

EXODUS: STRUCTURING REDEMPTION OF CAPTIVES

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The question of how to react to ransom demands in kidnap situations is ancient and persistent. It was asked as far back as Biblical times, and yet modern states have still not found answers. In terrorist kidnapping scenarios, the private victims, including the families, are often used as leverage to pressure the authorities, with the anticipation that the combination of public sympathy and private lobbying will result in excessive concessions. In the kidnap game, the victim's family is a single-game player and thus operates under a completely different set of considerations than the repeat player: the state. The question is how the repeat player is able to resist the one-off appearance of a particular kidnap victim and the pressure to concede to terrorist demands. The problem is compounded by an inflation effect in that each concession becomes the baseline for the next. Predictably, democracies do not deal well with this issue, and they may find themselves in a vicious cycle

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where ransom demands are repeatedly raised and conceded to, creating greater incentives toward kidnapping.

This Article identifies both why precommitment is the necessary solution to repeat kidnapping situations, and why it is a difficult solution to abide by. It argues that the world has so far tested only content-based precommitment strategies such as setting "red lines" regarding what prices states will not pay. These policies have largely failed to constrain states' concessions to terrorists. As an alternative, this Article argues that states should adopt only structural-procedural precommitment policies, and explains how this may serve as an antidote to some of the pressure for escalation.

TABLE OF CONTENTS

INTRODUCTION	180
I. CONFRONTING TERRORIST KIDNAPPING	183
A. <i>Terrorist Kidnapping Challenges Civilized Society</i>	184
1. Distinguishing Kidnapping from Barricade Hostage-Taking Scenarios	184
2. Confronting the Rise of Terrorist Kidnapping Worldwide.....	185
3. Failing to Deal with Terrorist Kidnapping Through International Law	187
B. <i>The Israeli Response to Terrorist Kidnapping as a Case Study</i>	188
1. Family and Societal Pressure to Succumb.....	188
2. Decision-Makers Led by Public Opinion	190
3. Current Debate	192
II. WHAT IS THE PRICE OF CONCEDED TO TERRORISTS' DEMANDS?	194
A. <i>Contributing to the Dynamics of a Vicious Cycle</i>	194
B. <i>Encouraging Cooperation Between Criminal and Terror Organizations</i>	197
C. <i>Causing Negative Externalities and Moral Hazard Problems</i>	198
D. <i>Paying Intangible "Prices" in the Form of National Symbols and Morale</i>	198
E. <i>Misallocating Limited Resources</i>	199
F. <i>Compromising Rule of Law Principles</i>	200
III. COMPARATIVE EXPERIENCE WITH CONTENT-BASED RESTRICTIONS	201
A. <i>Complete Ban: A Rule of No Concessions</i>	202
1. Western Countries' Policy of No Concessions.....	202
2. The Pitfalls of Having a Complete Ban.....	204
3. Italy's Anti-Kidnapping Statute.....	206
4. Colombia's Law Against Kidnapping	207

2014]	<i>EXODUS: STRUCTURING REDEMPTION</i>	179
	B. <i>Selective Ban: Setting Maximum “Prices” or Red Lines</i>	209
IV.	WHY DO DEMOCRATIC SOCIETIES CONCEDE TO TERRORISTS’ DEMANDS?.....	211
	A. <i>Liberal Values that Sanctify Human Life</i>	211
	B. <i>Social Ethos of Leaving No Soldier Behind</i>	211
	C. <i>The Porous Nature of Democratic Societies</i>	212
	D. <i>The Prevalence of Short-Term Considerations</i>	213
	E. <i>The Identifiable Single Victim Empathy Phenomenon</i>	213
	F. <i>Rational Choice</i>	214
	G. <i>Constitutional Balancing</i>	215
	H. <i>Religious Ethos of Redemption</i>	216
V.	CAN A PROCESS-STRUCTURAL APPROACH COMBAT TERRORIST	
	KIDNAPPING?.....	217
	A. <i>A Model Statute: Possible Procedural Limits</i>	218
	1. Two-Tier Ratification Process, Secrecy, and Absolute	
	Majorities.....	218
	a. Two-Tier Ratification Process.....	218
	b. Secrecy.....	220
	c. Absolute Majorities.....	221
	2. Special Standing to Heads of Security Services.....	221
	3. Declaring Death When Known.....	222
	4. Balanced Treatment of Aggrieved Families.....	225
	5. Use of Parole or Conditional Release Rather than Pardon.....	226
	6. Lightly Entrenched Statute.....	229
	B. <i>Why Prefer Procedural Limitations to “No Regulations”?</i>	230
	1. Enhancing Bargaining Power.....	230
	2. Deliberating.....	231
	3. Taking Control.....	232
	4. Reflecting True Preferences.....	233
	5. Treating Victims Equally.....	233
	6. Setting Expectations or Defining the Social Contract.....	234
	7. Accountability.....	234
	8. Creating the Right Incentives.....	234
	C. <i>Why Are Procedural Limitations Preferable to Content-Based</i>	
	<i>Limitations?</i>	235
	1. Utilitarian Considerations.....	235
	2. Legitimacy Concerns.....	237
	3. Legal Perspective.....	237
	CONCLUSION.....	239

*While the world permits sufferers to be chosen, something beyond their agony is earned, something even beyond the satisfaction of the world's needs and desires. For it is in the choosing that enduring societies preserve or destroy those values that suffering and necessity expose. In this way societies are defined, for it is by the values that are foregone no less than by those that are preserved at tremendous cost that we know a society's character.*¹

INTRODUCTION

The United States views terrorist kidnapping as an “urgent threat”² to the civilized world. Increasingly, terrorist organizations kidnap western citizens to extract ransoms that fund terrorist activities or to coerce governments to perform certain acts, such as withdrawal of troops from “Arab” or “Muslim” lands.³ The United States seeks to develop a uniform western method for countering this threat. Likewise, in December 2013, the United Kingdom submitted a draft resolution to the United Nations Security Council that calls on countries not to concede to terrorist kidnappers’ demands.⁴ The public, too, is concerned with terrorist kidnapping and this is mirrored in recent Hollywood films, such as “Brake,”⁵ and popular TV series, such as “Homeland.”⁶

In terrorist kidnapping scenarios, the private victims, including the families, are often used to leverage the public authorities with the anticipation that the combination of public sympathy and private lobbying will result in excessive concessions. The families’ lobbying is a given, and its lack of moderation or repeat-play considerations is also a

¹ GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 17 (1978).

² Noah Barkin, *Al Qaeda in N. Africa Making Millions Kidnapping: U.S.*, REUTERS, Oct. 2, 2012, available at <http://in.reuters.com/article/2012/10/02/islamists-kidnapping-usa-idIND EE89107K20121002>.

³ This Article focuses on terrorist kidnapping defined as the unlawful seizing and detaining of a person by terrorists to coerce governments to concede to terrorists’ demands in exchange for the release of the victims. See International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 [hereinafter *Hostages Int’l Convention*], available at <http://www.un.org/en/sc/ctc/docs/conventions/Conv5.pdf>; see also PAX CHRISTI NETHERLANDS, *THE KIDNAP INDUSTRY IN COLOMBIA: OUR BUSINESS?* 11 (Pax Christi Netherlands ed. 2001) [hereinafter *THE KIDNAP INDUSTRY*].

⁴ Michelle Nichols, *Britain Pushes U.N. Resolution Against Ransom Payments to Extremists*, REUTERS, Dec. 3, 2013, available at <http://uk.reuters.com/article/2013/12/03/uk-kidnappings-ransoms-un-idUKBRE9B216B20131203>.

⁵ BRAKE (IFC Films 2012).

⁶ *Homeland* (Showtime 2011). There is no consensual definition of terrorism, yet its most important trait is the targeting of innocent people for political purposes. See, e.g., Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 *CARDOZO L. REV.* 1987 (2006); Todd Sandler & John L. Scott, *Terrorist Success in Hostage-Taking Incidents: An Empirical Study*, 31 *J. CONFLICT RESOL.* 35, 35 (1987).

given.⁷ The question is how the repeat player, the state, is able to resist the one-off appearance of a particular kidnap victim and the demands of paying what the terrorists ask for. By their nature, democracies are porous, meaning that there are multiple entry points for highly motivated interests. It is in the nature of a democratic society that it will predictably not deal well with this issue.⁸ The problem is compounded by an inflation effect in that each concession becomes the baseline for the next.⁹ Democracies may find themselves in a vicious cycle where the higher the expected price, the greater the incentive toward kidnapping.

So far, the world has tested only content-based approaches to terrorist kidnapping. Various countries attempted to set content-based limitations, setting “red lines” regarding what “prices” they will not pay in return for their kidnapped citizens and soldiers. Content-based limitations focus on the content of the transaction with the terrorists. Chief examples of this approach are the official policies of the United States, the United Kingdom, other G8 countries, and Australia, which require “no concessions” to terrorist kidnapers. Nonetheless, these policies have largely failed to constrain governments’ concessions to terrorists.¹⁰

The Article argues that content-based precommitments are unlikely to work in democracies in the context of terrorist kidnapping. In contrast, procedural precommitment strategies may serve as a negotiating antidote.¹¹ The Article thus contends that democratic states should utilize law as a strategic tool in cases of terrorist kidnapping. Countries should enact a statute whose content will be known to both the public and the terrorists to be credible and effective. Such a statute should embody only structural-procedural limitations on the decision-making process in kidnapping cases. It may assist in breaking vicious cycles created by the fact that the higher the expected price, the greater the incentive toward kidnapping.

The Article argues that such a statute is preferable both to the adoption of content-based restrictions and to having no regulations. It explains why such a statute is preferable to content-based restrictions from utilitarian, legitimacy, and legal perspectives.¹² It further explains why such a statute is preferable to no regulation by imposing *credible* precommitment strategies that are flexible yet restrictive in a way that will paradoxically enhance decision-makers’ bargaining power, as well

⁷ See *infra* Part I.

⁸ See *infra* Part IV.

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.

¹¹ For an argument that democracies use process constraints as an advantage in handling war, see Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. OF LEGAL STUD. 189 (2009).

¹² See *infra* Part V.C.

as reduce terrorists' incentives to kidnap.¹³ Since the statute will set only procedural-structural limitations, societies may be able to abide by these limitations, even though they have proven not to be able to abide by content-based red lines. At the same time, the statute will allow sufficient flexibility to decision-makers, thus, the statute is expected to withstand constitutional scrutiny.

The Article offers a model statute that sets restrictions on the decision-making process with regard to responses to terrorist kidnapping. This Article provides numerous examples of possible procedural-structural restrictions that could be embodied in such a statute and explains how each of them may improve the status quo.¹⁴ The model statute is relevant to all countries yet the Article uses Israel as a case study to show how the model statute may have improved Israel's bargaining power.

Israel should serve as an important case study because nowhere has terrorist kidnapping extracted higher prices and affected governmental behavior more than in the Israeli context. Israeli governments have repeatedly conceded to terrorists' demands to release masses of terrorists from Israeli prisons in exchange for the release of one or a few kidnapped soldiers or citizens, or even in return for a body. Just in October 2011, Gilad Shalit was released from Hamas captivity in exchange for the release of 1027 terrorists from Israeli prisons.¹⁵ Kidnapping has already led directly or indirectly to Israel's involvement in three wars or extensive military operations: Operation Protective Edge in Gaza, following the kidnapping and murder of three Israeli teenagers as well as the subsequent kidnapping and murder of one Palestinian teenager;¹⁶ Operation Cast Lead in Gaza, following Shalit's kidnapping;¹⁷ and the Second Lebanon War, following the kidnapping of two Israeli reservists, Goldwasser and Regev.¹⁸ The Winograd

¹³ See *infra* Part V.B. This Article follows Jon Elster's definition of precommitment:

When precommitting himself, a person acts at one point in time in order to ensure that at some later time he will perform an act that he could but would not have performed without that prior act. . . . [P]recommitment requires an observable action, not merely a mental resolution. Moreover, the action must be one that creates a change in the external world that can be undone only (if at all) with some cost or effort.

Jon Elster, *Don't Burn Your Bridge Before You Come To It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1754 (2003) (footnote omitted).

¹⁴ See *infra* Part V.A.

¹⁵ See Ronen Bergman, *Gilad Shalit and the Rising Price of an Israeli Life*, N.Y. TIMES, Nov. 13, 2011, at MM34; see also RONEN BERGMAN, *BY ANY MEANS NECESSARY: ISRAEL'S COVERT WAR FOR ITS POWS AND MIAS* (2009).

¹⁶ See Steven Erlanger & Isabel Kershner, *Israel and Hamas Trade Attacks as Tension Rises*, N.Y. TIMES, July 9, 2014, at A1.

¹⁷ See BERGMAN, *supra* note 15, at 588.

¹⁸ See Ben D. Mor, *Using Force to Save Face: The Performative Side of War*, 37 PEACE & CHANGE 95, 109 (2012).

Commission, which investigated the Second Lebanon War, concluded that formulating a comprehensive policy to deal with the “strategic” threat of terrorist kidnapping was urgent.¹⁹ Furthermore, overwhelming the reasons which led Israel to concessions are traits shared by other western democracies. Finding a solution to Israel’s dilemmas may thus serve as an important example to other democratic countries.

This Article proceeds as follows. Part I describes the rise of terrorist kidnapping worldwide and explains why we should differentiate between kidnapping and barricade hostage-taking scenarios. It further explains why Israel should serve as an important case study.

Part II explains the costs of conceding to terrorists’ demands. These prices are borne by societies as diverse as the American and Israeli on the one hand and the Colombian on the other.

Part III discusses international and comparative experiences with terrorist kidnapping. It shows that the world has attempted to deal with terrorist kidnapping via content-based restrictions alone and argues that such an approach has failed to achieve its goals.

Part IV offers explanations for the seemingly irrational repeated concessions by democracies to terrorists’ demands. It explains why states seem to be incapable of abiding by content-based precommitment strategies. Any statute that aims to be effective must understand the reasons for concessions, so that it can remedy the pitfalls while respecting societal values.

Part V then suggests a new process-based approach to terrorist kidnapping. It proposes various procedural-structural limitations that democracies should consider imposing by statute and explains how each of them may improve the status quo. It uses Israel as a case study to show how the implementation of the model statute may have strengthened Israel’s bargaining power. It then explains why imposing structural-procedural precommitment is preferable to having no regulations as well as to content-based red lines. It argues that procedural limitations will achieve the benefits of precommitment, yet are preferable to content-based restrictions from utilitarian, legitimacy, and legal perspectives. Part VI offers a brief conclusion.

I. CONFRONTING TERRORIST KIDNAPPING

This Part explains why terrorist kidnapping should be treated separately from barricade hostage-taking scenarios. It further discusses

¹⁹ THE COMMISSION OF INQUIRY INTO THE EVENTS OF MILITARY ENGAGEMENT IN LEBANON 2006, at 501–09 (2008) [hereinafter *The Winograd Report*], available at <http://www.vaadatwino.gov.il/reports.html>.

the rise of terrorist kidnapping worldwide and why Israel should serve as a case study in the world's quest to combat terrorist kidnapping.

A. *Terrorist Kidnapping Challenges Civilized Society*

1. Distinguishing Kidnapping from Barricade Hostage-Taking Scenarios

Though kidnapping and barricade hostage-taking scenarios are both intended to exploit the victims as bargaining chips, the two scenarios must be addressed separately. In hostage-barricade cases, the location of the victims and the terrorists is known, and the terrorists are confined to this location.²⁰ Thus, the terrorists and the government are operating under great time pressure to resolve the situation rapidly.²¹ There are usually military options to overcome the terrorists in barricade situations, and negotiations are usually conducted while the terrorists' location is surrounded by police and army forces.²² Since the 1970s, for example, Israel has consistently applied military force in barricade situations.²³ Nonetheless, from the victims' perspective, a rescue attempt often leads to inferior results compared to a negotiated settlement.²⁴

Also, in barricade scenarios, a group of victims, rather than a single victim, is often captured.²⁵ Furthermore, the terrorists holding the hostages are usually lower-ranked members and have physical difficulties in receiving instructions from their leaders. Thus, the terrorists' initial demands reflect their superiors' instructions. As time

²⁰ Richard E. Hayes, *Negotiations with Terrorists*, in INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES 416, 419 (Victor A. Kremenyuk ed., 2d ed. 2002).

