination against women'.
 81 Fareda Banda, "Global Standards, Local Values," *International Journal of Law, Policy and Family* (2003): 8.
 82 This is apparent from the preamble of both the Gender Protocol and the Women's Protocol.
 83 Gender Protocol Art. 1 sv "gender equality".
 84 Ibid.
 85 Gender Protocol Art. 1 sv "gender mainstreaming".
 86 Jerome J. Shestack, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 20 (1998): 210. Shestack explains that equality and justice are distinct philosophical foundations of human rights.
 87 Women's Protocol, Art. 1(g).
 88 Women's Protocol, Art. 5(b).
 89 Dunia P. Zongwe, "The Legal Justifications for a People-Based Approach to the Control of Mineral Resources in the Democratic Republic of the Congo," *Cornell Law School. Cornell Law School LL.M. Papers Series*. (2008): 10, <http://lsr.nellco.org/cornell/lps/clacp/12>. Christof H. Heyns, A 'Struggle Approach' to Human Rights. In *Human Rights, Peace and Justice in Africa: A Reader*, ed. Christof H. Heyns and Karen Stefiszyn (Pretoria: Pretoria University Law Press, 2006). Heyns argues that it is easier to identify injustice than justice and to work out a way through from human wrongs to human rights. Edmond N. Cahn, *A Sense of Injustice* (New York: New York University Press, 1949). Cahn maintains that demands for equality, dignity and fair adjudication are rooted in a sense of injustice.
 90 Robert Alexy, *A Defense of Radbruch's Formula. In Recrafting the Rule of Law; The Limits of legal Order*, ed. David Dyzenhaus. (Oxford: Hart Publishing, 1999). Dyzenhaus proposes that law should lose its legal validity when its contradiction with justice reaches an 'intolerable level'.
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 93 Rachel Rebouché, "Labor, Land and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women," *Harvard Human Rights Journal*

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- 94 Stephanie Kodish, "Balancing Representation: Special Mechanisms Addressing the Imbalance of Marginalized Voices in African Legislatures," *Suffolk Transnational Law Review* 30, (2007): 3.
- 95 Fareda Banda, 2003, 22.
- 96 Celestine I. Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries," *Harvard International Law Journal* 41, (2000): 409ff.
- 97 *Ibid.*, 410.
- 98 Gender Links 2005, 1.
- 99 *See* Gender Protocol Art. 4.
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Public Policy and the Combination of Anti-Americanism and Anti- Semitism in Contemporary Islamist Ideology

Bassam Tibi

ABSTRACT

The question of how people in other countries and civilizations view the United States touches on the domain of public policy and public affairs. Some who seek answers are driven by an inclination to reduce the matter of anti-Americanism to the faulted unilateralism of the Bush administration and its questionable way of countering terror. President Bush's "war on terror" has rather contributed to alienation between the U.S. and the world of Islam than to taming jihadism. Even though the cited drive is not fully wrong, it does not plausibly explain anti-Americanism; it is flawed by placing the focus on most present day affairs while overlooking the overall context. In this way, it leads to some short-sighted judgments. The present study suggests a different way of addressing the issues. It combines the analysis of anti-Americanism with that of anti-Semitism and seeks to identify the roots of the phenomenon.

Prior to 9/11 in the West, Ayatollah Khomeini's anti-Americanism was the best-known variety of the phenomenon of creating an image of enmity regarding the U.S. The related sentiments were connected with Jew-hatred. Jew-hatred has existed in Europe throughout history and this prejudice can be found in traditional Islam as well. For the purposes of this paper, however, anti-Semitism differs from Jew-hatred in that unlike traditional anti-Jewish bias, it advocates for the annihilation of the Jews who are stigmatized as an "evil" to be exterminated. This understanding of anti-Semitism is murderous and far more than the prejudices of Judeophobia. Therefore, anti-Semitism is considered to be genocidal ideology. This distinction between anti-Semitism and Jew-hatred is a matter of classification and should not be construed as a means to reprove one and not the other.

The Khomeinist anti-Semitism was incorporated into an anti-American ideology based on the perception of "the Israeli conspiracy to destroy Islam."¹ However, in this ideology the Jews act as a proxy for the U.S., not of their own volition. According to this perception, the Jewish state of Israel "was identified as an alien essentially Western colonial

element in the region and a policeman”² acting in the U.S. interest. This is a variety of Jew-hatred, but it differs from the murderous anti-Semitism that advocates an annihilation of the Jews. Rather, the focus of this hatred is the U.S.-the Jews are merely viewed as executioners. Graham Fuller, who shares this assessment, acknowledges a “latent anti-Semitism... that the Islamic Republic [of Iran] brought about.”³ The present article is neither about Khomeinism nor about Shi’i Iran, but rather Sunni Islamism.

This article argues that the combination of anti-Semitism and anti-Americanism is an important issue area of public policy which cannot be reduced to topicalities, such as the wanting policies of the Bush administration. Furthermore, this study introduces a new analysis of Sunni anti-Americanism combined with anti-Semitism.

One of the core arguments of this article is that the prevalent form of anti-Semitism throughout the Islamic world has been imported from Europe and given an Islamic shape. This variety of anti-Semitism more closely resembles the Nazism in which the Jew is seen as the source of all evil. There is a further implication that Jews are capable of manipulating others-including the U.S.-in a conspiracy to rule the world.⁴ Historically, this kind of prejudice is European in origin and it resulted in the Holocaust annihilation. Previously, although Judeophobia existed in traditional Islam, it was not anti-Semitism of this type. This murderous form of anti-Semitism was a European idea that became indigenized in an Islamization process.

The introductory reference to the anti-Jewish sentiments of Khomeinism serves as a starter to make an important difference clear: in Shi’i-Iranian anti-Semitism, the Jews are viewed as the “small Satan.” Their Jewish state of Israel is the “little Satan” acting in the service of the “big Satan,” the U.S. In Sunni Islamism, the Islamization of European anti-Semitism is the inverse. America itself is the victim of the Jews who rule the U.S. via Wall Street and steer U.S. foreign policy directed against Islam. The “big Satan” is the Jewish state of Israel, no longer the U.S., which is - as stated - merely an executioner of a “Jewish conspiracy.”

A reference to a significant political-religious book written by the Saudi professors Ali Mohammed Jarisha and Mohammed Yusuf al-Zaibaq illustrates the pending issue. The West is accused of being the contemporary expression of “crusaderism” guided by world Jewry.⁶ It is unfortunate to see U.S. books completed by Western scholars published by a U.S. university press using the same jargon. One of these books bears the title: *The New Crusaders*.⁷ What does this mean? Why do scholars use the same language employed by Islamists? Is the narrative of Islamists so convincing to the extent that some postmodernists adopt it and thus view political Islam positively as “the other modernity?” These are questions highly pertinent to public policy and the present

inquiry suggests some answers.

Before any further discussion, it is important to note the distinctions between Islamism—synonymous with political Islam and Islamist ideology and the religion of Islam. The latter rests on an interpretation of Islamic faith whereas Islamist ideology is based on the politicization of Islam and the religionization of politics. It articulates political, social and economic issues in religious language. The foremost feature of Islamism is its agenda to establish a shari'a-governed system in the world of Islam, and furthermore, to remake the world in pursuit of an Islamic world order.

The awareness of the outlined connection between anti-Semitism and anti-Americanism is most important for designing U.S. public policy in the early 21st century. In an important Cornell book on anti-Americanism in world politics, Katzenstein and Keohane argue that “Anti-Semitism... has some links to current anti-Americanism ... In the Middle East anti-Semitism and anti-Americanism often blend seamlessly into one another.”⁵ This is a correct statement, but it needs to be substantiated and be worked out in more detail. This task is unfortunately not accomplished by the contributors of the cited Cornell book. This article claims to shed light on the addressed combination of anti-Americanism and anti-Semitism as it occurs in the Sunni part of the Islamic world and also in its European diaspora.