²¹ See Adam Dolnik, *Contrasting Dynamics of Crisis Negotiations: Barricade Versus Kidnapping Incidents*, 8 INT'L NEGOT. 495, 512-13 (2003); see also WALTER ENDERS & TODD SANDLER, THE POLITICAL ECONOMY OF TERRORISM 161 (2006); JON ELSTER, KIDNAPPINGS IN CIVIL WARS 4-5 (2004), available at <http://www.seminario2005.unal.edu.co/Trabajos/Elster/Kidnappings%20in%20civil%20wars.pdf>.

²² See ENDERS & SANDLER, *supra* note 21, at 210-11 (Table 7.1 for selected key hostage-taking incidents prior to 1986).

²³ BERGMAN, *supra* note 15, at 15-16, 28, 35; BOAZ GANOR, THE RELEASE OF IMPRISONED TERRORISTS: A NEW POLICY FOR ISRAEL 8-9 (2011) (an International Institute for Counter-Terrorism (ICT) position paper). In contrast, when the Popular Front for Liberation of Palestine (PFLP) skyjacked El-AL Boeing 707 to Algiers in 1968, Israel negotiated and conceded to terrorists' demands. BERGMAN, *supra* note 15, at 28.

²⁴ Dolnik, *supra* note 21, at 510.

²⁵ Rex A. Hudson, *Dealing with International Hostage-Taking: Alternatives to Reactive Counterterrorist Assaults*, 12 STUD. IN CONFLICT & TERRORISM 321, 329-30 (1989).

passes and the crisis unfolds, the hostage holders will have to make decisions by themselves in real time.²⁶

In contrast, when kidnapping occurs, the terrorists usually move the victim quickly to a hidden location. The terrorists therefore enjoy more time to exploit the situation to their advantage.²⁷ Indeed, kidnapping increases the likelihood that terrorists will succeed in their negotiations by eight to twelve percent compared to other hostage-taking scenarios.²⁸ Once the victim is hidden, there are often no military options to the government to release the victim, and what few options are available are often too risky, since the victim is usually held in a territory that is militarily controlled by the terrorists.²⁹ There is also generally one or only a few victims kidnapped, because it is easier for the terrorists to hide and transport a small number of individuals.³⁰ Furthermore, terrorist kidnapers who hold the victim maintain contact with their superiors and do not make independent decisions regarding a possible deal.³¹ Because the concerns raised by these diverse scenarios and their respective decision-making processes are different from the perspective of both the terrorists and the governments, the discussion in this Article refers to kidnapping alone.³²

2. Confronting the Rise of Terrorist Kidnapping Worldwide

Kidnapping has been a prevalent, recurrent, and growing phenomenon in many countries increasingly since the 1990s.³³ Around 7–10% of terrorist activity worldwide is kidnapping,³⁴ and when

²⁶ Hayes, *supra* note 20, at 419; *see also* Michael Ross Fowler, *The Relevance of Principled Negotiation to Hostage Crises*, 12 HARV. NEGOT. L. REV. 251, 285–86 (2007).

²⁷ ENDERS & SANDLER, *supra* note 21, at 183–85; Dolnik, *supra* note 21, at 513.

²⁸ ENDERS & SANDLER, *supra* note 21, at 184–85; *see also* Dolnik, *supra* note 21, at 505–06, 509 (writing that the bargaining position of authorities is “significantly” weaker in kidnapping compared to barricade situations).

²⁹ Dolnik, *supra* note 21, at 509.

³⁰ Hudson, *supra* note 25, at 329–30. *But see* THE KIDNAP INDUSTRY, *supra* note 3, at 31–32 (describing mass abductions and being unclear whether the incidents involved the transfer of the kidnapped people to a hidden place); James J. F. Forest, *Kidnapping by Terrorist Groups, 1970–2010: Is Ideological Orientation Relevant?*, 58 CRIME & DELINQ. 769, 770 (2012) (describing the abduction of fifty people in Baghdad); Fowler, *supra* note 26, at 258 (writing that “[i]n 2003, Islamist militants kidnapped thirty-one European tourists in the Algerian Sahara desert”).

³¹ *See supra* note 26 and accompanying text.

³² It should be noted that many studies do not differentiate between kidnapping and barricade hostage-taking scenarios. Generally, when studies (including many of those cited in this Article) refer to hostage taking, they include both incidents.

³³ THE KIDNAP INDUSTRY, *supra* note 3, at 12.

³⁴ Based on International Terrorism: Attributes of Terrorist Events (ITERATE) data for 1968–2003, just 14.2% of all terrorists attacks were hostage-taking missions. ENDERS & SANDLER, *supra* note 21, at 162–63. The individual percentages corresponding to each type of hostage-taking event are: 9.44%, kidnappings; 2.88%, sky-jackings; 1.42%, barricade missions; and 0.46%,

terrorists decide to kidnap, they enjoy a very high logistical success rate of 80–90%.³⁵ The number of kidnapping cases is alarming: “Kidnappings are the least risky hostage events owing to their unknown location and, as such, account for over two-thirds of the hostage incidents (1318 of 1941 incidents in our data set [for the period 1968–2005]).”³⁶ Most terrorist kidnapping cases over the past forty years (1970–2010) occurred “in just a handful of countries, including Colombia (18.2%), India (8.3%), Pakistan (6.3%), the Philippines (6.2%), Iraq (5.0%), and Afghanistan (4.6%).”³⁷

The numbers are even higher if we include both criminal and terrorist kidnappings.³⁸ Many times there may be combined motives in kidnappings and it is difficult, if not impossible, to distinguish between the two. Accordingly, the European Council defines every act of kidnapping as a “terrorist act.”³⁹

Even if terrorists obtain no concessions from governments, it is worthwhile for terrorists to kidnap because they often reap the immediate rewards of mass-media publicity.⁴⁰ Furthermore, kidnapping makes it easier to recruit new members to terrorist organizations and to obtain funding.⁴¹ Of course, the rewards are much greater if the terrorists also succeed in striking a deal for the release of the kidnapped

takeovers of nonaerial means of transportation. *Id.* Another study based on Global Terrorism Database (GTD) indicates that hostage or kidnapping incidents were approximately 7% of all terrorists’ activity occurring between 1970 and 2010. Forest, *supra* note 30, at 771.

³⁵ ENDERS & SANDLER, *supra* note 21, at 163; *see also* Hudson, *supra* note 25, at 332 (“According to U.S. Department of State statistics, kidnappers escaped with their victims in more than 80% of 409 kidnapping incidents surveyed between 1918 and 1982.”). Furthermore, kidnapping increases the likelihood of logistical success over other types of hostage missions. ENDERS & SANDLER, *supra* note 21, at 185; *see also* Hayes, *supra* note 20, at 422 (“The chance of success in a kidnapping was 8 percent to 12 percent higher than that in other types of hostage-taking incidents.”).

³⁶ Patrick T. Brandt & Todd Sandler, *Hostage Taking: Understanding Terrorism Event Dynamics*, 31 J. OF POL’Y MODELING 758, 759 (2009).

³⁷ Forest, *supra* note 30, at 778.

³⁸ *See* IKV PAX CHRISTI, KIDNAPPING IS BOOMING BUSINESS 5 (July 2008) [hereinafter KIDNAPPING], available at <http://www.eisf.eu/resources/item.asp?d=4208> (“The official figures for 2006 show that there were definitely 25,000 kidnaps globally in that year. This number excludes countries such as China, where the authorities disclose no data. Assuming reliable estimates, it is likely that the actual number of cases exceeded 100,000. The absolute leaders are Mexico, Iraq and India.”).

³⁹ *See* Council Common Position (EC) No. 2001/931/CFSP of 28 Dec. 2001, art. 1, 2001 O.J. (L 344) 93, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>.

⁴⁰ ENDERS & SANDLER, *supra* note 21, at 162–65. It should be noted that media exposure is a major aim of barricade situations and only one of the aims of kidnapping. Dolnik, *supra* note 21, at 501–03, 519–20; ELSTER, *supra* note 21, at 8, 16; *see also* Steven Poe, *Nations’ Responses to Transnational Hostage Events: An Empirical Evaluation*, 14 INT’L INTERACTIONS 27, 38 (1988).

⁴¹ THE KIDNAP INDUSTRY, *supra* note 3, at 18. For example, the 1972 Munich Olympics massacre of Israeli athletes led to worldwide publicity for the Palestinian cause and to an influx of new members, despite the failure to achieve governmental concessions. ENDERS & SANDLER, *supra* note 21, at 165, 179.

victims.⁴² Since kidnapping is relatively successful and lucrative from the terrorists' perspective, society should expect the number of kidnappings to rise.⁴³

3. Failing to Deal with Terrorist Kidnapping Through International Law

Kidnapping is a violation of international law and the laws governing armed conflicts, or international humanitarian law (IHL).⁴⁴ The Red Cross considers the prohibition against taking hostages as customary international law in both international and non-international armed conflicts.⁴⁵ The 1979 Convention against the Taking of Hostages bans the taking of hostages of any kind in all circumstances.⁴⁶ The Convention defines hostage-taking as dependent on the specific intent to blackmail.⁴⁷

In addition, Article 7 of the statute of the International Criminal Court qualifies as a crime against humanity the “[e]nforced disappearance of persons” which is defined, *inter alia*, as the “abduction of persons” followed by refusal “to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”⁴⁸ While this Article deals with attacks against “any civilian population,”⁴⁹ Article 8 defines “war crimes” as including the “taking of hostages” and it applies to all persons “protected under the provisions of the relevant Geneva Conventions.”⁵⁰ The International Committee of the Red Cross

⁴² See *infra* Part II.

⁴³ “25% of all kidnapping incidents recorded in the [Global Terrorism Database] occurred within the [five]-year period, 2006–2010.” Forest, *supra* note 30, at 771.

⁴⁴ For the question of the applicability of IHL to terrorist groups, see Daphne Richmond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001 (2007); see also M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L. L.J. 83 (2002); Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, HARV. PROGRAM ON HUMANITARIAN POL’Y & CONFLICT RES. OCCASIONAL PAPER SERIES (Feb. 2006), available at <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf>. For our purposes, it is sufficient to show that the international community has established both a norm prohibiting kidnapping and minimum standards of protection for persons in captivity. Terrorist organizations disregard these.

⁴⁵ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 334 (2009), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁴⁶ Hostages Int’l Convention, *supra* note 3.

⁴⁷ *Id.* at 207.

⁴⁸ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 37 I.L.M. 999, available at <http://www.unhcr.org/refworld/docid/3ae6b3a84.html>.

⁴⁹ *Id.*

⁵⁰ *Id.* art 8.

in its treatise on customary international humanitarian law clarifies that the prohibition is general.⁵¹

But terrorists do not abide by international norms. They violate these laws in kidnapping and later in the conditions under which victims are held. Terrorists do not allow Red Cross visits,⁵² nor do they voluntarily release any information on the victim.⁵³ The victim is treated like a bargaining chip. International law has thus failed in combating terrorist kidnapping. A different approach to the problem is required.

B. *The Israeli Response to Terrorist Kidnapping as a Case Study*

Israel serves as an important case study for dealing with terrorist kidnapping. Many of the difficulties that Israel faces in dealing with kidnap situations arise from its liberal-democratic character, and will thus be shared by other liberal democracies.⁵⁴ Israel's response to kidnapping is an extreme manifestation of the difficulty the western world faces in balancing the individual rights of kidnapped victims versus societal interests. Thus, finding a solution to Israel's difficulties may serve as an inspiration for other countries.

1. Family and Societal Pressure to Succumb

Kidnapping is inherently a volatile situation, since the longer the victim is held in captivity, the higher the risks of both mental and physical harm.⁵⁵ There is also the fear of complete disappearance, as occurred in the Ron Arad case. In fact, "Ron Arad, the Israeli navigator, who was captured by Hezbollah in 1986, became one of the organization's most potent psychological weapons."⁵⁶

⁵¹ HENCKAERTS & DOSWALD-BECK, *supra* note 45, at 336.

⁵² On the duty to enable Red Cross visits, see HENCKAERTS & DOSWALD-BECK, *supra* note 45, at 442; see also Alain Aeschlimann, *Protection of Detainees: ICRC Action Behind Bars*, 87 INT'L REV. RED CROSS 83, 86-87 (2005).

⁵³ Under IHL, the families have a right to know the fate of their loved ones and be in contact with them. See Aeschlimann, *supra* note 52, at 108, 116.

⁵⁴ See *infra* Part IV.

⁵⁵ James R. Alvarez, *The Psychological Impact of Kidnap*, in 1 TRAUMA PSYCHOLOGY: ISSUES IN VIOLENCE, DISASTER, HEALTH, AND ILLNESS 61-97 (Elizabeth K. Carll ed., 2007). There is an Israeli NGO titled "Wake at Night" that specializes in assisting (former) prisoners of war, kidnapped victims, and their families to cope with life both during captivity time and thereafter. The NGO's name refers to the enduring effects of the trauma that keeps these captives from falling asleep even years after they have been released from captivity. See WAKE AT NIGHT, <http://www.erim-pow.co.il> (last visited Sept. 5, 2014).

⁵⁶ Ron Schleifer, *Psychological Operations: A New Variation on an Age Old Art: Hezbollah versus Israel*, 29 STUD. IN CONFLICT & TERRORISM 1, 5 n.19 (2006). On the effect of the Ron Arad case on decision-makers, see, e.g., Yoram Schweitzer, *Israel: Hostage to Its Soldiers' Captors?*, in

Once the kidnapping of an Israeli citizen or soldier occurs, there is an identified known victim with a face and a family. The family of the kidnapped victim brings great urgency to the matter, and their very presence increases the pressure on decision-makers to reach a transaction quickly. Families do not believe that officials will do everything in their power to save their relatives unless the families pressure them. The families understand that they must mobilize public opinion and gain media sympathies in favor of their loved one. The families receive the help of NGOs, professionals, and media free of charge. They hold large demonstrations and turn their son's picture into a familiar face in every home around the globe. Their son becomes the "son of all" as was evident in both the Shalit and the Goldwasser and Regev cases.⁵⁷

Israeli society experienced family pressure to release captured soldiers for the first time after the Yom Kippur War when about 1000 soldiers were missing or captured by Egypt and Syria.⁵⁸ These families were able to harness public outrage to successfully pressure for a negotiated release, and their struggle became a model to be followed in cases of terrorist kidnapping.

Not only do families influence decision-makers to release their loved ones, they also influence the means by which the release will take place.⁵⁹ The mother of the kidnapped soldier Abraham Amram famously stated:

Mr. PM [Menachem Begin], I will never forgive you if you will try and rescue my son by force. You will endanger other soldiers and him. You have a full wallet, and you are wandering in the market and stealing. Do not steal. Open the wallet and pay what they are asking for.⁶⁰

Families have even successfully objected to the authorities' intention to declare their loved ones dead, in part because they cannot accept the verdict and in part because they fear that he will be forgotten or his body not retrieved.⁶¹ Terrorists exacerbate families' despair, by

STRATEGIC SURVEY FOR ISRAEL 2010, at 28 (Shlomo Brom & Anat Kurz eds., 2010), available at [http://d26e8pvoto2x3r.cloudfront.net/uploadimages/Import/\(FILE\)1283331498.pdf](http://d26e8pvoto2x3r.cloudfront.net/uploadimages/Import/(FILE)1283331498.pdf).

⁵⁷ BERGMAN, *supra* note 15, at 589.

⁵⁸ See, e.g., Udi Lebel & Yona Rochlin, *From 'Fighting Family' to 'Belligerent Families': Family-Military-Nation Interrelationships and the Forming of Israeli Public Behavior Among Families of Fallen Soldiers and Families of MIAs and POWs*, 8 SOC. MOVEMENT STUD. 359, 364 (2009).

⁵⁹ See, e.g., BERGMAN, *supra* note 15, at 414 (reporting that Nachshon Wachshman's father fiercely criticized Prime Minister Yitzhak Rabin for trying to release his son through force thus leading to his death); *id.* at 584 (reporting that Noam Shalit would have objected to an attempt to rescue his son through force had such an option been available to the government).

⁶⁰ *Id.* at 43. Abraham Amram was released in 1979.

⁶¹ See *infra* Part V.A.3; see also BERGMAN, *supra* note 15, at 536-37 (describing the pressure of the Regev and Goldwasser families on him not to publish the information that the soldiers were probably dead for fear of losing the public interest in concluding a deal with Hezbollah).

not disclosing information and even misleading regarding the victim's fate. The uncertainty and lack of closure regarding the fate of the victim increases family and public pressure to reach an agreement for the release quickly.⁶² The missing person becomes the symbol of the connection between the living and the dead, the present and the mythical, the private and the public national spheres.⁶³

2. Decision-Makers Led by Public Opinion

How does this family and public pressure affect decision-makers? At first, in the 1970s, Israel faced mostly barricade hostage-taking rather than kidnapping scenarios. It established a reputation of reacting with force to these scenarios.⁶⁴ Israel embarked on rescue missions in multiple cases, including the famous Entebbe operation (1976),⁶⁵ the Savoy Hotel (1975),⁶⁶ the Ma'alot school (1974),⁶⁷ and the Sabena jet (1972).⁶⁸

However, even as the Entebbe mission was under way, Prime Minister (PM) Rabin established the policy that, if no military options are available, as is the case when the kidnapped person's location is unknown, then Israel will negotiate for the release of the kidnapped victim.⁶⁹ PM Rabin relied on Israel's past behavior. In the first case of terrorist skyjacking in the world, which occurred in 1968, when the Popular Front for Liberation of Palestine (PFLP) seized an El-Al Boeing 707 in Rome, Italy, and diverted it to Algiers, Israel released sixteen Palestinian prisoners in exchange for the twelve remaining Israeli passengers and crew held hostage.⁷⁰

⁶² See The Winograd Report, *supra* note 19, at 502.

⁶³ See Danny Kaplan, *Commemorating a Suspended Death: Missing Soldiers and National Solidarity in Israel*, 35 AM. ETHNOLOGIST 413 (2008).

⁶⁴ See, e.g., Timothy James, *Rescuing Hostages: To Deal or Not To Deal*, TIME, Sept. 18, 1972, at 34; see also *supra* note 21 24 and accompanying text.

⁶⁵ Terrorists hijacked an Air France plane en route from Lod to Paris with 160 passengers, of whom 103 were Israeli citizens, and demanded the release of 52 Palestinians held in prisons in Israel, West Germany, Kenya, and France. See Zeev Maoz, *The Decision to Raid Entebbe: Decision Analysis Applied to Crisis Behavior*, 25 J. CONFLICT RESOL. 677, 687-90 (1981).

⁶⁶ Palestinian terrorists took over the Savoy Hotel in Tel-Aviv and demanded the release of ten prisoners within four hours. Galit M. Ben Israel, *Databases on Terrorism: Constructing a Database on Hostage-Barricade Terrorism and Abductions*, in BUILDING AND USING DATASETS ON ARMED CONFLICTS 66 (Mayeul Kauffmann ed., 2008).

⁶⁷ The PFLP seized the Ma'alot high school in the north of Israel and demanded the release of twenty-six prisoners. *Id.*

⁶⁸ Palestinian terrorists seized ninety passengers on a Sabena jet en route from Vienna to Tel-Aviv and forced its landing at Tel-Aviv International Airport. They demanded the release of 317 fedayees from Israeli prisons. *Id.* at 63, 66; James, *supra* note 64.

⁶⁹ BERGMAN, *supra* note 15, at 15-16; GANOR, *supra* note 23, at 2, 9.

⁷⁰ See BRIAN MICHAEL JENKINS, THE TERRORIST THREAT TO COMMERCIAL AVIATION 1 (1989).

Since Israel consistently responded with force to barricade scenarios (excluding the 1968 El-Al flight) during the 1970s and 1980s, the terrorists shifted to kidnapping.⁷¹ In accordance with the Rabin formula, Israel in turn succumbed since the 1980s to terrorists' demands each time it had no military option to free its kidnapped soldiers and citizens.⁷² Israel has time and again negotiated indirectly with terrorist organizations like Hamas for Shalit and Hezbollah for Goldwasser, Regev, and Tannenbaum.⁷³ Over time, Israel pays higher and higher prices.⁷⁴ Israel has reached the point when over a thousand terrorists have been released from Israeli prisons in exchange for one soldier.⁷⁵

Furthermore, the Israeli government has set content-based red lines, but has broken them as often as it sets them.⁷⁶ Even Benjamin Netanyahu, who has written extensively against negotiating with terrorists in hostage cases,⁷⁷ conceded as PM in the Shalit case. The leaders cannot withstand family pressure, especially the grief of the mothers over their lost sons.⁷⁸ They are also influenced by public opinion and have an interest that their popularity will rise as the result of the deal.⁷⁹

Thus, unlike many governments around the world which have declared policies of no negotiation and no concessions,⁸⁰ Israel has no such declared policy and is now even famous for *not* abiding by such a policy. Yet, other democratic states, too, concede to terrorists' demands, their policy declarations to the contrary notwithstanding. Their concessions are usually in the form of ransom payment but may also include the release of prisoners.⁸¹ Democratic societies act *ad hoc* in

⁷¹ Ben Israel, *supra* note 66, at 71 (noting that the terrorists changed their tactics but not attributing the change to Israel's harsh and consistent response to barricade scenarios).

⁷² See *infra* Part II.

⁷³ See *id.*

⁷⁴ See GANOR, *supra* note 23, at 2, 10–16.

⁷⁵ See Itamar Marcus & Nan Jacques Zilberdik, *Hamas TV: Kidnap 6 More Israeli Soldiers and Free Remaining 6,000 Prisoners*, PALESTINIAN MEDIA WATCH (Oct. 27, 2011), http://www.palwatch.org/main.aspx?fi=157&doc_id=5764.

⁷⁶ See GANOR, *supra* note 23, at 2, 10–16.

⁷⁷ See, e.g., BENJAMIN NETANYAHU, FIGHTING TERRORISM: HOW DEMOCRACIES CAN DEFEAT DOMESTIC AND INTERNATIONAL TERRORISTS 131–48 (1996); BENJAMIN NETANYAHU, TERRORISM: HOW THE WEST CAN WIN 223–52 (1986).

⁷⁸ See *supra* Part I.B.1; *infra* Part IV.D. & G.; see also GANOR, *supra* note 23, at 11 (citing Shimon Peres' words in the Knesset).

⁷⁹ See, e.g., David Makovsky, *Freeing Gilad Shalit: The Cost to Israel*, WASH. INST. (Oct. 13, 2011), <http://www.washingtoninstitute.org/policy-analysis/view/freeing-gilad-shalit-the-cost-to-israel> (writing that “[d]omestic political calculations also loomed large” in the Shalit deal). The opposite is also true. Rabin did not consent to the proposed deal to free Ron Arad at the time because of the public criticism of the Jibril transaction. See BERGMAN, *supra* note 15, at 220.

⁸⁰ See *infra* Part III.

⁸¹ See *infra* Part III; see also Scott E. Atkinson, Todd Sandler & John Tschirhart, *Terrorism in a Bargaining Framework*, 30 J.L. & ECON. 1, 9 (1987) (“[W]hile there were sixty-one incidents in which prisoner releases were demanded, in only thirteen were any prisoners actually released.

response to terrorist kidnapping, with no coherent policy that they are able to abide by. Even if public opinion may sway good outcomes in specific cases, the cumulative effect of ad hoc behavior is devastating.

3. Current Debate

Israel faces a constant threat from terrorist organizations to kidnap more soldiers and civilians for negotiation purposes.⁸² Israel's Prime Minister declared the aim of Operation Protective Edge in Gaza was to destroy the tunnels, which Hamas built in order to infiltrate Israel and conduct terrorist attacks, including the kidnapping of soldiers and civilians.⁸³ During the Operation, Israeli soldiers found dozens of tunnels and in them IDF uniforms, weapons, tranquilizers, and handcuffs to enable abduction.⁸⁴ In fact, of the over one hundred attempts to commit large-scale terror acts prevented by Israeli security services in 2012, a third were attempts to kidnap.⁸⁵ In 2013, the Israeli security services prevented fifty-two attempts to commit terrorist kidnapping, which consisted again around a third of all prevented terrorist activity.⁸⁶

Current deliberations within Israeli society revolve around the question of whether Israel should negotiate with terrorist kidnappers at all. There is a hawkish camp that believes that the government should adopt a complete prohibition against negotiating with terrorist kidnappers to minimize terrorists' incentives to kidnap.⁸⁷ The opposite camp, which seems to present majority opinion, supports the status quo of having no regulations to enable decision-makers to reach the best decision possible under the circumstances.⁸⁸

Apparently, governments were very reluctant to bargain over prisoners.”); Hayes, *supra* note 20, at 420–21 (“[G]overnments tend to reject demands for the release of prisoners more than demands for ransom, publicity, or asylum and safe passage.”); John L. Scott, *Reputation Building in Hostage Taking Incidents*, 2 DEFENCE ECON. 209, 210 (1991) (“[P]re-commitments not to release prisoners are more binding on governments than pre-commitments not to pay ransom.”).

⁸² Marcus & Zilberdik, *supra* note 75.

⁸³ Yaakov Lappin & Herb Keinon, *IDF Starts Gaza Ground Offensive*, JERUSALEM POST, July 17, 2014, <http://www.jpost.com/Operation-Protective-Edge/IDF-intensifies-Gaza-attacks-with-artillery-fire-air-strikes-363289>.

⁸⁴ Joshua Mitnick, Nicholas Casey & Tamer El-Ghobashy, *Hamas Fighters Infiltrate Israel Through Tunnel and Kill Two Soldiers*, WALL ST. J., July 19, 2014, <http://online.wsj.com/articles/gaza-residents-see-growing-toll-in-israel-fight-1405758914>.

⁸⁵ See Carmela Menashe, *A Decline of 55% in the Numbers Killed by Terror*, ISRAEL BROADCASTING AUTHORITY (Jan. 24, 2013), <http://www.iba.org.il/bet/?entity=904083&type=1>.

⁸⁶ See ISR. SEC. AGENCY, 2013 ANNUAL SUMMARY (2014), available at <http://www.shabak.gov.il/English/EnTerrorData/Reports/Pages/2013AnnualSummary.aspx>.

⁸⁷ See, for example, the position of the Almagor Terror Victims Association. ALMAGOR: TERROR VICTIMS ASS'N, <http://al-magor.com/en> (last visited Sept. 5, 2014) [hereinafter ALMAGOR].

⁸⁸ See BERGMAN, *supra* note 15, at 15–16, 593.

There is also a middle ground position that Israel should adopt content-based restrictions on transactions with terrorist kidnappers. Members of this camp would prohibit the release of a disproportionate amount of terrorists or of terrorists “with blood on their hands.”⁸⁹ Boaz Ganor, who specializes in counter-terrorism studies, for example, proposes that terrorists be distinguished according to the targets of their attack.⁹⁰ If they committed violent acts against civilians, they should serve their full sentence before being released and not be part of prisoner swaps.⁹¹ In contrast, terrorists who committed violent acts against soldiers alone should be treated as prisoners of war and be released in a peace agreement or as part of a prisoner swap.

In 2008, the Defense Minister appointed former Supreme Court President Meir Shamgar to head the Commission for Establishing Principles of Negotiation for Release of Captive and Missing People. The Shamgar Commission’s recommendations seem to include the following content-based limitations: (1) Israeli bodies may be exchanged for terrorists’ bodies and live Israelis for live terrorists: no longer should Israel exchange living terrorists for bodies; and (2) the government should not release more than a few terrorists in return for one Israeli captive: there should be a number cap on the exchange rate.⁹² But the public or the terrorists do not know precisely what the Shamgar Commission recommended or how seriously the government will take these recommendations because these recommendations are treated as the State’s secrets and will serve only as soft law guiding the Israeli government.⁹³

In contrast, this Article argues that the government should restrain itself by adopting a statute whose content will be known to the Israeli public and the terrorists to be credible and effective.⁹⁴ Furthermore, this Article contends that the statute should set only structural, as opposed to content-based, limitations on bargaining with terrorists.

⁸⁹ The Israeli Security Agency used the expression “terrorists with blood on their hands” for the first time during the Entebbe affair. BERGMAN, *supra* note 15, at 34 (relying on Amos Eran, the Director-General of the PM’s office during Entebbe).

⁹⁰ See GANOR, *supra* note 23, at 3, 18–19.

⁹¹ Prisoner swaps refer to transactions in which terrorists are released from prisons in exchange for the return of kidnapped victims.

⁹² BERGMAN, *supra* note 15, at 578.

⁹³ *Prisoner Exchange Deals Put Us on Slippery Slope*, JERUSALEM POST, Jan. 5, 2012, <http://www.jpost.com/Diplomacy-and-Politics/Prisoner-exchange-deals-put-us-on-slippery-slope>.

⁹⁴ In 1956, Thomas Schelling wrote about the paradoxical tactic of restraining oneself as a method of enhancing one’s bargaining position. The effectiveness of this tactic depends, inter alia, on the rival knowing of this restraint. See Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 282–87 (1956); see also JON ELSTER, *ULYSSES UNBOUND* (2000); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

The Article offers a model statute for democracies that includes an array of procedural-structural limitations, addressing which bodies must consent to the deal and under what structural conditions. The Article explains how each restriction will improve democracies' bargaining power when compared to the status quo. It uses Israel as a case study to show how the model statute may have improved Israel's bargaining power, as discussed below.

II. WHAT IS THE PRICE OF CONCEDED TO TERRORISTS' DEMANDS?

The current ad hoc approach, characterizing western democratic societies' responses to terrorist kidnapping, leads to harsh long-term effects. This Part elaborates the different "prices" that Israel and other western countries pay by conceding to terrorists' demands.⁹⁵ It analyzes each of these "prices" to enable us a better understanding of the challenges that a statute dealing with terrorist kidnapping must address.

A. *Contributing to the Dynamics of a Vicious Cycle*

Conceding to terrorists' demands leads to vicious cycles as evident in various countries.⁹⁶ Among the incentives to engage in terrorist kidnapping is the potential for financial benefits that can support the means to carry out further strikes.⁹⁷ Terrorists frequently replenish their victims once negotiations are complete, leading to a "revolving door" phenomenon. This was most vividly illustrated not just in Israel but also in the Iran-Contra affair. President Reagan released three Americans from Beirut in exchange for arms, only to be faced with the additional kidnapping of three different Americans.⁹⁸ This replenishment technique was also vivid in Iraq after September 11, 2001.⁹⁹

Richard Hayes summarizes research showing that governments with a history of substantial and regular concessions to hostage-takers

⁹⁵ Though it may be more accurate to use the phrase "costs" to analyze the ramifications of Israel's behavior, the Israeli public discussion uses the term "prices."

⁹⁶ See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 161 (Penguin Books, 2d ed. 1991) (1981). "[T]he percentage of hostage-taking events displays a cycle in which a successful event yields an upturn in the percentage owing to a demonstration effect" and vice versa. ENDERS & SANDLER, *supra* note 21, at 164; see also GANOR, *supra* note 23, at 2, 10-16 (regarding Israel); THE KIDNAP INDUSTRY, *supra* note 3, at 33-36 (regarding Colombia).

⁹⁷ Thus, for example, in 1978, the Red Brigades funded the kidnapping of Italian ex-Prime Minister Aldo Moro with the ransom they received from Lloyd's to release an Italian businessman. ELSTER, *supra* note 21, at 24.

⁹⁸ ENDERS & SANDLER, *supra* note 21, at 171.

⁹⁹ *Id.* at 171-75.

(including kidnappers) are likely to face continuing terrorism and may even experience an increase in terrorist activity. In contrast, governments that show resolve against acquiescence over time and across events will experience less terrorism. This was demonstrable in countries as diverse as France, Colombia, Israel, Italy, Spain, West Germany, Portugal, the United States, and several Third World countries.¹⁰⁰ Similarly, David Cohen, United States Treasury Under Secretary for Terrorism and Financial Intelligence, stated in 2012: “We know that hostage takers looking for ransoms distinguish between those governments that pay ransoms and those that do not—and make a point of not taking hostages from those countries that do not pay ransoms.”¹⁰¹ Moreover, “[T]he size of the average ransom payment is increasing. In 2010, the average ransom payment per hostage to [Al-Qaeda in the Lands of the Islamic Maghreb] was \$4.5 million; in 2011, that figure was \$5.4 million.”¹⁰²

Furthermore, kidnapping seems to stand out even among the group of general hostage-taking. Patrick Brandt and Todd Sandler found in their empirical research that: “For kidnappings, each concession to the terrorists results in two to three additional abductions. A smaller number of additional skyjackings and other hostage incidents follows concessions granted.”¹⁰³ Thus, continued resolve serves long-term goals.