The present research-based article leans on Hannah Arendt, a German Jewish scholar who fled to the U.S. to survive Nazi crimes. Her major and lasting book *The Origins of Totalitarianism* includes the argument that anti-Semitism is an essential segment of any totalitarian ideology.⁸ In this light, Sunni Islamism is interpreted as the most recent variety of totalitarianism. At this point, I present the hypothesis that the Islamist right-wing radicalism includes an Islamization of anti-Semitism. This hypothesis is to be examined in the present study and it touches on a highly sensible issue which compels to differentiate between Islam as a world religion and Islamism as a new totalitarian ideology based on the politicization of Islam. With the authority of Bernard Lewis—a professor emeritus of Princeton University and for decades the dean of Islamic studies in the U.S.—I argue that in traditional Islam there were no roots for any anti-Semitism. The ideology under issue has been imported from Europe, Islamized, and then incorporated into the ideology of Sunni-Islamic fundamentalism.⁹ Religious fundamentalism is a global phenomenon. Islamism is the Islamic variety of this phenomenon.

In their hate of America, addressed as anti-Americanism, Islamists believe that Jews rule the United States via the Israel lobby which is in control of U.S. foreign policy.¹⁰ The reader is reminded of the two different varieties of anti-Americanism in Islam related to one another. Sunni Islamists view the Jews as the perpetrators who want to destroy Islam. Shi'i Islamists reduce Israel to a puppet of the U.S. and do this in

line with the ideology of Khomeinism addressed above. Sunni Muslims constitute about ninety percent of the umma world community of 1.6 billion peoples. The Shi'a community in Islam constitutes a minority within the umma, but it is the majority population of Iran and of Iraq. The religious schism within Islam in Sunna and Shi'a took place in early Islam in the year 661 A.D. As much as there is a Sunna and Shi'a Islam different from one another, there are also different Sunna and Shi'a Islamisms. The major transnational movement in Sunni-Islamism is the movement of the Muslim Brothers that also has an outreach to the United States.¹¹

In the contemporary assessment of Islamism in Western scholarship one faces some Western confusions-and maybe distortions. Among the confusions in Western scholarship about Islamism one finds the distortion of the listing of the Egyptian Muslim Brother Yussuf al-Qaradawi as a liberal.¹² In fact, Qaradawi is today the heir of Sayyid Qutb to be introduced later on in a separate section. Qutb is the intellectual father who gave Islamism its contemporary shape. Both Qutb and his heir, Qaradawi, not only address the U.S. as the core of the "gharb Salibi/crusader West," but their work is also the source of Islamized anti-Semitism. Walter Laqueur quotes from an appearance of al-Qaradawi in his weekly al-Jazeera TV incitement program this credential: "There is no dialogue between us and the Jews except by the sword and the rifle."¹³ Is this the "liberal Islam" Charles Kurzman presents to his Western readers?¹⁴ No, it is not. The thinking of Qaradawi is based on a perception of a "conspiracy"¹⁵ designed by the West and the Jews in order to deny Islam its claim for global leadership. Qaradawi borrows this thinking from his mentor Sayyid Qutb whose work is the major source of the Islamist combination of anti-Semitism combined with anti-Americanism.¹⁶

Strange Bedfellows: Antisemitic Islamists and European Anti-Americanists

The Islamist concept of the crusaderist West focuses on the U.S., but also covers Europe and it adopts the inherited European anti-Semitism. Today, anti-Americanism enjoys great popularity in Europe as shown in the Cornell study of Katzenstein.¹⁷ Therefore, it comes as no surprise that Islamists can count on European allies in their views on America. There is an authoritative study on anti-Semitism by Walter Laqueur, an influential and prolific analyst of strategy and public policy in the U.S. Laqueur is among the European-Jewish survivors of the Holocaust who fled to the U.S. He knows well anti-Semitism in Europe, which is believed to be today "predominantly Muslim" in its present character.¹⁸ This anti-Semitism is coupled with an increasing anti-Americanism. It is most disturbing to see how this general anti-

Westernism is granted respectability in European media dominated by the left, be it in its liberal or extreme branches. This is a marriage of convenience by two strange bedfellows: the anti-Semitic Islamists and anti-American Europeans. The right wing orientation of Islamism seems not to be disturbing. In this context, the combination of anti-Americanism and anti-Semitism is shared by Islamists and by the European left, even if it is not always spelled out. The American political scientist Andrei Markovits immigrated to the U.S. from Europe and he does not buy into the denial of the European left that there is no such combination; he argues, in Europe “anti-Semitism has consistently been such an integral part of anti-Americanism.”¹⁹ In this context, the Middle East conflict is brought in and it “is suddenly carried out in the middle of Hamburg, London or Paris”²⁰ in an alliance against Israel, implicitly viewed to be the embodiment of the Jews. This mindset unites the European old right and new left. These antisemites are also allied with those Muslim immigrants in Europe who preach against Jews. Of course, the protest is not only camouflaged as anti-zionism, but also assumes the shape of anti-Americanism. It has been shown that the denial of anti-Semitism simply does not work. It is belied by Islamists themselves, who make the link clear in their pronouncements.

Now, how does it come that Muslim immigrants, who are unfortunately mostly represented in public by Islamists, could claim to be “the new Jews of Europe”²¹ if the contention was correct that their ideology is imbued with anti-Semitism also spreading in the diaspora? Why do Europeans who despise Muslims suddenly become receptive to Muslim concerns? This is a puzzle and Andrei Markovits superbly helps us to solve it in his analysis. He states the situation in these apt terms:

While these immigrants awakened first and foremost in nasty strain of xenophobia in all European countries against themselves, they also have triggered a massive, twofold reemergence of anti-Semitism: first, on the part of those who hate these newcomers and wish them ill ..., second, on the part of those who are the targets of this hatred who happen to be from cultures where anti-Semitism has attained a major presence mainly - though not exclusively-by dint of the Arab-Israeli conflict.²²

On both sides one encounters the ugly combination of anti-Americanism and anti-Semitism which continues to prevail and flourish. It is outrageous that the European liberal left was most silent when the Serbian fascist groups massacred Muslim Bosniaks in the Balkans, but not when NATO intervened to protect Muslims. In Europe, there were huge demonstrations against NATO intervention. Today, the European

left has shifted gears and changed their attitudes toward Islam. The very same leftists “first raised their voices in the Bosnian war once the United States intervened.”²³ The driving anti-war motive was anti-Americanism, presumably not humanism. Anti-Semitism is implicitly included. After the Bosnian war the left has become more pro-Islamist.

The authority on the subject of the present study is the real left humanist and Holocaust survivor Max Horkheimer, whom I was lucky to have had as my academic teacher in Frankfurt. In the 1960s he refused to join forces with us in our anti-Americanism in the protest against the Vietnam War. Well, Horkheimer neither approved of that war, nor our stupidity. Today, forty years hereafter, I can see more clearly and share in what Horkheimer then foresaw and what the left had failed to see. In his collected writings one finds the insight which I follow today, as put forward in this manner in the more authentic translation by Andrei Markovits:

America, regardless of its motives, saved Europe from complete enslavement. The response today from everywhere, not only in Germany, has been widespread and profound hostility toward America. There has been a great deal of puzzling over the origin of this. Resentment, envy, but also the errors made by the American government and its citizens, all play a role. It is especially startling to notice that everywhere where one finds anti-Americanism, anti-Semitism flourishes. The general malaise caused by cultural decline seeks a scapegoat, and for the aforementioned reasons, it finds the Americans, and, in America itself, once again the Jews who supposedly rule America.²⁴

Today, one finds the view that the Jews rule America spreading, not only among the ill-informed left and racist Islamists, but also disturbingly among serious scholars. Earlier, I referred to a study by two American professors that contends that the Israel lobby in the U.S. shapes U.S. foreign policy.²⁵ This study has been abused, not only by the European liberal left, but also by Islamists. Unwittingly, this kind of book supports the view that “the Jews supposedly rule America.”²⁶ In the present study I follow Horkheimer and Markovits who see the combination of anti-Americanism and anti-Semitism. In my article I add a third component, namely Zionism and anti-Zionism. The historian Jeffrey Herf led the debate on anti-Zionism to show that only one new variety of anti-Semitism²⁷ is at work. The study of Islamist literature supports this very accurate assessment that Islamists do not distinguish between Judaism and Zionism. The citation of evidence shall be presented later on. At this point the focus shall be on the intellectual

foundations of the ideology of Islamist anti-Semitism. This is a highly important issue for a policy paper that cannot afford to evade dealing with the intellectual origins of a political phenomenon.

The Foundation of Islamist Anti-Semitism: Sayyid Qutb and his “Battle against the Jews”-The USA “Viewed Through the Lenses of Qutb”

The Egyptian Islamist Sayyid Qutb, executed in 1966, combines two features: Based on his two year stay in the U.S. he lays the foundation for anti-Americanism, and, in addition, he is the founder of Islamist anti-Semitism. In the academic literature it is acknowledged that the thinking of Sayyid Qutb reflects the mainstream, not a minority in political Islam. As Roxanne Euben rightly states, “Qutb’s prominence seems an accepted fact ... Qutb’s influence is undisputed ... He has altered the very terms of Islamic political debates”²⁸ Another scholar of Islam, David Cook, maintains:

Qutb ... has founded the actual movement ... (He) was the very center of the Arab Muslim political, intellectual and religious debate ... His works have been cited by radical Muslims from the 1960s until the present and his influence upon the movement is significant.²⁹

The reader is asked to discern the term “movement” for identifying Islamism, which is much more than a bunch of radical Muslims. The movement is inspired by Qutb’s views on Jews and the U.S.³⁰ In this context, Islamized anti-Semitism is much more than the anti-Jewish resentments mostly identified as Judeophobia. As stated previously, anti-Semitism in this way is associated with a call for genocide. Nothing like this ever existed in the classical Islamic history or in its thought.³¹ It follows, therefore, that an anti-Semitism in this understanding is recent in the world of Islam; it is neither the well-known classical-Islamic Judeophobia, nor the earlier imported anti-Semitism represented by some secular pan-Arab nationalist ideologues.³² At issue is a new Islamist, not Islamic anti-Semitism-which results from an Islamization of European anti-Semitism. The new ideology is combined with an anti-Americanism, as outlined in the introductory section. The source of this thinking is political Islam or Islamism³³-the terms denote the same phenomenon. In this section it is argued that Sayyid Qutb is the precursor of political Islam and the related Islamist anti-Semitism. He spent about two years in the U.S. and upon his return, after joining the Muslim Brotherhood, he became a major figure of Islamism. Based on his American experience, he hates the West and claims to know it “min al-dakil/from inside.”³⁴ The result is the combination of anti-Semitism

and anti-Americanism established in this form in the writings of Qutb. This combination has been adopted, among other major contemporary Islamist movements, by Hamas.

This section examines the assumptions outlined in the preceding section using original Arabic sources to support the hypothesis of an Islamization of a phenomenon hitherto alien to traditional Islam. To single out the political thought of Qutb is to acknowledge his already stated impact as the foremost thinker of Islamist ideology. The ideas of Sayyid Qutb have given Islamism its most authoritative imprint. To cut the story short I leave the reference to pre-Islamist anti-Semitism in the Arab world behind, despite the information that secular Arab nationalism also engaged sentiments related to Jew-hatred. I reiterate the statement that some pan-Arab nationalists were involved in a sort of translating of an anti-Semitism imported from Europe. One has to acknowledge the fact that this was not the mainstream in secular pan-Arab nationalism. Sati al-Husri, who laid down the intellectual foundations for a Germanophilia among Arab nationalists, never engaged in any anti-Semitic statement nor in any related activity. It is a research based fact that Husri never contributed to this new secular pan-Arab variety of anti-Semitism.³⁵

This does not overlook the clear records of a cooperation of Arab nationalists in Iraq with Nazi Germany. This is documented in detail in a number of studies. I present this information to draw a comparison between early pan-Arab and the contemporary Islamist anti-Semitism established by Sayyid Qutb. He was hanged in Cairo in 1966, a year before the beginning of the decline of pan-Arabism. The boost-giver to the rise of political Islam was the shattering military defeat in the Six Days War of 1967. This defeat contributed to the end of pan-Arab nationalism. The defeated secular regimes were mostly legitimized by secular pan-Arabism and they were delegitimized in the post-1967 developments.³⁶ In this context, pan-Arab anti-Semitism that was merely focused on Israel was replaced by a much deeper variety. The Islamization of anti-Semitism by the Islamists started to take over.

True, Islamism has existed since 1928, but it had not been the mainstream. It did not become visible and appealing until the 1967 defeat. The mastermind of this shift from pan-Arabism in the history of Middle Eastern anti-Semitism to an Islamized variety is Sayyid Qutb. He did not witness his success, because, as stated, he was executed in public one year prior to 1966. In a very little booklet of sixty-five pages, used here in its tenth printing in 1989, Qutb laid the already stated foundations for the Islamization of anti-Semitism.³⁷ It is worth mentioning that the public hanging of Qutb in Cairo in the year 1966 was ordered by the then most popular hero of pan-Arabism, Gamal Abdel Nasser. A year after Qutb's execution, his thoughts moved from the fringe to become ideology not only in the Middle East, but also

throughout the world of Islam. At issue is a shift from secular pan-Arabism to Islamism. Qutb is considered today as a shahid/martyr and Nasser no longer as a hero, but rather as a despotic killer.

For the study of the combination of anti-Americanism and anti-Semitism in Islamist ideology under the impact of Qutb, it is important to know that he does not represent a minority of political Islam, but rather the mainstream. It is also highly pertinent to keep in mind Qutb's U.S. sojourn that shaped his views. He came to the U.S. with a fellowship and lived there from 1948-1950. He came as a literary critic and returned to Egypt as an Islamist and joined the Muslim Brotherhood from which Islamism has emerged. Qutb pays a tribute to the youth that joins forces with this movement "not for the sake of any material benefits, but simply to die and sacrifice one's own life." For Qutb, young Muslims do this in a cosmic war that Muslim people are compelled to fight against the Jews. According to Qutb, Muslims have no choice, because the Jews themselves want this war. They are presented as the major enemy of Islam since the beginning of its history. Qutb accused the Jews of using their "La'ama/wickedness" to destroy Islam. Qutb reassures that "this is an enduring war that will never end, because the Jews want no more no less than to exterminate the religion of Islam ... Since Islam subdued them [in Medina] they are unforgiving and fight furiously through conspiracies, intrigues, and also through proxies who act in the darkness against all what Islam incorporates."³⁸ As outlined in the previous section, the U.S. of today is viewed by the Sunni Islamists in this tradition of Qutb to be the "major proxy of Jews/Zionists," not the other way around. In short, the big Satan is world Jewry. The relationship between anti-Semitism and anti-Americanism is highly pertinent for understanding the contemporary Jew-hatred of the Islamists and their view about decision-makers in Washington, D.C. as executors of a Jewish conspiracy. The Islamist image of the U.S. in an alleged cosmic war designed by the Jews and countered by the Islamists is created in the work of Sayyid Qutb.³⁹ This war against the Jews in his mindset is not primarily a military one. Islamists know that Jews have no armed forces, except today in Israel.

The notion "war of ideas," which is popular in the West since 9/11, is an Islamist, not a Western creation. To support this I refer to Qutb who argues: "The Jews do not fight in the battlefield with weapons ... they fight in a war of ideas through intrigues suspicions, defamations and maneuvering."⁴⁰ The Jews are believed to be known for their "wickedness and cunning."⁴¹ The quote reveals that Qutb is also a precursor of the concept of a "war of ideas."⁴² In short, at issue is propaganda which is well-known, so, what is new in the Islamization of European anti-Semitism?