Though there is debate within Israeli society as to whether conceding to terrorists leads to further kidnappings, the data does support the proposition that concessions lead to further attacks. Israel progressively paid higher prices per victim over the years, from 1150 terrorists in exchange for 3 soldiers at the end of the First Lebanon War as part of the Jibril Deal,¹⁰⁴ to 1027 terrorists for a single victim in the Shalit deal.¹⁰⁵ The Winograd Commission even described Israeli

¹⁰⁰ Hayes, *supra* note 20, at 424–25; see also ENDERS & SANDLER, *supra* note 21, at 162, 169 (writing that conceding to hostage-takers “often encourages more hostage taking”); Dolnik, *supra* note 21, at 511 (writing that terrorists rely on the government’s record of concessions in making their demands).

¹⁰¹ When Mr. Cohen discussed hostage taking, he meant to include kidnapping. Press Release, U.S. Dep’t of Treasury, Remarks of Under Secretary David Cohen at Chatham House on “Kidnapping for Ransom: The Growing Terrorist Financing Challenge” (Oct. 5, 2012) [hereinafter Cohen Remarks], available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1726.aspx>.

¹⁰² *Id.*; cf. Rukmini Callimachi, *Paying Ransoms, Europe Bankrolls Qaeda Terror*, N.Y. TIMES, July 30, 2014, at A1 (“While in 2003 the kidnappers received around \$200,000 per hostage, now [2014] they are netting up to \$10 million . . .”)

¹⁰³ Brandt & Sandler, *supra* note 36, at 760.

¹⁰⁴ See The Winograd Report, *supra* note 19, at 502–03, § 10; MICHAEL VIGODA, REDEEMING CAPTIVES AND BODIES IN EXCHANGE FOR THE RELEASE OF TERRORISTS 1 (2008) (an opinion submitted to the Shamgar Commission on October 7, 2008).

¹⁰⁵ See *supra* Introduction.

transactions with terrorists as “crazy transactions”¹⁰⁶ that create incentives for additional kidnappings.

Thus, Israel’s transactions exhibit an inflation effect in that each act becomes the baseline for the next. If Shalit is traded for 1000 prisoners, then 1000 is the baseline for the next transaction. This is the same escalation effect as in executive compensation, where each negotiation establishes the benchmark for the next.¹⁰⁷

Not only does Israel pay higher “prices” in numerical terms from deal to deal, but the slippery slope is also reflected in the characteristics of the terrorists it releases and the places to which they are released. The Jibril deal was a watershed not only in terms of the number of terrorists released, but also because Israel released the terrorists to the Western Bank,¹⁰⁸ which created a concrete threat to Israel’s own security. Another example is Samir Kuntar. Though Israel refused to release him in exchange for Elhanan Tannenbaum and the bodies of the three missing soldiers from Mount Dov, Israel eventually released Kuntar for the bodies of Regev and Goldwasser.¹⁰⁹

Moreover, not only does Israel enhance terrorists’ incentives to kidnap, it also provides them with better means to carry out those strikes. The release of hundreds of terrorists in exchange for the victim repopulates the terrorist organization and strengthens the network, increasing the likelihood of another attack.¹¹⁰ According to the Director of the Israeli Security Agency (ISA, which is widely known as the Shin Bet), Yoram Cohen, approximately sixty percent of the terrorists released in prisoner swaps return to terrorist activity.¹¹¹ Many of the terrorists released in the Jibril deal became the leaders of the First Intifada.¹¹² Former head of Intelligence Agency, Meir Dagan, stated that the terrorists released in the Tannenbaum deal caused the death of 231 Israelis.¹¹³ A high percentage of the terrorists released in the Shalit transaction returned to terrorist activity as well.¹¹⁴

¹⁰⁶ See The Winograd Report, *supra* note 19, at 507, § 28.

¹⁰⁷ See, e.g., Thomas A. DiPrete et al., *Compensation Benchmarking, Leapfrogs, and the Surge in Executive Pay*, 115 AM. J. SOC. 1671 (2010).

¹⁰⁸ Ze’ev Schiff, *The Prisoner Exchange*, 14 J. PALESTINE STUD. 176, 176 (1985) (“What makes the current agreement so terrible is that this time many hundreds of murderers are staying in our territory.”).

¹⁰⁹ BERGMAN, *supra* note 15, at 482 (describing Defense Minister Shaul Mofaz’s refusal to release Samir Kuntar).

¹¹⁰ See *supra* Part I.A.2.

¹¹¹ Gabe Kahn, *ISA Chief: Shalit Deal “Tough and Difficult”*, ISR. NAT’L NEWS, Oct. 12, 2011, <http://www.israelnationalnews.com/News/News.aspx/148730>.

¹¹² Of the 238 terrorists who returned to the West Bank following the Jibril deal, 48% returned to terror and were later recaptured by the IDF forces. See ALMAGOR, *supra* note 87.

¹¹³ Yitzhak Tessler, Op-Ed., *Shalit Deal Wrong Move*, YNET (Nov. 10, 2011), <http://www.ynetnews.com/articles/0,7340,L-4134381,00.html>.

¹¹⁴ See MEIR AMIT INTELLIGENCE & TERRORISM INFO. CTR., RETURN OF PALESTINIAN TERRORIST OPERATIVES RELEASED IN THE GILAD SHALIT PRISONER EXCHANGE DEAL TO

These vicious cycles created—when kidnapping routinely leads to concessions and where the higher the expected price, the greater the incentive toward kidnapping—have led some to make the counterintuitive argument that the redemption of a kidnapped victim sanctifies the individual over the society. In fact, opponents of concessions in societies as divergent as Israel, United States, and Colombia raised this argument that social solidarity—and even international solidarity—requires resistance to concessions.¹¹⁵

B. *Encouraging Cooperation Between Criminal and Terror Organizations*

Countries that are routinely subject to this form of terrorism must consider the possibility that their failure of resolve will foster cooperative relationships between criminals and terrorists. The reality is that each of these organizations can profit by specializing: criminals might kidnap, while the terrorists negotiate—each side exploiting their best skillset. This sort of cooperation already occurs in some parts of the world, including Italy, Latin America, Lebanon, Iraq, and Afghanistan.¹¹⁶ It occurred also in Israel in the case of the kidnapping of Elhanan Tannenbaum. Hezbollah was able to kidnap him only through cooperation with an Arab-Israeli drug dealer. This drug dealer lured Tannenbaum to fly to Dubai to conduct a drug-deal while coordinating with Hezbollah Tannenbaum's eventual abduction.¹¹⁷ To conclude, concessions to terrorist kidnapping might lead criminal organizations to perceive kidnapping as attractive for them as well.

TERRORIST ACTIVITIES 2 (2014), available at http://www.terrorism-info.org.il/Data/articles/Art_20662/E_100_14_63710732.pdf (suggesting that “about 12% of the prisoners released to Judea and Samaria and east Jerusalem have been apprehended for involvement in terrorist activities, and the number is expected to rise with the detentions resulting from the abduction of the three Israeli youths”).

¹¹⁵ See, e.g., THE KIDNAP INDUSTRY, *supra* note 3, at 44–45 (in the Colombian context); VIGODA, *supra* note 104, at 16 (in the Israeli context); Michael Crowley, *Obama Didn't Negotiate with 'Terrorists' for Bergdahl*, TIME, June 2, 2014, <http://time.com/2809612/bowe-bergdahl-obama-taliban> (in the United States context).

¹¹⁶ THE KIDNAP INDUSTRY, *supra* note 3, at 33 (regarding Latin America); ELSTER, *supra* note 21, at 25–29 (regarding Italy, Latin America, and Lebanon); see also Chester G. Oehme III, *Terrorists, Insurgents, and Criminals—Growing Nexus?*, 31 STUD. IN CONFLICT & TERRORISM 80 (2008) (regarding Afghanistan and Iraq); Cohen Remarks, *supra* note 101 (stating “we see terrorist groups like AQIM and AQAP, sometimes in coordination with local criminals, take foreign nationals hostage . . .”).

¹¹⁷ BERGMAN, *supra* note 15, at 279–87, 472–74.

C. *Causing Negative Externalities and Moral Hazard Problems*

Every country that concedes to terrorist kidnappers must also be aware of the negative externalities resulting from its behavior. Its behavior might encourage terrorist kidnappings in other parts of the world.¹¹⁸ Thus, Israel's behavior might demonstrate to terrorists operating elsewhere that it is beneficial to kidnap. If Israel conceded, they too may be able to pressure other governments to concede by kidnapping.¹¹⁹ In fact, terrorist organizations share strategies and tactics they use for kidnapping with other extreme groups operating in different parts of the world. United States officials attest that "the success of today's kidnappers attracts the attention of tomorrow's would-be kidnappers, who then seek to learn the tricks of the trade."¹²⁰

In addition, a state's attitude might contribute to morally hazardous behavior by its citizens. Citizens might take unnecessary risks in traveling to enemy countries or countries where their state has issued travel warnings, relying on their government to free them were they to be kidnapped.¹²¹ This is no mere theoretical problem; it materialized in the Tannenbaum case, when he flew to Dubai despite being aware of the risks.¹²²

D. *Paying Intangible "Prices" in the Form of National Symbols and Morale*

Countries that lack resolve in the face of terrorist extortion pay heavy prices also in the form of national symbols and morale. At times, terrorists conduct operations with little strategic value only to increase the morale and self-perception of their organization.¹²³ Hezbollah, for example, deliberately exploits kidnapping to humiliate Israel, treating it as a "spider's web" society that is too weak to make the required sacrifice

¹¹⁸ Brandt & Sandler, *supra* note 36, at 759 ("Each concession made to hostage taking terrorists by one government makes the terrorists change their beliefs about the likelihood of other governments' giving into their demands.").

¹¹⁹ See ENDERS & SANDLER, *supra* note 21, at 175.

¹²⁰ Cohen Remarks, *supra* note 101.

¹²¹ Governments use travel warnings as a means to shift responsibility to their citizens. Some of these governments even place conditions on helping their citizens, by requiring that they listen to and heed travel warnings. See Oded Löwenheim, *The Responsibility to Responsibilize: Foreign Offices and the Issuing of Travel Warnings*, 1 INT'L POL. SOC. 203, 215 (2007).

¹²² Elad Benari, *New Details of Tenenbaum's Illegal Dealings in Dubai Revealed*, ISR. NAT'L NEWS, Feb. 23, 2012, <http://www.israelnationalnews.com/News/News.aspx/153054#.U8vwmJTers5>. Tannenbaum was freed in 2004 as part of a prisoner swap with Hezbollah.

¹²³ Dolnik, *supra* note 21, at 501.

of sons and daughters to protect its safety.¹²⁴ Repeated concessions also grant the terrorists legitimacy by acknowledging them, even in an indirect manner, as counter-parties who must be dealt with.¹²⁵ Furthermore, the very exchange of terrorists for kidnapped citizens and soldiers puts both groups exchanged implicitly on equal footing.¹²⁶

E. *Misallocating Limited Resources*

When a terrorist kidnapping occurs, decision-makers may be consumed by the tragedy. President Carter made the hostage crisis in Iran his first priority.¹²⁷ He said:

[A]nything that happens in this country to take the mind of the world off the American hostages is damaging to our nation, is harmful to me in my efforts and is also threatening to the lives and the safety of those hostages.¹²⁸

Similarly, PM Rabin had a policy of meeting with families of kidnapped soldiers within twenty-four hours of their request.¹²⁹ Israel spends tens of millions of dollars on attempts to track its missing soldiers, while turning a blind eye to many other miseries of individual people in desperate need of resources.

Allowing terrorist kidnapping to determine the national agenda to a degree disproportionate to other tragic or even routine events may be another way that terrorism extracts a price from democratic societies.

¹²⁴ See Eyal Zisser, *The Return of Hizbullah*, 9 MIDDLE EAST Q. 3, 3–11 (2002), available at http://www.meforum.org/499/the-return-of-hizbullah#_ftnref8; see also Schleifer, *supra* note 56.

¹²⁵ See Fowler, *supra* note 26, at 287, 296 (discussing terrorists' desires to receive legitimacy from target governments and governments' fears of bestowing such legitimacy); Schweitzer, *supra* note 56, at 26 (describing the indirect negotiations between Israel and the Hezbollah as well as Hamas to prevent Israel's formal recognition of these organizations).

¹²⁶ Elad Lapidot, *Prisoners of War: Law, State and International Law*, in CAPTIVES 151, 157 (Merav Mack ed., 2014) (writing that kidnapping to release prisoners negates the idea of law because it puts the kidnapped person and the prisoners on equal footing); see also Merav Mack, *Historical and Contemporary Dilemmas Concerning Captivity and Ransom*, in CAPTIVES, *supra*, at 13, 40 (writing that it is no coincidence that kidnapped soldiers and citizens are replaced with terrorist prisoners; rather, it reflects the fact that the distinction between citizens and soldiers is blurred all over the world).

¹²⁷ For the relevance of this example to kidnapping scenarios, see *infra* Part III.A.1.

¹²⁸ Dominic Tierney, *Prisoner Dilemmas: The American Obsession with POWs and Hostages*, 54 ORBIS 130, 139 (2010).

¹²⁹ BERGMAN, *supra* note 15, at 383 (citing Eitan Haber, who was the manager of the PM's office).

F. *Compromising Rule of Law Principles*

Not only did the United States find itself in a severe breach of basic rule of law principles in the Iran-Contra scandal in order to free Americans kidnapped in Lebanon, but Israel, too, routinely breaks its laws to conduct prisoner swaps. While the Iran-Contra scandal is world-famous, Israel's constant breach of rule of law principles is denied. Prisoner swaps go against uniformity in justice and equal treatment of all prisoners,¹³⁰ because these prisoners are released to fulfill state interests, not because they deserved to be released.

Rule of law principles are also undermined by the processes through which prisoners are released. Israel releases terrorist prisoners after the President (who serves a symbolic role like the Queen of Britain) signs individual pardons for each of them.¹³¹ The pardons are, however, part of a general prisoner swap that has nothing to do with the individual behavior of each of the prisoner-terrorists to be released. The President becomes merely a rubber stamp for decisions made by the executive branch in this context.¹³² In fact, MKs made their support of the appointment of President Shimon Peres dependent on whether he would be willing to pardon to enable prisoner swaps.¹³³ Thus, this kind of pardon cannot be treated as an act of individual pardon.

Pardoning masses of terrorists without the exercise of presidential discretion over the release of each individual terrorist amounts to a general pardon. Rule of law principles require the enactment of a statute for general pardons to be valid.¹³⁴ But, the government never requests

¹³⁰ 2 AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 1064 (5th ed. 1996) (noting that pardon may raise equality questions); *see also* Fowler, *supra* note 26, at 288–89.

¹³¹ The President is the constitutional branch authorized to grant individual pardons. Basic Law: The President of the State, 5724–1964, 18 LSI 111, § 11(b) (1963–1964) (Isr.).

¹³² Israel usually conducts negotiations with terrorist organizations indirectly through the mediation of other countries, especially Germany. Thus, it cannot compromise its credibility to these intermediaries. *See, e.g.*, BERGMAN, *supra* note 15, at 531–53 (describing Germany's mediation between Hezbollah and Israel leading to the Regev and Goldwasser deal).

¹³³ *See* Sharon Gal, *The Ninth Israeli President: Shimon Peres*, NANA 10 (June 14, 2007), <http://news.nana10.co.il/Article/?ArticleID=494645> (reporting Peres' first speech in the Knesset after his appointment that he will act to release Shalit, Goldwasser, and Regev).

¹³⁴ This has been the Israeli parliament's practice in contexts other than prisoner swaps. *See, e.g.*, General Pardon Ordinance, 3 LSI 7 (1949) (Isr.) (to celebrate the establishment of the Israeli State); Pardon Statute, Year-1969 (1969) (to celebrate the victory in the Six Days War); Implementing the Intermediate Agreement with regard to the West Bank and the Gaza Strip (Judicial Authorities and Other Provisions) (Statutory Amendments), Year-1996 (1996) (enacting that the release of prisoners and detainees in accordance with the Israeli-Palestinian agreement will be done according to criteria set by the government rather than by the President's pardon power); Stopping Procedures and Erasing Registries with regard to the Disengagement from Gaza, Year-2010 (2010) (to stop criminal procedures against Jewish Settlers in connection with the disengagement from Gaza); *see also* RUBINSTEIN & MEDINA, *supra* note 130, at 1057 (writing that general pardons should be granted by statute); *cf.* Todd David Peterson, *Congressional Power*

the Knesset (Israel's legislature) to enact general pardon statutes before the execution of prisoner swaps for fear it will not ratify the deal or the State's secrets will be revealed. Thus, neither the process required for the grant of individual pardons nor that required for the grant of a general pardon is followed.¹³⁵

The rule of law has been broken not just by the process used to release terrorists in prisoner swaps, but also by those opposing these prisoner swaps. One of the gravest stories of a breach of rule of law principles occurred in Israel in the 300 Bus Line affair. In that case, members of the Shin Bet overcame terrorists who seized a bus with hostages. They executed two terrorists and later denied doing so.¹³⁶ The security officers, who were responsible for the executions, later asserted that they had done so out of fear that the captured terrorists would be freed in a prisoner swap.¹³⁷

This Part concludes that repeated concessions to terrorist kidnappers come with heavy "prices." Though terrorists may continue to kidnap even without concessions, concessions contribute to the frequency and severity of terrorist kidnapping. Societies as diverse as the American, Israeli, and Colombian have paid these heavy "prices."