The source of the addressed Islamization is the work of Qutb. At first he acknowledges his European source, which is "The Protocols of

the Elders of Zion.” It is quoted repeatedly to support his allegations. However, Qutb reads the European anti-Semitism into Islamic history to give it, through selective religious arguments, an Islamic authentic shape. One can see in this reading a major trait of the Islamized anti-Semitism. It becomes authentic as reflected in the narrative provided in Qutb’s *Ma’rakutna ma’a al-Yahud/Our Struggle against the Jews*. In this presentation, the Islamic-Jewish enmity which is constructed by Qutb begins as early as the year 622 of Islam. It is believed to prevail throughout the entire Islamic history, from the creation of the polity at Medina in 622 to date.

Unlike the Jew-hatred of the Arab Christians and Muslim secular pan-Arabists, Qutb’s anti-Semitism is no longer based on a pure copying of a European view, but rather on an Islamization of a murderous ideology. Through giving anti-Semitism an authentic Islamic shape, it becomes a public choice which is no longer restricted to secular Westernized elites. Qutb was an educated Muslim who knew the Qur’anic distinction between ahl-al-kitab/people of the book, Jews and Christians who are acknowledged as believers, and the kuffar/unbeliever. He speaks, though, of “al-kuffar al-Yahud/the Jewish unbeliever,” which is by Qur’anic terms a contradiction in terms. Qutb legitimates this deviation from the religious doctrine with an out casting of the Jews based on the allegation that they “who were originally in fact included in ahl-al-kitab community diverted, however, from the very beginning... They committed shurk/unbelief and became the worst enemies of believers.”⁴³ With the support of this interpretation Qutb constructs an enmity between Islam and the Jews articulated in religious terms. This enmity has allegedly commenced: “From the very first moment, when an Islamic state was established at Medina, as it was opposed by the Jews, who acted against Muslims on the first day when those united themselves in one umma.”⁴⁴ Qutb continues this propaganda on two levels, the first of which is the history of Jews that he invents. In this invention he deals with the interaction of Jews with Islam. The hypothesis of the present article that in the combination of anti-Semitism and anti-Americanism Jew-hatred ranks first is verified by this reference to Qutb’s constructed enmity between Islam and the Jews. In the 7th century America did not exist.

The second level of Qutb’s anti-Semitism is determined by psychological and anthropological aspects. It is articulated in the description of “simat al-Yahud/the basic traits of the Jews,” pursued on the one hand as an essentialization. In this unequivocally anti-Semitic jargon expressed in a combination of a “history” and an “anthropology” of the Jews, Qutb laid the foundations for an Islamized anti-Semitism. In its implication it approves the annihilation of Jews. From 1948-1950, when Qutb was a fellow in the U.S., this anti-Semitism was unfolded and combined with a new anti-Americanism.

The narrative of Qutb begins with the foundation of the polity of Medina in 622. Qutb wrongly speaks of this polity as “dawla/state.” It is a historical fact that the term “state” was never used in those times, and it is neither among the vocabulary of the Qur’an, nor of hadith. The constructed war with the Jews should have been continued throughout Islamic history, which Qutb sums up in a phrase that deserves being quoted at length. The text begins with a question about the source of the evil and Qutb answers it hereafter with one word “Yahudi/a Jew.” On these grounds, the following quote implicitly legitimates a purification, a kind of a new Holocaust, which is still an imagined one in Islamist ideology:

Who tried to undermine the nascent Islamic state in Medina and who incited Quraish in Mecca, as well as other tribes against its foundation? It was a Jew! Who stood behind the fitna-war and the slaying of the third caliph Osman and all what followed hereafter as tragedies? It was a Jew! And who inflamed national divides against the last caliph and who stood behind the turmoil that ended with the abolition of shari’a? It was Ataturk, a Jew! The Jews always stood and continue to stand behind the war waged against Islam. Today, this war persists against the Islamic revival in all places on earth.⁴⁵

Presently Jews use the U.S. to continue their war against Islam. Later on, in the section on Hamas, I shall present a similar quote from the Hamas Charter, which is basically a rephrasing of Qutb. This Charter also supports the annihilation of Jews defamed as the “source of evil.” Historically, the anti-Semitic tales constructed in religious terms are wrong, but they serve to underpin the view that there never can be a settlement, a reconciliation, or a compromise with Jews. Qutb believed in his lifetime that the Jews “use all weapons and instruments and employ all their genius Jewish cunning” in the pursuit of their “malicious conspiracy.”⁴⁶ In this mindset, the Jews, not the Muslims, are those who wage this never ending cosmic war. One is inclined to ask Qutb, why the Jews would assault Islam? The answer Qutb always provides is “the Jewish character.”

The image of the Jews seen through lenses of Qutb is based on attributes such as evilness and wickedness. The logical conclusion is that the annihilation of the Jews is the solution and therefore the consent to a Holocaust, and the approval of what happened in Europe between 1933 and 1945 is the clear implication. Qutb repeats the prejudice that “they [the Jews] killed and massacred and even sawed the bodies of a number of their own prophets ... So what do you expect from people who do this to their prophets other than to be blood-letting and to target the entire

humanity!”⁴⁷ The prejudice amounts to a consent to liberate humanity from this evil. This anti-Semitism was alien to classical Islam and it cannot be compared with any earlier existing Judeophobia.

To sum up, the presentation of Qutb’s anti-Semitism in religious Islamic terms underpins an “Islamization” of a European ideology that is more dangerous than any secular precedents. The Islamized image is therefore authenticated as an Islamized anti-Semitism. This is no longer an import from Europe given the fact that this anti-Semitism has been able to strike roots and to be enhanced as well as to be strengthened by the most popular anti-Americanism that prevails today throughout the world of Islam.

The alliance of the U.S. with Israel leads to war: “There is a crusader-Zionist *harban salibiyya-sahyuniyya*/war against every of the roots of the religion of Islam.”⁴⁸ Today, this is the perception of Islam under siege which Islamists following Qutb view as a conspiracy against Islam. Again, the source is world Jewry and world Zionism. Both terms for Qutb are the same and he used them interchangeably. Qutb is deeply convinced that: “The Jews were the instigator from the very first moment. The crusaders followed only next.”⁴⁹

The analysis of Qutb’s views on the U.S. and the Jews is essential for the policy-oriented study of the combination of anti-Semitism and anti-Americanism in the world of Islam. The analysis also belies the allegation that the consequentially flawed Middle East policy of the George W. Bush administration, in combination with Israeli injustice in the Palestinian-occupied territories, is the major source of the phenomenon addressed. The truth is that the equation of world Jewry and world Zionism as instigators of a U.S. war against Islam predates Bush. The Islamization of anti-Semitism combined with a new anti-Americanism is neither a recent occurrence nor a result of the policies of the Bush presidency. Articulated in policy-terms, the issue can be stated in this manner: Islamized anti-Semitism as introduced by the political thought of Sayyid Qutb can be better countered today by ventures like a dialogue than by the failed and disastrous politics of an indiscriminate “war on terror” unsuccessfully pursued by the George W. Bush administration. The U.S. Holocaust Museum supports the efforts of such a venture pursued by John Roth and Leonard Grob.⁵⁰ One cannot be silent about political Islam and its murderous and racist new anti-Semitism, nor the improper policies to deal with it.

The combination of anti-Semitism and anti-Americanism cannot be well understood with the reference to the intellectual origins of the imagery of Islam under siege facing a Jewish-American conspiracy. These origins are to be found in the work of Qutb. Those who belittle the impact of Qutb overlook his most powerful depiction of the Jews as an “evil” combined with the implication of an imagined Holocaust. Qutb’s anti-Semitism is not a view of a minority; Qutbism has become a

cornerstone in the political-religious thought of most modern Islamist movements. Qutb's thoughts have become the major source for a worldview that entails major traits of Islamist anti-Semitism combined with anti-Americanism.