III. COMPARATIVE EXPERIENCE WITH CONTENT-BASED RESTRICTIONS

This Part analyzes comparative attempts to set content-based restrictions and explains why they resulted in limited success. This comparative experience is highly relevant to Israel and the world at large, since the public debate concentrates on the question of whether to set content-based restrictions.

The first Section deals with attempts to completely ban concessions to terrorist kidnappers, whether done through direct prohibition, as in the United States, or indirectly, by preventing the means to concede, as in Italy and Colombia. It explains the problems associated with such complete prohibitions. The second Section presents a unique attempt by Jewish law to set direct limits on how much society may concede. This

over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative, 38 WAKE FOREST L. REV. 1225, 1240–50 (2003) (discussing the United States President's authority to grant both individual and general pardons).

¹³⁵ The Israeli Supreme Court has routinely upheld the practice and denied petitions against the conduct of prisoner swaps without legislation. *See, e.g.*, HCJ 7523/11 Almagor Terror Victims Ass'n v. Prime Minister, (Oct. 17, 2011) ¶12 (Beinish President's opinion), Nevo Legal Database (by subscription) (Isr.), (denying an injunction against the Shalit transaction).

¹³⁶ *See, e.g.*, Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 ISR. L. REV. 216 (1989).

¹³⁷ BERGMAN, *supra* note 15, at 226–27 (writing that Avraham Shalom ordered to execute the terrorists to prevent their release in future deals).

law presents a sophisticated understanding of the kidnapping game and addresses the incentives of both sides to the ordeal. The Article explains why this attitude cannot be easily borrowed to modern conditions.

A. *Complete Ban: A Rule of No Concessions*

1. Western Countries' Policy of No Concessions

The first pillar of the official United States counter-terrorism policy is that there will be no concessions to terrorists.¹³⁸ The rationale behind this policy is to decrease further attacks.¹³⁹ However, even the United States has been unable to fully abide by this stated policy. Presidents have repeatedly conceded to kidnappers' demands while often attempting to conceal their acts. They declared "no concessions" but, through intermediaries, secretly conceded, even in barricade hostage scenarios.¹⁴⁰ Thus, for example, President Carter signed the Algiers Declarations in exchange for the release of the hostages held in the United States embassy in Tehran.¹⁴¹ This example is especially relevant for negotiations in terrorist kidnapping scenarios, since the negotiations in the case extended over many months, the hostages were held in terrorist land, and, after a failed rescue attempt by the United States, there was no potent threat of hostage release through force.¹⁴² Similarly, President Reagan agreed to illegally exchange arms in return for the

¹³⁸ See OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2004, at 3 (2005), available at <http://www.state.gov/documents/organization/45313.pdf>. President Nixon formulated this policy in the 1970s in response to the kidnapping of Americans by the Black September organization. The terrorists executed these Americans. William C. Nagel, *The Law Enforcement Approach to Combating Terrorism: An Analysis of US Policy* (June 2002) (unpublished M.S. thesis, Naval Postgraduate School), available at <http://www.hsdl.org/?view&did=438507>.

¹³⁹ ENDERS & SANDLER, *supra* note 21, at 161–62. A policy of "no concessions" goes back to Roman times, when Hannibal captured thousands of Roman soldiers, but the Roman Senate banned their redemption. Mack, *supra* note 126, at 19–21.

¹⁴⁰ See, e.g., Hudson, *supra* note 25, at 362–67. Thus, for example, the American Journalist Peter Theo Curtis was freed on August 24, 2014, after being held for nearly two years by Al-Qaeda affiliated Jabhat al-Nusra in Syria. The family thanked both Qatar and the U.S. Government though the latter officially denies paying ransom. See Liz Sly & Adam Goldman, *U.S. Hostage Peter Theo Curtis is Freed After Nearly Two Years in Syria*, WASH. POST, Aug. 24, 2014, http://www.washingtonpost.com/world/us-hostage-peter-theo-curtis-freed-in-syria/2014/08/24/aaa0d07d-37ac-407a-8753-23574383b4cf_story.html.

¹⁴¹ ENDERS & SANDLER, *supra* note 21, at 161–62; Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 320–22 (2001). It may be argued that this was not a great concession on the part of President Carter since the Algiers Declarations mainly restored the status quo existing before the hostage-taking incident began. The United States agreed to unfreeze Iranian assets in exchange for the victims, while the very freezing was the result of the hostage-taking. ELSTER, *supra* note 21, at 7.

¹⁴² Tierney, *supra* note 128, at 141–42.

release of three kidnapped Americans held in Beirut in what became the infamous Iran-Contra scandal.¹⁴³ In 2014, President Obama released Army Sergeant Bowe Bergdahl in exchange for the release of five senior Taliban terrorists from Guantanamo Bay.¹⁴⁴

That the United States is known to have a bark that is worse than its bite has worked against it.¹⁴⁵ Certain cities have avoided this problem by disregarding the “no-concessions” federal policy. These jurisdictions do so in part to avoid inciting terrorists to show their strength by coercing cities to disregard their own counter-terrorism policy.¹⁴⁶

Britain,¹⁴⁷ other G8 countries,¹⁴⁸ and Australia¹⁴⁹ adopted official policies of no concessions as well. Nonetheless, inconsistency between words and deeds characterizes also many European governments’ behavior.¹⁵⁰ This inconsistency was manifested, for example, in the United Kingdom, Dutch, and German governments’ responses to terrorist kidnapping of their citizens in Colombia.¹⁵¹ Many European states—including Austria, France, Germany, Italy, Spain, and Switzerland—pay millions of dollars to terrorist organizations in order to free their citizens, who were kidnapped mostly in Africa, but also in Syria and Yemen.¹⁵² These European states deny the payment of ransom

¹⁴³ In this case as well, the United States had no real option of a rescue mission. ENDERS & SANDLER, *supra* note 21, at 171; *see also* Navin A. Bapat, *State Bargaining with Transnational Terrorist Groups*, 50 INT’L STUD. Q. 213 (2006) (discussing President Reagan’s involvement in a prisoner swap to free a 1985 Trans World Airlines flight).

¹⁴⁴ Crowley, *supra* note 115.

¹⁴⁵ *Cf.* Sandler & Scott, *supra* note 6, at 51 (writing in 1987 that “[s]ince more than 50% of all international terrorism is directed at U.S. citizens or their property, the insignificance of U.S. hostages in explaining terrorist success in negotiating is especially interesting” and that “[t]his result suggests that the U.S. Government has been consistent in its policy of not negotiating with terrorists” (footnote omitted)).

¹⁴⁶ Fowler, *supra* note 26, at 267.

¹⁴⁷ *See Foreign Travel Advice: Israel*, GOV.UK, <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/middle-east-north-africa/israel-occupied> (last updated Sept. 2, 2014) (covering “Israel and the Occupied Palestinian Territories”).

¹⁴⁸ *See* Conclusions of G8 Foreign Ministers (May 9, 1998), *available at* http://www.mofa.go.jp/policy/economy/summit/1998/g8_min.html. They state: “No concessions to terrorists. A united front against ransom payment is essential to deter hostage-takers.” *Id.* § 28.

¹⁴⁹ *See* NAT’L COUNTER-TERRORISM COMM., NATIONAL COUNTER-TERRORISM PLAN 15, ¶ 92 (3d ed. 2012), *available at* <http://www.nationalsecurity.gov.au/Mediaandpublications/Publications/Documents/national-counter-terrorism-plan-2012.pdf>. Australia’s counter-terrorism plan states: “Australia’s policy is, wherever possible and appropriate, to resolve terrorist acts through negotiation to minimise the risk to life. Australia will not make concessions in response to terrorist demands.” *Id.*

¹⁵⁰ *See* Hudson, *supra* note 25, at 336 (writing that the majority of governments “prefer to take a hard line publicly but not necessarily in practice”).

¹⁵¹ THE KIDNAP INDUSTRY, *supra* note 3, at 99–105. The United Kingdom is more consistent in applying a “no-concessions” policy in recent years. *See* KIDNAPPING, *supra* note 38, at 50.

¹⁵² KIDNAPPING, *supra* note 38, at 48–51; *see also* Callimachi, *supra* note 102; Ellen Knickmeyer, *Al Qaeda-Linked Groups Increasingly Funded by Ransom*, WALL ST. J., July 29, 2014, <http://online.wsj.com/articles/ransom-fills-terrorist-coffers-1406637010>; Johnlee Varghese, *German Hostage Freed by Islamic State in Syria After Government Paid Ransom-Report*, INT’L BUS.

to terrorist kidnappers. They conceal their concessions by paying the ransom through intermediaries or writing it in their budget law under the title of “humanitarian [or development] aid for the poor” in Africa.¹⁵³ In 2014, the New York Times published its findings that “Al Qaeda and its direct affiliates have taken in at least \$125 million in revenue from kidnappings since 2008, of which \$66 million was paid just last year [i.e., 2013].”¹⁵⁴ David Cohen, United States Treasury Under Secretary for Terrorism and Financial Intelligence, stated in 2012 that kidnapping for ransom became “our most significant terrorist financing threat today.”¹⁵⁵

While governments attempt to build “no-concessions” reputations, private entities generally do not formulate an official policy. They will pay ransom when governments will not because they do not expect to face repeated incidents of kidnapping.¹⁵⁶ Indeed, the United States policy of “no concessions” does not bind the private behavior of American citizens kidnapped for ransom purposes.¹⁵⁷ American citizens working in or traveling to dangerous locations around the world buy, directly or through their employers, kidnap and ransom insurance policies that pay hefty ransoms. This private behavior, too, decreases the effectiveness of public “no-concessions” policies.

It may be concluded that even when states adopt an official policy of no concessions, they are often unable to abide by it. Their inability to comply may not necessarily reflect the weakness of their society. Rather, there may be important reasons to justify deviating from their pre-declared policy, as discussed below.

2. The Pitfalls of Having a Complete Ban

Governments that adopt an official policy of “no concessions” are often characterized as countries with a double ban on both negotiations and concessions to terrorists. The idea is that if the government refuses to concede, then there is nothing left to negotiate. But this policy may prevent desirable negotiations, even if no concessions are made.

TIMES, Aug. 24, 2014, <http://www.ibtimes.co.in/german-hostage-freed-by-islamic-state-syria-after-government-paid-ransom-report-607513>.

¹⁵³ Callimachi, *supra* note 102; *see also* Knickmeyer, *supra* note 152. In fact, it is embedded in European traditions, going as far back as the twelfth century, to conceal acts of captives’ redemption and portray captives’ release as nothing short of a miracle. Yvonne Friedman, *Image-creating Reality in the Crusader Period: The Shifting Concept of the Captive, from Coward to Hero*, in CAPTIVES, *supra* note 126, at 83, 96.

¹⁵⁴ Callimachi, *supra* note 102.

¹⁵⁵ Cohen Remarks, *supra* note 101.

¹⁵⁶ Scott, *supra* note 81, at 209, 215–18.

¹⁵⁷ Meadow Clendenin, Comment, “No Concessions” with No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy, 56 EMORY L.J. 741 (2006).

Negotiating with terrorists is a means to achieve many intermediate goals. Negotiations buy time that enables authorities to gather intelligence and plan a response. They may help keep the victims alive, as kidnappers remain hopeful of a possible beneficial exchange of money or prisoners.¹⁵⁸

Additionally, some terrorists will translate the government's refusal to negotiate as proof that the government cannot be reasoned with and should be resisted by force alone.¹⁵⁹ Negotiations convey a message to the terrorists that talk may be an alternative to violence.¹⁶⁰ In fact, in Muslim tradition, captives have a major role in facilitating a dialogue with the enemy, and transitioning from war to cease fire.¹⁶¹

Not only may negotiations be justified, but at times even concessions may be the best strategy from a cost-benefit perspective in the specific case. At times, partial concessions may serve the government's interests.¹⁶² For example, terrorists may demand access to the broadcasting channels to advance their cause, while the government may believe that such exposure will actually portray the terrorists in a bad light.¹⁶³ If such a concession may enable the government to free victims, it may be worthwhile.

Last but not least, it is doubtful whether a policy of "no concessions" is perceived as firm from the opponent's perspective.¹⁶⁴ Terrorists usually do not believe that states will abide by a no-concessions policy. Empirical data supports their skepticism: States are often willing to negotiate and reach a settlement. Some estimate that in seventy percent of kidnappings cases ransom is paid.¹⁶⁵ In fact,

¹⁵⁸ Thus, for example, the Israeli military overtook the Sevana jet and the Savoy hotel while the Israeli authorities were conducting negotiations with the terrorists. Ben Israel, *supra* note 66, at 63–66. For many other fictitious negotiations between Israel and terrorists, see *id.* at 66–70. See also Hudson, *supra* note 25, at 358 (regarding hostage barricade situations); Poe, *supra* note 40, at 38 (suggesting that states should not adopt a strict no-concessions policy but rather have a more flexible policy out of utilitarian considerations).

¹⁵⁹ Fowler, *supra* note 26, at 266.

¹⁶⁰ *Id.* at 261 (relying on Dominick Misino, NYPD hostage negotiator, who handled more than 200 domestic and international hostage incidents without loss to life); see also Peter C. Sederberg, *Conciliation as a Counter-Terrorist Strategy*, 32 J. PEACE RES. 295 (1995) (discussing why and when conciliation might be sought with terrorist groups).

¹⁶¹ Friedman, *supra* note 153, at 89.

¹⁶² See, e.g., Hudson, *supra* note 25, at 324–26 (writing in the context of hostage-barricade terrorism); see also Harvey E. Lapan & Todd Sandler, *To Bargain or Not to Bargain: That Is the Question*, 78 AM. ECON. REV. 16, 19 (1988); David Tucker, *Responding to Terrorism*, 21 WASH. Q. 103, 105–06 (1998).

¹⁶³ See Fowler, *supra* note 26, at 289–90 (arguing that the German government conceded to the Baader-Meinhof Gang's demand to broadcast which only hurt the terrorists' cause).

¹⁶⁴ Dolnik, *supra* note 21, at 524; ELSTER, *supra* note 21, at 29; Fowler, *supra* note 26, at 263.

¹⁶⁵ See Atkinson et al., *supra* note 81, at 2 (writing that in kidnappings, terrorists "receive their ransom demands in 70 percent of the incidents"); see also Lapan & Sandler, *supra* note 162 (discussing why states may find it difficult to abide by their precommitment not to concede). Enders and Sandler write that the prisoner exchange involving Syria, Egypt, and Israel conducted

negotiations have become “the primary method of dealing with hostage incidents in many countries in the world.”¹⁶⁶ Declaring a policy that no one believes in is not an effective strategy.¹⁶⁷ Furthermore, failing to abide by your own self-imposed limitations weakens your bargaining position more than not declaring any policy at all.¹⁶⁸

3. Italy’s Anti-Kidnapping Statute

Another form of complete prohibition on concessions may be found in Italy. Though this time the policy is embodied in a statute, rather than soft-law, and its toll is borne mainly by private citizens rather than the state. Furthermore, in order to increase its effectiveness, the prohibition concentrates on the means of conceding rather than on the act of concession.

In the 1970s and 1980s, Italy had the highest number of kidnappings in Western Europe.¹⁶⁹ To combat kidnappings, Italy enacted the anti-kidnapping statute in 1991, which imposed a freeze on the assets of the kidnapped victim and her family to prevent the payment of ransom. It was enacted to eliminate incentives to abduct people for ransom, since nothing would be paid for the release of the victims.¹⁷⁰

After the enactment of the anti-kidnapping statute, the average annual number of kidnappings fell from 29 to 5.¹⁷¹ The Italian anti-kidnapping statute succeeded in terms of sequence in that after the Act there was less kidnapping, but it is unclear whether this is the result of the statute.¹⁷² The Italian statute served as an example to Colombia in its struggle against kidnappings. While the Italian statute was designed to

as the result of the 1969 hijacking by the PFLP of TWA Flight 840 with 113 people aboard proves that “even the staunchest supporters of no-negotiation policy may make an exception and negotiate if the cost of holding firm is too high.” ENDERS & SANDLER, *supra* note 21, at 165. The same holds true of the Iran-Contra incident, which forced President Reagan’s hand. *Id.* at 171.