Again, the reader is reminded of the most important distinction between Islam and Islamism.⁵¹ This distinction is of great importance for any public policy in the world of Islam. The Islamists are fighting a war of ideas against the West in order to purify or de-Westernization. In this war, the work of Qutb has a great impact.⁵² The reference of most Islamists to the "wickedness" of the Jews considered to be "evil-doers" who act in pursuit of their "secret master plan" is based on an adoption from Qutb.⁵³ This anti-Semitism is articulated in the language of Islamic fundamentalism that promotes the simultaneity of globalization and fragmentation.⁵⁴ Political Islam declares a war of ideas on the U.S. and the Jews to counter their cultural impact. This voice is represented today by the global Mufti Yusuf al-Qaradawi⁵⁵ and by his followers who continue the Islamization of European anti-Semitism based on the ideology of Qutb. These Islamists seek to establish authenticity. The Saudi professors Jarisha and Zaibaq continue the reasoning established by Qutb in this manner:

The West waves the flag of secularism ... invades with its new values the society of Islam to replace the Islamic values ... We shall talk about Zionism, or world Jewry, in order to address the related master plan pursued by the related secret societies for the destruction of the world.⁵⁶

The alleged master plan is then identified by those two Saudi professors as a "Jewish conspiracy." This thinking is documented in the cited book, which is distributed by a leading Islamist press in Cairo, al-I'tisam, in its second edition. The quote resembles a textbook-like definition of the combination of anti-Americanism and anti-Semitism. The Christian west in which the U.S. stands as a proxy for the Jews is involved in a universal conspiracy to destroy Islam. The full definition of the term sahyuniyya/Zionism and al-Jahudiyya al-alamiyya/world Jewry included in the quoted statement is a continuation of the thinking of Qutb. In line with the contention made in the preceding section, I argue that the allegation that anti-Zionism is not anti-Semitism is false. This falsified argument is not merely intellectual: it serves to cover and legitimate a real anti-Semitism advanced in the name of a political contestation of Zionism and of the injustice it inflicts on Muslims. In the narrative of the Islamists, Islam is embattled; it is encircled by a Jewish-crusader alliance embodied today by the U.S. In this Islamist narrative of Islam under siege another narrative is put forward: The combination of anti-Americanism and anti-Semitism based on the tale that Jews rule

America.”The big Satan of Khomeini shrinks in the ideology of Sunni-Islamism to a small Satan acting in the service of world Jewry.

The corpus of the ideas presented and analyzed in this section determines the political action of Islamism born in 1928 in Egypt with the movement of the Muslim Brothers. Among the offspring of this movement is Hamas, to be introduced in the ensuing section within the scope of this study: anti-Semitism and anti-Americanism.

Before providing an analysis of Hamas, I will sum up the findings reached: The unfolding of Islamist anti-Semitism takes place in a process of an Islamization of anti-Semitism. It is supported by an Islamist contention of a combination of Judaism and crusaderism. To counter both evils, a global jihad by Islamism is needed. This thinking legitimates a combination of anti-Semitism and anti-Americanism. To understand this ideology, one needs to grasp the mindset of political Islam and the worldview that underlies it. Seen from this perspective, Islamic civilization is viewed to be a victim; it is under siege, encircled by an imaginary world Jewry. Qutb described the Jew as an evil doer who pulls the strings in all the wrong-doings Islam has been exposed to since its birth in the year 622. All aspects of the ideology of political Islam are rooted in the political-religious thoughts of Qutb continued today by Yusuf al-Qaradawi, who is an Islamist, not a liberal Muslim.

In the ensuing section I deal with the case of Hamas, in which Qutb’s ideas have been put into action to guide a powerful movement committed to the idea that “a fight between Islam and the Jews is permanent due to the uncompromising will of the Jews to destroy Islam.”⁵⁷ The Islamized anti-Semitism is a religionized political ideology based on the outlined cultural-religious perceptions. It claims to preempt the Jewish agenda in turning the table on the Jews in an imagined Holocaust. This murderous Islamist anti-Semitism is, in many ways, different from the earlier secular anti-Semitism of pan-Arab nationalists. Those who contend a similarity, or even a continuity, are wrong.

The Legacy: Sayyid Qutb’s Islamist Anti-Semitism in Action-The View of Hamas’ on the U.S. and the Jews

The movement of the Muslim Brothers is, as stated, the first manifestation of political Islam and is the source of the Islamization of anti-Semitism established by Qutb, the spiritual father of Islamism and its combination of anti-Semitism and anti-Americanism. In Islamic belief there is a dichotomy between the pre-Islamic ignorance named jahiliyya and the revelation of Islam and the truth. For Qutb, modernity is a setback and a return to jahiliyya in a modern shape. This neo-jahiliyya is represented by the U.S. and is inspired by the Jews. As Marc Lynch states, Qutb maintains a “zero-sum game between Islam and the evil”⁵⁸ but stops short of identifying “the evils.” For Qutb, these are the

Jews and the crusaders. Today, the heir of Qutb is Qaradawi, who is not moderate as Lynch wrongly states in the Cornell book. Qaradawi legitimates global jihad. However, Lynch is right in quoting Qaradawi's blame of the U.S. "for seeking to destroy Arab and Islamic civilization ... Forms of Islamism are significant for understanding the politics of anti-Americanism."⁵⁹ In the contribution by Sophie Meunier it is spelled out what Lynch is silent about: This "anti-Americanism ... is ... directly linked to anti-Semitism."⁶⁰

This combination is maintained in the ideology of the Muslim Brotherhood to which Hamas subscribes. Political Islam can be identified as one variety of the return of the sacred in which religion is advanced as a component of world politics.⁶¹ September 11 has been a watershed in this process. On these grounds a religionization of conflict takes place in the Middle East and elsewhere in the world of Islam. This religionization becomes a source of tension.⁶² At issue is a general phenomenon that materializes in regional and local conflicts and makes them intractable. This insight is highly important for public policy.

The focus of this section is on the Arab-Israeli conflict in which political Islam replaces pan-Arab nationalism.⁶³ In this context of religionized politics one can also state an Islamization of Palestinian politics. This interpretation is supported by the Palestinian Islamist Muhsin Antabawi in his tiny booklet of fifty-eight pages *Why Do We Refuse Any Peace With the Jews?*⁶⁴ This is a publication written on behalf of the Islamic Association of Palestinian Students in Kuwait and articulates a public choice that evidences the misgiving of a religionized conflict that in this way becomes intractable. In this specific Palestinian context one encounters the general, earlier cited contention of Qutb that "there can be no peace between Muslims and Jews." It is applied to the conflict over Israel/Palestine.

All arguments presented qualify it as an Islamized anti-Semitism. The Jews are clearly identified in an anti-Semitic manner by the formula "al-sahyuniyun/the Zionists." Unlike the Iranian President Mohammed Ahmadinejad, who was at pains to cover his anti-Semitism as anti-Zionism in his venture in 2007, the Palestinian al-Antawabi classifies all Jews as an anti-Islamic Zionist entity. For him all Jews are permanently conspiring in a cosmic war against Islam. His conclusion is that Jews can therefore never be appeased. Antabawi's other conclusion is: "The solution for Palestine can only be brought by a generation mobilized against the Jews on the grounds of a combination of the Qur'an with the gun."⁶⁵ The result of this mobilization seems to be the imagined Holocaust, since no middle-way seems to be admitted.