¹⁶⁶ Dolnik, *supra* note 21, at 495.

¹⁶⁷ See Schelling, *supra* note 94, at 293.

¹⁶⁸ FISHER, URY & PATTON, *supra* note 96, at 139; Hudson, *supra* note 25, at 322 (“[T]he more outspoken a government is in advocating a hardline, the more humiliated it will be when it does yield, and the higher the political cost will be.”); see also The Winograd Report, *supra* note 19, at 504, § 15; cf. Atkinson et al., *supra* note 81, at 19 (noting that evidence shows “bluffing works against the bluffer’s final payoff”); Scott, *supra* note 81, at 215 (“Allowing deadlines to pass (DPASS) significantly lowers ransom payments.”).

¹⁶⁹ ELSTER, *supra* note 21, at 12, 22.

¹⁷⁰ *Id.*; see also THE KIDNAP INDUSTRY, *supra* note 3, at 39.

¹⁷¹ ELSTER, *supra* note 21, at 22.

¹⁷² See ANN HAGEDORN AUERBACH, RANSOM: THE UNTOLD STORY OF INTERNATIONAL KIDNAPPING 249–50 (1998). Pax Christi, for example, asserts that the number of kidnappings dropped because the Red Brigades terrorist organization was disbanded. THE KIDNAP INDUSTRY, *supra* note 3, at 40. Furthermore, the Italians learned how to circumvent the statute by concealing from authorities that a kidnapping had occurred or by disguising the way ransom was paid. *Id.*

combat mainly criminal kidnappings, in Colombia it was used to fight kidnapping generated mainly by terrorist organizations.¹⁷³

4. Colombia's Law Against Kidnapping

Colombia had the highest rate of kidnapping worldwide in 2000: an average of eight kidnappings a day.¹⁷⁴ In fact, it “led the world in terrorist-related kidnappings for almost every year from the late 1970s through 2003.”¹⁷⁵ The terrorists especially aimed to kidnap foreigners working for international corporations in Colombia, since they were often able to extract millions of dollars in ransom paid by their victims’ anti-kidnapping insurance policies.¹⁷⁶

In 1993, Colombia enacted an anti-kidnapping statute known as “Act 40” or the Law Against Kidnapping. The statute included three components: (1) the authority to freeze the assets of the victim and her family to prevent them from paying ransom; (2) the prohibition on the sale of kidnap and ransom insurance policies; and (3) the prohibition on providing support of professional kidnap response negotiators to the families of the kidnapped victims.¹⁷⁷

This statute, however, did not bring about the desired results.¹⁷⁸ It failed to reduce the rate of kidnappings in Colombia due to several factors: *First*, the Colombian Constitutional Court declared unconstitutional the statutory provisions that prevented the family from paying ransom. It ruled that the government could not freeze the assets of the victim and her family. The Court decided that the victim’s constitutional rights to life and freedom prevailed over the public interest in preventing future attacks.¹⁷⁹ Thus, a major part of the statutory scheme to combat kidnapping never took effect.¹⁸⁰

Second, even the parts of the statute that were held constitutional—the ban on selling kidnap and ransom insurance—did not bring about the desired results. These provisions were circumvented by signing insurance policies outside Colombia. In addition, the families of

¹⁷³ KIDNAPPING, *supra* note 38, at 7.

¹⁷⁴ THE KIDNAP INDUSTRY, *supra* note 3, at 27; ELSTER, *supra* note 21, at 14.

¹⁷⁵ Forest, *supra* note 30, at 779.

¹⁷⁶ THE KIDNAP INDUSTRY, *supra* note 3, at 67–81.

¹⁷⁷ *Id.* at 39; ELSTER, *supra* note 21, at 22–23.

¹⁷⁸ Though some assert that while the statute was in force there may have been a twenty percent reduction in the number of kidnappings. See PNUD, UN-FUNDING THE WAR: A STRICT CONTROL OF INCOME SOURCES 4, available at <http://www.pnud.org.co/2003/EnglishVersion/Chapter12.pdf>.

¹⁷⁹ Corte Constitucional [C.C.] [Constitutional Court], noviembre 24, 1993, Sentencia C-542/93 (Colom.). See THE KIDNAP INDUSTRY, *supra* note 3, at 39, for the unofficial English translation.

¹⁸⁰ THE KIDNAP INDUSTRY, *supra* note 3, at 40.

kidnapped people stopped reporting the incidents to the authorities, as has happened in Italy.¹⁸¹ The ban was ultimately revoked in 2002 under the pressure of international insurance companies.¹⁸²

It may be concluded, that all three countries discussed—the United States, Italy, and Colombia—completely prohibit concessions to terrorist kidnappers, whether done through a direct prohibition as in the United States or indirectly by banning the means that enable concessions as in Italy and Colombia. The United States bans the government from conceding, while Italy and Colombia prohibited the individuals from paying ransom. Each country's regulation is aimed at addressing the specific kind of blackmail that terrorists exercise with regard to their nation. In the Italian and Colombian context, kidnapping is primarily an economic game directed at the family of the victim. In the United States, by contrast, the private prisoners are generally used to extract concessions directly from the public rather than the private. Israel is more similar to the United States than Italy or Colombia in this regard.

These attempts have had limited success either because the state could not abide by its own policy—as has happened at times in the United States—or because the families of the victims found a way to circumvent the limitations—as has happened in Italy and Colombia. Furthermore, the constitutionality of complete prohibitions is doubtful, as was ruled by the Colombian Constitutional Court. These prohibitions may compromise too greatly the constitutional rights of the victim and her family in favor of the public interest.

It should be emphasized that having an across-the-board prohibition on negotiations and concessions is the most severe form of having content-based restrictions on negotiations with terrorists. When there is no such declared clear-cut approach, even if the state has content-based red lines, it enables it some flexibility in specific cases. Negotiators can validly assure kidnappers that, although some demands cannot be met, this does not mean that other demands cannot be fulfilled. The Jewish law provides such an example of content-based restrictions that fall short of a complete prohibition on concessions, as discussed below.

¹⁸¹ Even before the statute banning the payment of ransom, the families of kidnapped victims often did not involve the Colombian authorities because of their famous positions against the payment of ransom. “[T]he Colombian police were more concerned about catching kidnappers than with getting the victims back alive.” *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1283 (1980).

¹⁸² ELSTER, *supra* note 21, at 23.

B. *Selective Ban: Setting Maximum “Prices” or Red Lines*

From early times, Jewish law dealt extensively with the question of the appropriate response to kidnapping. The issue was brought to the fore by numerous kidnappings of members of the Jewish community by criminals for monetary enrichment.¹⁸³ Redemption efforts were limited to the economic resources of the community, which lacked the ability to respond by force, as a state may act.

Jewish law presents a very sophisticated understanding of the kidnapping cycle. By the second century, Jewish law understood that it must regulate the field of negotiations for redeeming captives. Despite treating redemption of captives as the highest possible duty (*mitzvah*),¹⁸⁴ Jewish law forbids paying more for the victims’ redemption than their value.¹⁸⁵

This prohibition and cap on prices was adopted in the *Mishna* days. The *Mishna* states: “One may not ransom captives for more than their value. This prohibition was enacted for the benefit of society.”¹⁸⁶ The *Mishna* uses the rationale of *Tikkun Ha’olam*, which literally means to make the world a better place. The Talmud discusses two potential rationales to justify this prohibition: The first rationale is to protect the community’s economic resources; the second is to protect members of the community from further kidnappings triggered by the increased appetite of kidnappers in light of a hefty ransom paid. It presents an understanding that conceding to ransom demands may supply the incentives for further kidnappings.¹⁸⁷ Maimonides holds by the second approach.¹⁸⁸ That regulation for the sake of *Tikkun Ha’olam* is about

¹⁸³ Michael Vigoda writes that the situation Israel currently faces of terrorist kidnapping differs sharply from kidnapping for ransom purposes experienced by Jewish communities throughout the centuries. The Israeli society is at war with the terrorists and at war, the individual—whether in battle or captivity—must risk her life for the sake of the collective. Thus, the proper response to terrorist kidnapping is a rescue mission, even if it endangers human lives. But conceding to terrorists’ demands is not justified as this means losing the war. VIGODA, *supra* note 104, at 3, 13–16.

¹⁸⁴ See *infra* Part IV.H.

¹⁸⁵ *Mishna, Gitin 4: 6*, in 2 TALMUD BAVLI: TRACTATE GITTIN (Rabbi Hersh Goldwurm & Rabbi Yisroel Simcha Schorr eds., Schottenstein ed. 2001) [hereinafter *Mishna, Gitin*]. There is controversy whether this was a prohibition on redemption of kidnapped victims for more than their value or whether this was merely releasing the community from the duty to redeem the victim for any price but the community was allowed to redeem her anyhow if there was danger to her life. VIGODA, *supra* note 104, at 8. See also Joseph Isaac Lifshitz, *The Maharam of Rotenberg and the Ransom Which Was Never Realized*, in CAPTIVES, *supra* note 126, at 133, 144–45 (suggesting that there was no duty to redeem for more than the captives’ value but there was no prohibition on redemption in such cases either).

¹⁸⁶ See *Mishna, Gitin*, *supra* note 185.

¹⁸⁷ *Id.*

¹⁸⁸ *Matnot Aniyim—Chapter 8*, CHABAD.ORG, at Halacha 12 (Eliyahu Touger trans.), available at http://www.chabad.org/library/article_cdo/aid/986709/jewish/Chapter-8.htm.

creating the right incentives for action is true in other *Mishna* and Talmudic contexts as well.¹⁸⁹

So, what does this formula of “not paying more than their value” mean? Interpretations range from ancient interpretations to more contemporary approaches.¹⁹⁰ Under the first rationale for the prohibition, this formula takes into account the specific captive’s status and economic worth. It assumes that the captive will be able to return the money to the community, so that the burden will be borne mainly by him.

Under the second rationale, this formula forbids the Jewish community to pay more than the money non-Jewish people are willing to pay for redeeming their loved ones. This approach is intended to guarantee that kidnapping of Jews does not become more attractive than kidnapping non-Jews.¹⁹¹

This prohibition seems to have applied at the community level alone. Jewish law differentiates between enabling the families to pay any price for redeeming their loved ones, or at least turning a blind eye, and prohibiting the community from doing just that.¹⁹² This differentiation stems from an understanding that, in any event, no prohibition would have prevented the family from acting accordingly. It thus reflects a humane understanding of the family’s unbearable situation.¹⁹³ Jewish law thus avoids the United States’ mistake of setting a complete ban, while also not making the mistakes of Italy and Colombia of setting unconstitutional limitations on the victims and their families.

Yet, Jewish law cannot provide Israel and other western countries with the remedy. Each of the countries discussed, including Israel, has attempted to set content-based red lines but was unable to abide by them. The next Part discusses why democratic societies concede to terrorist demands and find it difficult to adhere to content-based limitations.

¹⁸⁹ See Babylonian Talmud, tractate Gitin 36a (regarding the *prosbul*).

¹⁹⁰ Some Jewish scholars interpreted this formula to mean that the captive’s price was determined according to the price people were paying in the market for slaves. Under this interpretation, the community should redeem the captive by paying the money his kidnappers would get were they to sell him in the open market. Eliezer Bashan (Shterenberg), *Redeeming Captives in the Jewish Society in the Mediterranean Countries: From the Middle Ages until the New Era 63–64* (1971) (unpublished Ph.D. thesis).

¹⁹¹ *Id.*

¹⁹² Thus, for example, according to the *Tosafos* and *Rosh*: “Even according to the second approach (*viz.* the prohibition was enacted to avoid further abductions), a husband is permitted to redeem his wife for an exorbitant price because a man and his wife are considered as one, and no limits are set on the rights of a person to redeem himself.” See *Mishna, Gitin*, *supra* note 185, at 26; see also *Tractate Ktuvot 52a & b*, in 2 Talmud Bavil: Tractate Gittin, *supra* note 185.

¹⁹³ See VIGODA, *supra* note 104, at 10.

IV. WHY DO DEMOCRATIC SOCIETIES CONCEDE TO TERRORISTS' DEMANDS?

Every society has individual characteristics that make it more or less susceptible to terrorists' demands. This Part analyzes why democratic societies seem to be incapable of abiding by a policy of no-concessions. Understanding democracies' reasons for conceding to terrorists' demands will enable us to shape a statute that may improve democracies' bargaining power in future kidnap situations.

A. *Liberal Values that Sanctify Human Life*

Many democratic societies place human life as the highest value, and many within these societies are not willing to put any price tag on human life. Democracies do not view humans as bargaining chips and disdain the term "price" to discuss transactions with the terrorists for the release of victims. This perception aligns with Immanuel Kant's perception that people have dignity but not a price (or its equivalence).¹⁹⁴ Such a deontological attitude treats human life as an absolute value that should not be weighed against other competing interests and values. The irony is that at the same time that such an approach sanctifies human life to the degree that "any" price justifies the redemption of the captive, it contributes to the existence of a market for exchange of human beings.¹⁹⁵

B. *Social Ethos of Leaving No Soldier Behind*

Equally as pressing is the social ethos of leaving no soldier behind.¹⁹⁶ This ethos characterizes not only the Israeli army, but also the United States Army in its Soldier's Creed. The ethos has become a symbol of American culture and the subject of Hollywood films such as "Black Hawk Down"¹⁹⁷ and "Saving Private Ryan".¹⁹⁸ Moreover, it is argued that this commitment to redeem kidnapped soldiers encourages

¹⁹⁴ IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS: TEXT AND CRITICAL ESSAYS 60 (Robert Paul Wolff ed., Lewis White Beck trans., 1969).

¹⁹⁵ See Mack, *supra* note 126, at 39.

¹⁹⁶ See, e.g., Emily Amrousi, 'We Do Not Sanctify Death,' ISR. HAYOM (June 22, 2012), http://www.israelhayom.com/site/newsletter_article.php?id=4804 (interviewing Professor Asa Kasher, the author of the IDF's Code of Ethics and a member of the Shamgar Commission).

¹⁹⁷ BLACK HAWK DOWN (Sony Pictures 2001).

¹⁹⁸ SAVING PRIVATE RYAN (Dreamworks Pictures 1998); see also Elizabeth D. Samet, *Leaving No Warriors Behind: The Ancient Roots of a Modern Sensibility*, 31 ARMED FORCES & SOC'Y 623, 625-26 (2005). Samet traces the ethos of leaving no soldier behind to ancient times. *Id.* at 626.

soldiers to fight and serve with rigor knowing that, if they are hurt or captured, the state will come to their rescue. It affects the national morale and strengthens the bonds of society.¹⁹⁹

The solidarity that is embodied in this ethos is strengthened in Israel by the fact that young members of Israeli society are required by law to serve in the army. Thus, many believe that it is society's responsibility to save them if they are abducted.²⁰⁰ Nonetheless, not all agree that Israel has "one Israeli ethos,"²⁰¹ and some soldiers have even signed letters, individually and collectively, that request that no concessions be made if they are kidnapped.²⁰²

C. *The Porous Nature of Democratic Societies*

Even aside from values and ethos, by its nature, a democratic society will predictably not deal well with terrorist kidnapping, regardless of it being Kantian, Jewish, Christian or what have you. By their nature, democracies are porous, meaning that there are multiple entry points for highly motivated interests.²⁰³ As detailed above, in Israel, interest groups formed to promote the release of kidnapped soldiers by pressuring politicians to succumb to terrorist demands.²⁰⁴ "All over Europe, families rallied, pressuring governments to pay" for the releases of kidnapped victims of terrorism.²⁰⁵ Similarly, the United States was unable to deal intelligently with the widows group organized after the September 11 attacks and allowed the entire rebuilding of Ground Zero to be derailed for a decade in a public outpouring of grief, demands for memorials, demands for greater compensation, and a whole mix of politics of grief.²⁰⁶ There was little capacity to resist this

¹⁹⁹ See The Winograd Report, *supra* note 19, at 503, § 11.

²⁰⁰ Saul Israeli, *Should We Concede in Redeeming Hostages and Captives*, 17 TORAH SHEBEALPE 69, 74 (1975) (writing that since the state sends the soldiers to war to protect the nation, there is an unwritten obligation that the state should take reasonable steps to redeem them from captivity, if that redemption does not endanger state security).

²⁰¹ The Winograd Report, *supra* note 19, at 507, § 30. In fact, Israel did not try to retrieve its captured sons and daughters after the Lavon Affair or the War of Attrition (1969–1970). Lebel & Rochlin, *supra* note 58, at 363.

²⁰² See, e.g., Rafi Reshef, *The 12th Grader's Letter: Against Prisoner Swap—Even If They Fall in Captivity*, NANA 10 (Oct. 25, 2011), <http://news.nana10.co.il/Article/?ArticleID=840881>. Some Americans stationed in Iraq sent similar letters. See Clendenin, *supra* note 157, at 770 (describing a letter one aid worker in Iraq sent to her family).

²⁰³ See, e.g., Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEG. STUD. Q. 149 (1994); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress: or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

²⁰⁴ See *supra* Part I.

²⁰⁵ Callimachi, *supra* note 102.

²⁰⁶ See Robert Kolker, *The Grief Police*, N.Y. MAG., Nov. 28, 2005, <http://nymag.com/nymetro/news/sept11/features/15140/index2.html>.

widows group, even though the United States bore no responsibility for the actual deaths.

D. *The Prevalence of Short-Term Considerations*

Concessions to terrorists manifest the prevalence of short-term considerations in societies' decision-making. The kidnapping dilemma requires balancing between short-term considerations in favor of saving the victim and long-term considerations to avoid further kidnappings. Though it may be preferable not to concede in order to reduce terrorist incidents in the long run, many societies are unable or unwilling to pay the short-term price of such a policy.²⁰⁷

Furthermore, from the decision-makers' point of view, this gap between the short and long-term perspectives may be exploited for political gain.²⁰⁸ The release of the captives reaps immediate benefits to the leaders' popularity while prices will be paid by future leaders.²⁰⁹

E. *The Identifiable Single Victim Empathy Phenomenon*

Concessions to terrorists are not only the result of societal values, but also exhibit the salience effect discussed in the behavioral literature. In late 1987, an eighteen-month-old baby named Jessica fell in a well in Texas. No expense was spared in digging a second well to save Jessica, under truly extraordinary circumstances. At the end of the saga, it was pointed out, to great public dissatisfaction, that the money spent digging out baby Jessica could have paid for an advanced baby immunization program, and saved many more lives. The difference between a statistical life, necessarily abstract, and an actual child will always result

²⁰⁷ “[I]n the long run, “no ransom” is likely to be proven a most effective policy against hostage seizures. However, in the short run, the implementation of the policy and the establishment of its credibility might be exceedingly costly.” Nehemia Friedland, *Hostage Negotiations: Dilemmas About Policy*, in PERSPECTIVES ON TERRORISM 211 (Lawrence Zelic Freedman & Yonah Alexander eds., 1983).

²⁰⁸ See *supra* Part I. President Carter was frank enough to admit that popularity concerns matter. See Tierney, *supra* note 128, at 141; Knickmeyer, *supra* note 152 (writing that most of the time European governments are weak and cannot withstand public pressure to release their kidnapped citizens).

²⁰⁹ Lapan & Sandler, *supra* note 162, at 20.

in the saving of the actual, the salient.²¹⁰ The same dynamics were at work in Chile with regard to saving the Chilean miners.²¹¹

Moreover, psychological studies show that people prefer to save the life of a known single victim over the lives of a group, even if the individuals of the group are identified.²¹² Information about an individual is processed differently than information about a group because people are more able to adopt the victim's perspective when she is an identified single person. It sparks elements of direct self-experience. This in turn will be reflected in people's willingness to help the victim.

This general irrational psychological phenomenon, which leads people to save an identified individual rather than an identified group, has direct bearing on the way democratic societies handle terrorist kidnapping. Because society and decision-makers can so strongly identify with the victim and the family, social empathy drives society to do everything in its power to relieve them from their suffering.²¹³

This characteristic, too, is not unique to the Israeli society. But the identifiable single victim empathy phenomenon may be exhibited more severely in Israel because of the small size of the nation as well as the relative homogenous background of the victims of terrorist kidnapping, which seem to belong to the mainstream part of society.

F. Rational Choice

Some even contend that acquiescing to terrorists' demands is a rational decision of the individuals composing society. Each member of society assumes the increased risk of being kidnapped based on a policy of concessions in return for the increased likelihood that, if kidnapped, the state would save them too.²¹⁴

²¹⁰ See, e.g., Karen E. Jenni & George Loewenstein, *Explaining the "Identifiable Victim Effect,"* 14 J. RISK & UNCERTAINTY 235 (1997) (suggesting that the identifiable victim effect may be attributed mainly to two factors: (1) the certainty that the identified victim will die, if not saved; and (2) the percentage of the reference group saved effect—baby Jessica “comprised 100% of the risk group”).

²¹¹ See *Obama Salutes Chile and Rescue*, N.Y. TIMES, Oct. 13, 2010, <http://www.nytimes.com/2010/10/14/world/americas/14obamachile.html>.

²¹² See, e.g., Tehila Kogut & Ilana Ritov, *The "Identified Victim" Effect: An Identified Group, or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING 157, 165 (2005) (“[T]he single identified victim evoked more distress and elicited more contributions than the group of identified victims.”); George Loewenstein, Deborah A. Small & Jeff Strnad, *Statistical, Identifiable, and Iconic Victims*, in BEHAV. PUB. FIN. 32–35 (Edward J. McCaffery & Joel Slemrod eds., 2006) (discussing how concreteness and particularization of the victim affects people's decisions).

²¹³ See *supra* Part I.

²¹⁴ Alon Klement, *Statistical Lives* (July 10, 2010), <http://aklement.wordpress.com/2010/07/10/%D7%97%D7%99%D7%99%D7%9D-%D7%A1%D7%98%D7%98%D7%99%D7%A1%D7%98%D7%99%D7%99%D7%9D-2>.

G. Constitutional Balancing

The psychological preference to save identifiable single victims over groups is legitimized and even supported by comparative constitutional law. Constitutional law requires balancing between the constitutional rights of the kidnapped victims and societal interest in safety. On the one hand, the kidnapped victim's constitutional rights to freedom, life, bodily integrity, and human dignity are clearly infringed. Even though the terrorists are the ones infringing upon those constitutional rights, in some democracies—including Germany and Israel—the state is obligated to affirmatively and actively protect these positive constitutional rights of its citizens.²¹⁵ On the other hand of the balancing dilemma, there is the public interest in saving “statistical lives” of others, who are as of yet unidentified and may possibly be endangered by the early release of terrorists from prison and the increased appetite of the terrorists to kidnap again. In this kind of a balancing dilemma, constitutional law may give precedence to the constitutional rights of the former over the statistical rights of the latter, which are treated as comprising mere public interest in safety.²¹⁶ Only if there is high probability that the public interest will be seriously endangered will the courts prefer to protect it over infringed constitutional rights of individuals. The courts often find that this probability test is not met and the constitutional rights prevail.²¹⁷ This kind of constitutional analysis implies the duty to redeem the captives as long as the prices paid do not create too great a risk to the public interest in safety.

²¹⁵ See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 518–21 (David Dyzenhaus & Adam Tomkins eds., Doron Kalir trans., 2012). For criticism, see Rivka Weill, *Did the Lawmaker Use a Canon to Shoot a Flea? On Proportionality in Law*, 15 L. & BUS. J. 337 (2012). See also Oren Gazal-Ayal & Amnon Reichman, *Public Interests as Constitutional Rights?*, 41 MISHPATIM 97 (2011) (writing that the question of how direct is the infringement may affect our analysis whether there exists an infringement of a constitutional right or not). Treating constitutional rights as positive rights is not the dominant approach in comparative constitutional law. See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2000); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006).

²¹⁶ Klement writes that an identified life is “worth more” than a statistical life. He explains this preference by two normative arguments: *First*, the government must respect its citizens' preferences to take certain calculated risks on their lives in return for some benefits (a *welfare* argument). *Second*, the government is not allowed to sentence to death an identified innocent person but is authorized to take calculated risks on its citizens' lives (a *moral* argument). He does not however place this preference for an identified life within the context of Israeli constitutional law. Klement, *supra* note 214.

²¹⁷ This line of reasoning first emerged in Israel as the State was founded. See H CJ 73/53 Kol Ha'am Co. v. Minister of Interior 7 PD 871 [1953] (Isr.). *But see* H CJ 466/07 Zehava Galon MK v. Attorney General (Jan. 11, 2012), Nevo Legal Database (by subscription) (Isr.) (where the majority opinion left intact the statute prohibiting the entrance of Palestinians into Israel).

H. *Religious Ethos of Redemption*

While liberal values and even a “no-soldier-abandoned” ethos are not unique to Israel, the Jewish tradition is. The ethos of rescuing every soldier is strengthened by Jewish traditions that emphasize the religious duty (*mitzvah*) to redeem abducted members of the community. Maimonides wrote “[t]here is no *mitzvah* as great as the redemption of captives.”²¹⁸ Jewish law considers being in captivity to be worse than suffering from hunger or even than being dead.²¹⁹ Historically, Jewish communities in the Diaspora have gone to great lengths to redeem their members.²²⁰

The duty to redeem is tied to the story of the Jewish nation’s birth. Israel became a nation only after its redemption from slavery in Egypt.²²¹ This collective redemption is celebrated each year anew in every Jewish home during Passover.

Thus, strong individual and collective values form the very core of the Jewish ethos to redeem captives, and this obligation cannot be easily resisted. The Israeli debate is thus centered on the question what is implied by this ethos in the case of terrorist kidnapping, not on the question of whether the ethos exists.²²²

Similar to Jewish acts of redemption conducted in the first and second centuries, solidarity acts took place also among the Christian communities regarding their captive members. In Christianity, redemption of captives became a religious imperative in some writings beginning in the third century.²²³ The second half of the twelfth century marked a major shift in Christian attitude towards captives. Before then, captives were often considered losers, cowards, and left to face their destinies as slaves.²²⁴ After Saladin conquered Jerusalem and captured many Christians, Pope Innocent III became personally involved in negotiations for releases of captives. He portrayed Jesus as a quasi-

²¹⁸ *Matnot Aniyyim—Chapter 8*, *supra* note 188, at Halacha 10.

²¹⁹ Babylonian Talmud, Tractate Bava Batra 8:2.

²²⁰ See, e.g., Bashan (Shterenberg), *supra* note 190.

²²¹ Sagit Mor, *All’s Well That Ends Well? Returning from Captivity in Talmudic Literature*, in CAPTIVES, *supra* note 126, at 61, 80.

²²² A contrary ethos to redemption at any price runs along the following lines: The Maharam of Rotenberg was the leader of German Rabbis in the 13th century. King Rudolf I captured the Maharam of Rotenberg and demanded a great sum of money to release him. The Maharam of Rotenberg died while in captivity. It is attributed to him that he refused to be redeemed at too great a price for fear of encouraging further attacks. Lifshitz, *supra* note 185, at 133–47.

²²³ Youval Rotman, *Ransom and Exchange of Captives as a Political Act: Development of a Medieval Custom in Judaism, Christianity, and Islam*, in CAPTIVES, *supra* note 126, at 43, 47–48.

²²⁴ Friedman, *supra* note 153, at 86, 106; Merav Mack, *Crossing Divides: Captives, Merchants and Diplomats at the Time of the Crusades*, in CAPTIVES, *supra* note 126, at 109–11.

captive. He suggested that one of the aims of the crusade was to redeem captives.²²⁵

To conclude, as the combination of these various democratic characteristics are shared by many western societies, terrorist kidnapping poses a serious challenge to all. These characteristics lead diverse democratic societies to concede to terrorist kidnappers' demands.

V. CAN A PROCESS-STRUCTURAL APPROACH COMBAT TERRORIST KIDNAPPING?

Democracies face the following challenge: How can they take the specific individual into consideration, while bolstering their bargaining power and reducing terrorists' incentives to kidnap? This Article proposes that states should adopt a statute applicable to future cases of kidnapping, thus avoiding the "single victim empathy" and fulfilling the requirement of the generality of the law.²²⁶

Such a statute should only set structural-procedural limitations that can achieve the paradoxical outcome of enhancing decision-makers' bargaining power. At the same time, the statute will allow enough flexibility to decision-makers to make the best possible decision in terms of content, when taking into account the specifics of the case. Structural limits will lead states to reject deals whose "prices" are unreasonable without declaring this aim outright. The limitations will also enable states to endorse deals when the benefits outweigh the costs. No less important, structural limitations will lead the terrorists to offer more reasonable deals, knowing that otherwise the transaction will not be approved. Thus, structural limitations will achieve in an indirect way what content-based red lines try to achieve directly.

To establish these claims, Section A discusses a few examples of the kind of procedural limitations that a model statute may embody. Sections B and C discuss why such a statute that focuses on procedural-structural limitations is preferable to both having no regulation and to competing proposals to impose content-based restrictions.

²²⁵ Friedman, *supra* note 153, at 90–91; Mack, *supra* note 126, at 120–31.

²²⁶ LON L. FULLER, *THE MORALITY OF LAW* 46–49 (rev. ed. 1969).

A. *A Model Statute: Possible Procedural Limits*

1. Two-Tier Ratification Process, Secrecy, and Absolute Majorities

a. Two-Tier Ratification Process

States' ratification processes should be set in a statute, rather than be decided ad hoc, to achieve the benefits of precommitment. This ratification process should include the need to obtain the separate consent of both the government and a legislative subcommittee specializing in nonpublic reviews of security matters—the Knesset's Foreign Affairs and Defense Subcommittee for Intelligence, Secret Services, Captives and Missing Soldiers in the Israeli case.²²⁷

Having a two-tier ratification process will require the head of the executive branch to bring a deal that will gain bipartisan support since opposition members form part of the legislative subcommittee. Heads of states will thus be required to weigh apolitical public interests and not allow narrow political considerations to weigh too heavily on the decision.²²⁸

Furthermore, such interbranch cooperation will increase the democratic legitimacy of decisions. When approval must be obtained from both the legislative and executive branches, it creates a system of checks and balances.²²⁹

In addition, a two-tier ratification process has proved beneficial in enhancing the bargaining power of various bodies.²³⁰ For example, the United States bicameral ratification process for international agreements may make a deal more difficult to achieve, but makes the final agreement reached more beneficial to the United States.²³¹ Hamas is already acting in such a way, by requiring the consent of both the Hamas leadership in Gaza and the Hamas leadership in

²²⁷ For this subcommittee website, see http://www.knesset.gov.il/committees/eng/committee_eng.asp?c_id=4. This subcommittee was established in 1974 in response to parents' demands after the Yom Kippur War that a special body will deal with missing soldiers. See Lebel & Rochlin, *supra* note 58, at 365. Interestingly, in the United States as well, select committees are called to take a greater role in supervising the war on terror. See Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1588 (2013).

²²⁸ Moreover, requiring such interbranch cooperation aligns with the democratic requirement that general pardons should be enacted by the legislature. See *infra* Part V.A.5.

²²⁹ In fact, the United States Supreme Court has regularly required cooperation of the legislative and executive branches when dealing with balancing of security and liberty concerns in times of war. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004).

²³⁰ FISHER, URY & PATTON, *supra* note 96, at 133.

²³¹ Putnam, *supra* note 94, at 440–41; Schelling, *supra* note 94, at 286–87.

“Damascus/Qatar,” thus strengthening their bargaining power when facing Israel.²³²

Let’s illustrate the effects of such precommitment on Israel’s bargaining power. Currently there is vagueness in Israeli law regarding the identity of the governmental body that must ratify a deal with terrorists. The PM has a lot of room to maneuver. Sometimes, the PM submits the transaction to the government at large for approval, as happened in the Shalit deal.²³³ But at other times, the PM submits the deal for ratification only to the Security Cabinet, a governmental subcommittee, as has happened in the Grapel deal.²³⁴ In such cases, the government is collectively responsible for the deal, even though its members may not even know the deal’s contents, since the Security Cabinet follows a secrecy protocol. There may not even be a majority in the government were the deal brought to the government rather than its subcommittee.²³⁵ The PM currently does not seek the consent of the legislature or any of its subcommittees to such a deal.