The history of Hamas that represents the Palestinian variety of Islamism leads to the transnational movement of the Muslim Brotherhood.⁶⁶ Today, the movement of the Muslim Brotherhood bases its discourse on the thought of Sayyid Qutb outlined above. I reiterate

that in the booklet *Ma'rakatuna ma'a al-Yahud/Our Struggle Against the Jews* Qutb laid the foundations for the new pattern of Jew-hatred in political Islam which is the origin of an Islamization of anti-Semitism. I repeat the statements by Qutb that "the Jews continue to be perfidious and sneaky, and try to mislead the Islamic umma in diverting it away from its religion" and then he points to all tragedies of the Muslim umma which are wholly reduced to an "impact of the evil of the Jews."⁶⁷ Hamas transfers these views into a political agenda.⁶⁸ Those EU politicians and the European opinion leaders who want to accommodate Hamas in an inclusive approach know nothing about Hamas' agenda, nor anything about its Islamist anti-Semitism.⁶⁹

The Palestinian variety of Islamism reflects the Jew-hatred of political Islam. Hamas is a self-professed offspring of The Muslim Brotherhood and it shares the Islamist view of a conspiracy against Islam pursued "from the very beginning by the Jews, but it was only continued by the crusaders." The secular PLO is still in place, but it is virtually replaced by Hamas, which rules Gaza. In a major contribution to the study of Islamist anti-Semitism the German political scientist Matthias Küntzel notes about the Hamas Charter: "In every respect, Hamas' new document put the 1968 PLO Charter in the shade ... The Hamas Charter probably ranks as one of contemporary Islamism's most important programmatic documents and its significance goes far beyond the Palestine conflict."⁷⁰ For this reason, Hamas' Charter deserves closer scrutiny as a prominent example of Islamized anti-Semitism. Even in the West, Hamas has received respectability and great attention. In Europe, Hamas is viewed positively by the liberal left as a liberation movement acting against oppressors. Despite the election of January 2006, Hamas is a terrorist, anti-American, and anti-Semitic organization.

Hamas' significance goes beyond the Palestine conflict. The Charter of Hamas underlines this point in its text. Article two acknowledges that Hamas is rooted in the movement of the Muslim Brotherhood, which is a transnational one. Today this movement represents one of the major networks of internationalist Islamism. In its first pronouncement of December 14, 1988, Hamas acknowledged itself to be "the armed hand of The Muslim Brotherhood." Furthermore, there is the Charter's Article 32 that identifies world Zionism as the enemy;⁷¹ here one fails to find the name of Israel. The reference makes it clear that Islamism relates the conflict over Palestine to a cosmic war against what Qutb termed the "world Jewry." Hamas perceives of itself as the "ra's hurbah/spearhead" in this cosmic war against "world Zionism." All Muslims who fail to share this view are vilified.

Two references in the Hamas Charter are indicative of the religionization of the conflict. The first draws on the "secret plans" included in The Protocols of the Elders of Zion to unveil the "wickedness

of the Jews,” while the second relates to the allegation that the “Zionist master plan/conspiracy” knows no boundaries, “today Palestine, tomorrow more expansion.” The Charter outlaws on these religious grounds, in the name of shari’a, all Muslims who engage in any politics of a peaceful solution. This rejection includes the Oslo Accords as well as the peace of Camp David. The Muslims who engage in peace negotiations are accused of committing a “khiyana uzma/great treason.” A comparison of the Charter text with the polemical pamphlet by Qutb against the Jews discussed at length in the first section reveals great borrowings. There is also a resemblance based on congeniality in the argumentation. In the text of the Charter there exists no distinction between Jews and Zionists. Both are the enemy. Again, Article 22 views Jews as the source of all evil. The reader is encouraged to compare the following quotation with the very similar one from Qutb in the first section of the present study. Hamas states the Jews:

stood behind the French and the communist revolutions ... in the pursuit of the interests of Zionism ... they were behind the First World War that led to the abolition of the caliphate ... to get the Balfour Declaration ... Then they established The League of Nations to rule through it the world and hereafter they pulled the strings for the Second World War ... to establish the state Israel and to replace the League of Nations by the UN and its security council. They rule the world ... There is no single war without the hidden hand of the Jews acting behind it....⁷²

Islamists ask, “What can one do to contain this hidden hand?” and they obviously imagine a new Holocaust. If the pronouncement quoted is not an expression of anti-Semitism, what is it then? Those Europeans who support Hamas are challenged to answer. This Article 22 of the Hamas Charter discloses the great impact of Qutb, most obvious throughout the Hamas Charter.

The argument of a religionization of conflict can be specified in the demarcation established between Hamas, as based on Islamism, and the PLO, as based on secular Palestinian nationalism. The boundaries are drawn in the Charter’s Article 27, described in this phrasing: “Secular thought contradicts fully the religious idea ... We refuse the belittling of the place of religion in the Arab-Israel conflict and insist instead on the Islamiyyat/Islamicity of Palestine. We cannot replace these claims by secular thoughts. The Islamicity of Palestine is part and parcel of our religion.”⁷³ The outcome is a religionized conflict that leaves no room for negotiation or for compromise. The foremost implication of this unwavering religionization is the introduction of an understanding of political religion that also includes the new religionized anti-Semitism

presented in a religionized shape and combined with the firm belief that “the Jews” design U.S. foreign policy.

From the outset, the Charter of Hamas makes reference to the Qur’anic verse from Al Umran that qualifies Muslims as “*khair umma/ chosen people*” followed by a quote from Hasan al-Banna, the founder of The Muslim Brotherhood made in this phrasing: “Israel stands and shall continue to stand until Islam eradicates it, as it did undo earlier similar entities.” The goal is to “wave the flag of Allah over every inch in Palestine.”⁷⁴ Article 7 quotes the highly disputed Hadith alleged to have been transmitted from the Prophet by Buchari. This Hadith states that the day of resurrection comes with a fight against the Jews. It ends symbolically with the hiding of the Jew behind a tree and a stone. The stone and the tree shout: “Oh Muslim, oh server of Allah, a Jew is hidden behind me, come and kill him.” The alleged Buchari-hadith states that only “the gnarled tree fails to betray the hiding Jew, because it is Jewish.” The reference to this Hadith is a telling story in itself: it prescribes the killing of the Jew as a religious obligation and thus includes the most perilous implication of the religionization of anti-Semitism. Applied to Israel, it means an eradication of the Jewish state. The fears related to another Holocaust are nurtured by this new anti-Semitism.

The Charter of Hamas stands in continuity with the political-religious thoughts of Qutb, who pronounced “a cosmic war” against the Jews viewed as a zero-sum game. The contemporary crusaders, who do not exist in reality, are the Americans in the Islamist imagery. In the realities of the twenty-first century the U.S. embodies the crusaders that political Islam imagines.

The Palestinian politician, opinion leader, and writer Antabawi describes “peace with the Jews” as a violation of the shari’a.⁷⁵ Given that the U.S. is viewed as the executor of a Jewish conspiracy, one may extend this sentiment to the U.S. The Charter of Hamas is full of this anti-Semitism and in Article 11 it declares Palestine as “*waqf Islamic/ divine property*.” It acknowledges that Jerusalem, prior to the Islamic futuhat wars, was not an Islamic space. The Charter adds, however, “The shari’a rules that every land conquered by Muslims is their property until the day of resurrection/qiyama.” Then the text adds the phrase: “Peaceful solutions contradict the commitment of Hamas to Islam. The abandonment of any piece of Palestine is an abandonment of the religion itself.”⁷⁶ It follows the conclusion: “There is no real solution to the conflict over Palestine except other than jihad ... anything else is a wasting of time.”⁷⁷

Today, Europeans are mostly positive about Hamas and, at the same time, mostly critical of Israel, viewed in polls as “the foremost danger to world peace.” One of the explanations for these attitudes is a combination of anti-Semitism and anti-Americanism also existing in Europe, as shown in the study by Markovits.⁷⁸ This may explain the

appeal of the Islamization of anti-Semitism as included in the Charter of Hamas to some Europeans.

Finally, the reference of the Islamists to the “ghazu fikri/intellectual invasion” of the world of Islam is adopted in Hamas’ charter. It is to be countered by an armed jihad parallel to the war of ideas. This is specified in Article 35: “The lesson to learn is that the contemporary Zionist ghazu/invasion was preceded by the crusaders of the West ... As Muslims defeated the earlier invasion they shall also manage similarly with the new one ... Muslims learn from the past, and purify themselves from any intellectual invasion.” This quote invokes the theme of purification. In the contemporary writings of political Islam the search for authenticity assumes the shape of a combination of anti-Semitism and anti-Americanism to purify Islam from the U.S. and Jewish evil.⁷⁹ This is another issue area not well understood in U.S. public policy.

Conclusions

The analysis of the Islamization of anti-Semitism combined with sentiments of anti-Americanism has been concerned with the roots of the phenomenon. The thinking of Qutb, his followers, and Hamas as the Palestinian variety of Islamism, revolves around the misconception of the Jews as instigators of a conspiracy against Islam fulfilled by “Western crusaders.” If there were a lesson to learn from the history of the crusades and from the Islamic futuhat wars, it would be that religionized war is, in general, an evil to humanity.⁸⁰ The religionization of the conflict with Israel in the course of an Islamization of anti-Semitism combined with anti-Americanism is an issue of significant pertinence to public policy. The major insight is that religionized conflicts become intractable.

Political Islam is not an expression of liberation theology, as some believe. Its outspoken anti-Semitism is a right-wing ideology that combines the antisemitic bias with anti-Americanism. Today what is referred to as anti-crusaderism is an anti-Western ideology, not a contestation of capitalism or anti-globalization. There is a need for an enlightenment based on solid information to which this article aims to contribute. One can and should criticize U.S. policies in the world of Islam, in particular in the Middle East⁸¹ and also the Israeli occupation of Palestine, but one should beware of an anti-Semitism combined with an anti-Americanism. Public policy in the U.S. also needs, in this understanding, to be a policy of dialogue and enlightenment.

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Endnotes

1 Ervand Abrahamian, *Khomeinism* (Berkeley: University of California Press, 1993), 124-125.

2 Graham Fuller, *The Center of the Universe. The Geopolitics of Iran* (Boulder, CO: Westview, 1991), 123.

3 Ibid.

4 The book by Emmanuel Sivan, *Radical Islam. Medieval Theology and Modern Politics* (New Haven: Yale University Press, 1985) continues to be an interesting study, but is partly outdated and cries out for some updating, not done despite repeated reprintings. With regard to the present subject-matter, it is not so helpful.

5 Peter Katzenstein and Robert Keohane, eds. *Anti-Americanisms in World Politics* (Ithaca, NY: Cornell University Press, 2007), 22. The volume includes a weak chapter 7 by Marc Lynch on “Anti-Americanisms in the Arab World” that lacks any reference to the connection of anti-Semitism/anti-Americanism that is— as cited—acknowledged by the editors. The issue is addressed, however, in the chapters by John Brown (chapter 8) and Sophie Meunier (chapter 5), albeit in a very scant way.

6 Mohammed Jarisha and Yusuf al-Zaibaq, *Asalib al-Ghazu al-fikri lil-alam al-Islami/Methods of the Intellectual Invasion of the World of Islam*, 2nd ed. (Cairo: Dar al-I’tisam, 1978).

7 Emran Qureshi and Michael Sells, eds. *The New Crusaders* (New York: Columbia University Press, 2003).

8 Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & Co., 1951) is the source of inspiration for the study of Islamism by Bassam Tibi, *Der neue Totalitarismus* (Darmstadt: Primus, 2004).

9 See the classic work by Bernard Lewis, *The Jews of Islam* (Princeton, NJ: Princeton University Press, 1984), and Bassam Tibi, “Der djihadistische Islamismus, nicht der Islam, ist die zentrale Quelle des neuen Antisemitismus,” in: *Antisemitismus und radikaler Islamismus*, ed. Wolfgang Benz and Juliane Wetzels (Essen: Klartext, 2007), 43-69.

10 It is deplorable that the Chicago and Harvard scholars John Mearsheimer and Stephen Walt in their questionable book, *The Israel Lobby and US Foreign Policy* (New York: Farrar, Strauss and Giroux, 2007) give incorrect impressions in this direction, although these may not be intended by the authors.

11 On Muslim Brothers in the U.S. see Zeyno Baran, “The Muslim

- Brotherhood's US Network," in *Current Trends in Islamist Ideology* (Washington D.C.: The Hudson Institute, 2008), 6: 95-122.
- 12 See the texts by Qaradawi included in: Charles Kurzman, ed. *Liberal Islam. A Sourcebook* (New York: Oxford University Press, 1998), 196-204. The work of Qaradawi, basically his book trilogy, *al-hall al-Islami/The Islamic Solution* enjoys a great dissemination in numerous reprints published in Cairo and Beirut.
- 13 Qaradawi quoted by Walter Laqueur, *The Changing Face of Antisemitism* (New York: Oxford University Press, 2006), 199.
- 14 Baran 2008.
- 15 On Arab conspiracy-driven thought see Bassam Tibi, *Die Verschwörung. Das Trauma arabischer Politik* (Hamburg: Hoffmann & Campe, 1993, expanded second edition 1994), and later on, however, with no reference to this predecessor-book: Daniel Pipes, *The Hidden Hand. Middle East Fears of Conspiracy* (New York: St. Martin's Press, 1996).
- 16 The booklet by Sayyid Qutb, *Ma'rakatuna ma'a al-Yahud/Our Struggle Against the Jews*, 10th ed. (Cairo: Dar al-Shureq, 1989), is the major source of Islamist anti-Semitism. On Qutb as the source of Islamist anti-Americanism see Salah A. al-Khalidi, *America min al-dakhil bi minzar Sayyid Qutb* (The US viewed from inside through the lenses of Sayyid Qutb), 3rd ed. (Jeddah, Saudi Arabia: Dar al-Manarah, 1987).
- 17 Katzenstein & Keohane 2007.
- 18 On new, primarily Islamist anti-Semitism, particularly in Europe see Laqueur, 2006, 6-12 and also chapter nine in the same book; furthermore Bassam Tibi, "A Migration Story," *The Fletcher Forum for World Affairs*, 31, 1 (2007), pp. 158-160.
- 19 Andrei S. Markovits, *Uncouth Nation: Why Europe Dislikes America* (Princeton, NJ: Princeton University Press, 2007), 6, 163-168.
- 20 *Ibid.*, 181.
- 21 Bassam Tibi, "Foreigners: Today's Jews?" in *The Resurgence of Right-Wing Radicalism in Germany* ed. Ulrich Wank (New Jersey: Humanities Press, 1993), 85-102.
- 22 Markovits 2007, 180.
- 23 *Ibid.*, 195.
- 24 Max Horkheimer, *Gesammelte Schriften*, quoted after the beautiful translation by Markovits, 2007, 199.
- 25 Mearsheimer & Walt 2007.
- 26 Horkheimer 2007, 199.
- 27 Jeffrey Herf, ed., *Antisemitism and Anti-Zionism in Historical Perspective* (New York: Routledge, 2007) in particular the introduction by Herf, pages. X-XIX and the chapter by Markovits, pages 71-91.
- 28 On the religio-political thought of Sayyid Qutb see Roxanne Euben, *The Enemy in the Mirror: Islamic Fundamentalism and the Limits of Modern Rationalism* (Princeton, NJ: Princeton University Press, 1999), chapter 3.
- 29 David Cook, *Understanding Jihad* (Berkeley: University of California Press, 2004), 102-103.
- 30 Qutb 1989.
- 31 Lewis 2007.
- 32 Despite a great appreciation of the book by Küntzel for which I wrote the endorsement, I am in disagreement with him on some basic issues; see

Matthias Küntzel, *Jihad and Jew-Hatred: Islamism, Nazism and the Roots of 9/11* (New York: Telos Press, 2007), part 2. Above all, the equation of the anti-Semitism of pan-Arab nationalism and of Islamism is simply wrong because these are two utterly different patterns, not to be confused with one another. These shortcomings notwithstanding, Küntzel's book is the kind of a contribution urgently needed in the West, and therefore I endorse it.

33 Bassam Tibi, *Political Islam, World Politics and Europe: Democratic Peace and Euro-Islam versus Global Jihad* (New York: Routledge, 2008).

34 Qutb 1989.

35 For more details on the history of Arab nationalism, see Bassam Tibi, *Arab Nationalism. Between Islam and the Nation-State*, 3rd ed. (New York: Macmillan, 1997) and on the political thought of Husri see the major parts III and IV of this book.

36 On the Six-Days-War of 1967 and on its repercussions see Bassam Tibi, *Conflict and War in the Middle East: From Inter-State War to New Security*, 2nd ed. (New York: St. Martin's Press, 1998), chapters 3 and 4.

37 Qutb 1989.

38 Ibid., 36.

39 For more details see the book by the Islamist Anwar al-Jundi, *Amerika min al-dakhil bi minzar Sayyid Qutb/America Viewed from Inside Through the Lenses of Sayyid Qutb*, 3rd ed. (al-Mansura, Egypt and Jedda, Saudi Arabia: Dar al-Manara, 1987).

40 Qutb 1989, 21.

41 Ibid., 20.

42 Walid Phares, *The War of Ideas: Jihadism against Democracy* (New York: Palgrave, 2007), and Zeyno Baran, "Fighting the War of Ideas," *Foreign Affairs* (November/December 2005):68-78.

43 Qutb 1989, 31.

44 Ibid.

45 Ibid., 33.

46 Ibid., 32.

47 Ibid., 27

48 Ibid., 33.

49 Ibid, 23.

50 See John Roth and Leonard Grob, eds, *Encountering the Stranger* (forthcoming).

51 See Bassam Tibi, "Between Islam and Islamism," in *Redefining Security in the Middle East*, ed. Tamy A. Jacoby and Brent Sasley (Manchester: Manchester University Press, 2002), 62-82, and also Peter Demant, *Islam vs. Islamism: The Dilemma of the Muslim World* (Westpoint, CT: Praeger, 2006), and on the perception of Islam under siege see Graham Fuller, *A Sense of Siege: The Geopolitics of Islam and the West* (Boulder, CO.: Westview, 1995), as well as Tibi, 2008.

52 The major and most influential book by Sayyid Qutb is: Sayyid Qutb, *Ma'alim fi al-tariq/Signposts along the Road*, 13th ed. (Cairo: al-Shuruq, 1989).

53 Qutb 1989, 20.

54 On the simultaneity of globalization and fragmentation see Bassam Tibi, *Islam between Culture and Politics* (New York: Palgrave, 2001, updated edition 2005), chapter 4. On this issue in the context of political Islam see Bassam Tibi, *The Challenge of Fundamentalism* (Berkeley: University of California

Press, 1998, updated edition 2001), chapter 5.

55 Yusuf al-Qaradawi, *al-Hulul al-mustawradah/The Imported Solutions*, vol. 1 of *Hatimiyyat al-hall al-Islami*(Cairo: Mu'ssasat al-Risalah, 1980). The top Islamist of today, the TV-global Mufti of Islamism, the Muslim Brother Yusuf al-Qaradawi (see note 17) is wrongly introduced as "liberal" in the most distortive reader by Charles Kurzman, ed. *Liberal Islam* (New York: Oxford University Press, 1989).

56 Jarisha and Zaibaq 1978, 3-4.

57 Qutb, *Ma'rakatuna ma'a al-Yahud*, 36.

58 Marc Lynch, "Anti-Americanisms in the Arab World," in: *Anti-Americanisms in World Politics*, eds. Peter Katzenstein and Robert Keohane (Ithaca, NY: Cornell University Press, 2007), 207.

59 Ibid.

60 Sophie Meunier, "The Distinctiveness of French Anti-Americanism," in: *Anti-Americanisms in World Politics*, eds. Peter Katzenstein and Robert Keohane (Ithaca, NY: Cornell University Press, 2007), 144.

61 This formula of the "return of the sacred" was coined by the Harvard sociologist Daniel Bell in his lecture held at LSE in 1977. On the debate on this issue resumed after 9/11 see the new chapter 11 completed for the second 2005 edition of Tibi, *Islam between Culture and Politics*, 1998, 232-272. Both editions were published in association with Harvard's CFIA.

62 On this religionization as a source of tensions see Bassam Tibi, "Islam: Between Religious-Cultural Practice and Identity politics," in: *Tensions and Conflict. The Culture and Globalization Series*, Vol. I, eds. Y. Raj Isar and Helmut Anheier (New York: Sage, 2007), 221-231.

63 On Islam placed in the Middle East conflict see Rifaat S. Ahmed, *al-Islam wa qadaya al-sira' al-Arabi al-Isra'eli/ Islam and Conflict*. Studies on Islam and the Arab-Israel Conflict (Cairo: Dar al-Sharqiyya, 1989). See also Beverly Milton-Edwards, *Islamic Politics in Palestine* (London: Tauris, 1999).

64 Mushin al-Antabawi, *Limatha narfud al-Salam ma'a al-Yahud (Why do we Reject Peace with Jews)* (Cairo: Kitab al-Mukhtar, no date). This publication was completed at the order of the "Islamic Association of Palestinian Students" at the University of Kuwait, as stated in the booklet.

65 Antabawi, as cited in Anwar al-Jundi, *Min al-taba'iyya ila al-asalah/From Dependency to Authenticity* (Cairo: Dar al-I'timam, no date)

66 On the Muslim Brotherhood, see Michael Mitchell, *The Society of the Muslim Brothers* (Oxford: Oxford University Press, 1969).

67 Qutb 1989.

68 On Hamas, see Matthew Levitt, *Hamas: Politics, Charity and Terrorism in the Service of Jihad* (New Haven, Yale University Press, 2006). The Palestinian Khalid Hurub, based in Cambridge, UK, defamed this superb book by Levitt as U.S. propaganda in the Arab-Saudi sponsored newspaper *al-Hayat*. Yale University Press was attacked by some scholars of the biased U.S.-Middle Eastern Studies community for publishing this book.

69 Bassam Tibi, "Die Mär des Islamismus. Von der jüdischen und kreuzzüglerischen Weltverschwörung gegen den Islam", in: *Neu-alter Judenhass. Antisemitismus*, ed. Julius Schoeps et al. (Berlin: Verlag Brandenburg, 2006, 2nd edition 2007), 179-202.

70 Küntzel 2007, 109.

71 In the following and throughout this section, the Charter of Hamas is

quoted from its original text in Arabic and the quotes are translated by this author. The document is included in: Ahmed Izzuldin, *Harakat al-Mqawama al-Islamiyya Hamas/The Islamic Resistance Movement Hamas* (Cairo: Dar al-Tawzi' al-Islamiyya, 1998), 43-82.

72 Ibid.

73 Ibid.

74 Ibid.

75 Tibi 2006.

76 Izzuldin 1998.

77 Ibid.

78 Markovits 2007.

79 The Islamist Anwar al-Jundi, *Min al-taba'iyya ila al-asalah/From Dependency to Authenticity* (Cairo: Dar al-I'timan, no date), believes to see a "Jewish-Zionist master plan" to undermine Islam and pleas for authenticity as an agenda of purification.

80 On the history of crusade wars, see Steven Runciman, *History of the Crusades* (Cambridge: Cambridge University Press, 1954). On jihad wars of Islamic expansion, see Bassam Tibi, *Kreuzzug und Djihad* (Munich: Bertelsmann, 1999), and in contrast, the very biased study by Efraim Karsh, *Islamic Imperialism* (New Haven: Yale University Press, 2006).

81 Osama Khalid, *al-Mustaqbal al-Arabi fi al-Asr al-Ameriki/The Future of the Arab World in the Age of American Hegemony* (Cairo: Markaz al-Qadah, 1992).

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