The fact that the PM enjoys flexibility and is perceived as strong enough at home to easily garner support for transactions is translated into a weaker bargaining position when facing the terrorists. The PM’s strength conveys to the terrorists the message that he can approve a more favorable deal from their perspective.²³⁶ Stricter processes for ratification will help Israel strike a better deal, because terrorists will know that deals will not be ratified if unreasonable.²³⁷ As Thomas Schelling wrote, “in bargaining, weakness is often strength” and vice versa.²³⁸

²³² See JIM ZANOTTI, CONG. RESEARCH SERV., R41514, HAMAS: BACKGROUND AND ISSUES FOR CONGRESS 19 (2010), available at <http://www.fas.org/sgp/crs/mideast/R41514.pdf> (noting the way Hamas reaches decisions in general).

²³³ Barak Ravid et al., *The Government Approved the Shalit Deal*, HAARETZ, Oct. 11, 2011, <http://www.haaretz.co.il/news/shalit-deal/1.1521464> (twenty-six ministers in favor and three against).

²³⁴ *Israel Approves Swap Deal for Jailed US-Israeli*, WALL ST. J., Oct. 25, 2011, <http://online.wsj.com/article/AP1e1864171ca649dabce6208ed13f6311.html> (writing that Israel’s Security Cabinet approved to “swap 25 Egyptian prisoners for a U.S-Israeli citizen arrested in Egypt”).

²³⁵ Moreover, the Supreme Court denied a petition arguing that such a decision should have been made by the government at large rather than a subcommittee of it. The Court did not view the specific decision as one that requires government’s approval. See H CJ 7793/11 MK Dr. Michael Ben-Ari v. Prime Minister of Isr. Mr. Benjamin Netanyahu (Oct. 26, 2011), Nevo Legal Database (by subscription) (Isr.).

²³⁶ Putnam, *supra* note 94, at 440–41, 449, 459.

²³⁷ Thus, for example, in barricade situations, experts write that “[t]he negotiator should never be the same person as the commander of the operation, as the possibility of deferring demands onto a higher authority is one of the most important tools in the negotiator’s toolbox.” Dolnik, *supra* note 21, at 500.

²³⁸ See Schelling, *supra* note 94, at 282.

b. Secrecy

Each of these ratifying bodies will conduct its deliberation in secrecy and reveal only the final outcome, without disclosing the size of the majority supporting the decision.²³⁹ Secrecy is sometimes needed to enable international agreements.²⁴⁰ Secrecy will diminish the pressures to concede that might be exerted by the families of the kidnapped victims.²⁴¹ It might also be preferable for each of the ratifying bodies to vote by secret ballot to enable members' true opinions to be expressed. Without secret ballot, members might fear that their opinions will be revealed and judged, and this in turn could affect the way they will cast their votes.²⁴²

The problem with requiring a secret ballot in the government is that it diminishes the democratic accountability of the government to the public, which is a major tenet of democratic government.²⁴³ Imposing secrecy on the government's discussions, while revealing only the final outcome, seems to strike a better balance between the collective responsibility of the entire government and a state's security interests.²⁴⁴ In contrast, there is more support for the proposition that a legislative subcommittee may decide in this matter by secret vote.²⁴⁵

²³⁹ If the size of the majority is publicized, this may affect members' voting. They may fear that the way they casted their vote may be revealed indirectly.

²⁴⁰ Putnam, *supra* note 94, at 436.

²⁴¹ On the importance of conducting discussions while maintaining secrecy and even holding a secret ballot, see Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97, 105–16 (1998); James D. Fearon, *Deliberation as Discussion*, in *DELIBERATIVE DEMOCRACY*, *supra*, at 44–68. In the Israeli context, the default rule is that the discussions of the Knesset's Foreign Affairs and Defense subcommittee for Intelligence, Secret Services, Captives and Missing Soldiers are secret. See KNESSET, INTERNAL PROCEEDINGS MANUAL § 120, available at <http://main.knesset.gov.il/Activity/Documents/RulesOfProcedure.pdf>.

²⁴² Revealing the government's discussions that are "secret" is a severe criminal offense though this prohibition is not enforced on Israeli government members de facto. See Penal Law, 5737–1977, § 113a (1977) (Isr.), which provides that revealing a secret matter without authorization may subject the offender to fifteen years of imprisonment. See also RUBINSTEIN & MEDINA, *supra* note 130, at 856.

²⁴³ Israel's Government's Internal Proceedings Manual does not provide for a secret ballot. See GOVERNMENT, INTERNAL PROCEEDINGS MANUAL, available at <http://www.pmo.gov.il/Secretary/Documents/takanon33.pdf>.

²⁴⁴ In Israel, *Basic Law: The Government* explicitly authorizes the government to decide that certain matters should be kept secret as a matter of national security, international affairs or other state crucial interest. See *Basic Law: The Government* § 35 (2003) (Isr.).

²⁴⁵ In Italy, for example, parliament used the secret vote from the nineteenth century and until 1988 to enable MPs to vote according to their conscience. See Torbjörn Bergman, Wolfgang C. Müller, Kaare Strøm & Magnus Blomgren, *Democratic Delegation and Accountability: Cross-national Patterns*, in *DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES* 109, 112 (Kaare Strøm, Wolfgang C. Müller & Torbjörn Bergman eds., 2003). Thus, for example, when individual fates are on the line, Knesset Members have been permitted under Israeli *Basic Laws* to vote by secret ballot in order to free them from individual pressures and enable members to express their true opinions. In fact, both the President and the State Comptroller are appointed in the Knesset through secret ballot. See *Basic Law: The President of the State*, 18 LSI 111, § 7 (1963–1964) (Isr.); *Basic Law: The State Comptroller*, SH No. 30, § 7 (Isr.). Allowing vote by secret ballot

c. Absolute Majorities

Both ratifying bodies should decide by absolute majorities—that is with the support of at least one half of all the members comprising the body plus one. This will guarantee that the decision is not made because of coincidental support of those members present at the time of vote and actually expressing an opinion, as is the case with regular majorities. Absolute majority requirement means that those abstaining from the vote are not counted as supporting it and thus it increases members' accountability and responsibility to the decision. At the same time, absolute majority requirement respects majority rule.

2. Special Standing to Heads of Security Services

States should also provide in the statute special, official standing to the heads of the security services—e.g., the Chief of Staff, the head of the Intelligence Agency, and the director of the Security Agency—in any process to ratify a deal. It should require each of the ratifying bodies to hear the three heads of security services' opinion before decision is made. The heads of security services should separately state their opinion with regard to the deal in front of each of the ratifying bodies. Their position should be kept secret from the public to avoid strategic behavior led by public pressure.

Heads of security services are the professionals with the accumulated information and experience necessary to make important decisions of this kind. They also represent the official bodies that bear the consequences of such decisions. After all, they have to provide solutions to any security threat that their state faces. Granting them official status by statute will require the elected bodies to hear the recommendations of the heads of security services before making any decision. It will guarantee a more informed decision-making process.²⁴⁶ It will require justification if a governmental decision is made contrary to their recommendations.²⁴⁷

Nonetheless, as appointed personnel subject to executive control, it would run against basic principles of separation of powers and democracy to grant these heads of security services a veto power over

in a parliamentary subcommittee will require amendment of the Knesset's Internal Proceedings Manual, § 113. See INTERNAL PROCEEDINGS MANUAL, *supra* note 241.

²⁴⁶ On the problems found in the decision-making process of the elected bodies in crisis time that may result from lack of appropriate dialogue between the security forces and the decision-makers, see the Winograd Report, *supra* note 19, 577–91.

²⁴⁷ On the culture of justification, see, e.g., Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM. RTS. 31, 32 (1994).

the decision to conduct a deal. They will thus enjoy the power to influence, not dictate, the final outcome.²⁴⁸

Let's illustrate the effects of such precommitment on Israel's bargaining power. Currently, these heads of security services enjoy no formal standing in prisoner swaps. At times, the PM handles the matter with his special envoy to the negotiations without involving other security personnel.²⁴⁹ The PM, the Defense Minister, and their aides may be the only ones exposed directly to the opinions of the heads of the security services. Requiring each of the ratifying bodies to hear the heads of security services speak individually about their positions, means the standing of these officials is also enhanced vis-à-vis the government.²⁵⁰

3. Declaring Death When Known

Another possible procedural limitation is to require that, if the executive branch has enough information to substantiate a declaration of death, the executive branch must officially declare the victim deceased before finalizing a deal.²⁵¹ Such a declaration will necessarily lower the price of the deal.²⁵² The balancing of interests is totally different when a state is trying to retrieve a body, rather than rescue a living victim.²⁵³ Indeed, if not for that difference, there would be no

²⁴⁸ See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (discussing the logic of the nondelegation doctrine).

²⁴⁹ See BERGMAN, *supra* note 15, at 575 (writing that Olmert and Dekel were handling the negotiations with Hamas for the release of Shalit while treating the head of security services as "at most advisers and sometimes not even this").

²⁵⁰ PM Peres and Defense Minister Rabin approved the Jibril transaction against the opposition of the Chief of Staff, Moshe Levi. *Id.* at 108–15. In fact, even the special envoy for the negotiations Shmuel Tamir opposed the Jibril deal believing that with patience a better deal from Israel's perspective can be reached. *Id.* at 108. More recently, Ehud Olmert concluded the deal with Hezbollah for retrieving the bodies of Regev and Goldwasser against the opinions of the director of the ISA, Yuval Diskin, and the head of the Intelligence Agency, Meir Dagan. They argued that the price about to be paid was too high for retrieving bodies. They asserted that this transaction will set a dangerous precedent with regard to the prospective deal for the release of Shalit, who was alive, and it was more important to rescue him. *Id.* at 550.

²⁵¹ In Israel, the authority to declare a missing soldier dead is in the hands of the Chief Rabbi of the Army. See Fallen Soldiers (Registration of Deaths) Law, 5727-1967, 21 LSI 110, § 3 (1966–1967) (Isr.); see also Yossi Sharabi & Yuval Sinai, *Declaration of a Missing Soldier as Dead that his Place of Burial is Unknown*, available at <http://www.netanya.ac.il/ResearchCen/JewishLaw/AcademicPub/Procedure/Pages/Soldiermissing.aspx>.

²⁵² Dolnik, *supra* note 21, at 510 ("the discount is large" when dealing with a body). Michael Vigoda, for example, argues that under Jewish Law retrieving a body cannot be at the cost of endangering human lives. VIGODA, *supra* note 104, at 19–20.

²⁵³ The endgame is preserving the deceased person's human dignity alone by burying the body. Retrieving the body is also an illusory way of making the body politic whole again. See Samet, *supra* note 198.

incentive for terrorists to keep a victim alive, since the same exchange could be made for a body.²⁵⁴

The lack of knowledge regarding the victim's fate has a great impact on the terms of the deal. It is important to declare the victim dead before negotiating a transaction because, absent that declaration, the uncertainty creates pressure on governments to concede simply to bring closure to the matter that weighs heavily on the public.²⁵⁵ A declaration by the government when death is known means a state takes charge of its own collective self-care, and the terrorists' leverage over society in the form of control of information is thus reduced.

To be clear, this Article is not suggesting new criteria or procedures for deciding when a person is deceased. States have already set criteria and processes to determine when missing people are deceased.²⁵⁶ Instead, it is argued that, when enough information has been amassed to substantiate a declaration of death, then states *must* declare it.

Let's illustrate the effects of such precommitment on Israel's bargaining power. The need for closure has an added dimension in Israel when it comes to the legal status of wives of missing husbands. These wives are considered *Agunot* (chained women) under Jewish law and as such are prohibited from marrying again and having children until the fate of their husband is clarified.²⁵⁷ In fact, one of the driving forces of the Goldwasser and Regev deal was the desire to prevent Karnit Goldwasser from becoming an *Agunah*.²⁵⁸ Such a declaration of death will change the legal status of the wife from *Agunah* to a widow and thus enable her to continue on with her life.

Until Operation Protective Edge, since there was no precommitment to declare a victim dead when death was known, on more than one occasion the executive branch refrained from making such a declaration because of families' pressure. Families feared that public attention would fade if it became clear that the kidnapped person was deceased and thus they worried that her body would not be

²⁵⁴ The terrorists' incentive to keep the victim alive has been described by a kidnapping negotiator as follows: "if you are running a china shop, you don't break the china." Dolnik, *supra* note 21, at 503.

²⁵⁵ *Id.* But see Joseph Melnick & Susan Roos, *The Myth of Closure*, 11 *GESTALT REV.* 90 (2007).

²⁵⁶ See *supra* note 250.

²⁵⁷ See, e.g., Erica R. Clinton, *Chains of Marriage: Israeli Women's Fight for Freedom*, 3 *J. GENDER RACE & JUST.* 283 (1999) (discussing women's special marital status under Jewish law); Leora Nathan, *Preventing an Agunah Crisis in the Wake of the World Trade Center Disaster by Establishing Death Through Various Forms of Evidence*, 40 *ALTA. L. REV.* 895 (2002) (on the challenge to establish death and release Jewish women from *Agunah* status flowing from September 11); Elyakim Rubinstein, *On Agunot Regulation*, 26 *TECHUMIN* 190 (2006).

²⁵⁸ Schweitzer, *supra* note 56, at 28 ("[T]he prime minister [Ehud Olmert] was interested in avoiding a situation in which a woman would remain an *aguna* . . .").

retrieved.²⁵⁹ Or, families refused to accept that their loved ones were actually dead.²⁶⁰ In addition, at times, the State refrained from such a declaration for fear that the terrorists would retaliate and refuse to make a deal for the body.²⁶¹

As a result, Israel faced situations in which the public expected the victims to be returned alive, and was devastated when coffins were returned instead. “Only on July 16, 2008 as the soldiers [Ehud Goldwasser and Eldad Regev] were returned did [Hezbollah] reveal publicly—in a dramatic and humiliating fashion—that the two abducted soldiers were in fact dead.”²⁶² The transaction could have gone totally differently had the IDF, which had enough information to substantiate that they were deceased, declared them officially dead.²⁶³

Operation Protective Edge seems to mark a new era in Israel's treatment of missing soldiers. Hamas declared it held hostage the soldier Shaul Oron, but the Chief Rabbi of the Army gathered enough data to substantiate a declaration of death. The Chief Rabbi assembled an official tribunal to declare him dead and only thereafter notified the family. The family accepted the verdict and mourned over Shaul, even though there were no remains to bury.²⁶⁴ Similarly, Hamas captured Second Lieutenant Hadar Goldin during an official cease fire, but the army gathered enough evidence to declare Goldin dead. Only after a special tribunal decided Goldin was dead, did the Chief Rabbi notify the family. The family accepted the verdict and Goldin's partial remains were buried.²⁶⁵

²⁵⁹ In the case of the three missing soldiers who took part in the battle of Sultan Yaakov during the First Lebanon War in 1982, the families appealed to the Supreme Court to order the State to withhold its declaration of death. See CA 8594/09 *Jane Doe v. Jane Doe* (Dec. 28, 2011), Nevo Legal Database (by subscription) (Isr.); see also Kaplan, *supra* note 63, at 416. The State agreed to withhold such declaration despite the fact that the district court had denied the families' petition on the merits. CC 8036/06 *Sarah Katz v. State of Israel* (Sept. 14, 2009), Nevo Legal Database (by subscription) (Isr.).

²⁶⁰ Furthermore, even when families secretly desire a declaration of death to have closure, they may simultaneously resist the declaration out of shame for wanting to continue on with their lives. Removing the decision from their spheres of influence may ease their consciences.

²⁶¹ BERGMAN, *supra* note 15, at 546.

²⁶² Schweitzer, *supra* note 56, at 27 (describing Hezbollah's tactics of concealing the fact that Regev and Goldwasser were dead).

²⁶³ BERGMAN, *supra* note 15, at 548–50 (writing that the Chief Rabbi of the army did not declare them dead because of the public pressure to reach a transaction).

²⁶⁴ See Gili Cohen, *IDF Determines Staff Sgt. Oron Shaul, Previously Considered Missing, Is Dead*, HAARETZ, July 25, 2014, <http://www.haaretz.com/news/diplomacy-defense/premium-1.607236.607236>; *Family of Fallen Soldier Oron Shaul Urges Army to Secure Body for Burial*, JERUSALEM POST, Aug. 3, 2014, <http://www.jpost.com/Breaking-News/Family-of-fallen-soldier-Oron-Shaul-urges-army-to-secure-body-for-burial-369878>.

²⁶⁵ Gili Cohen, *IDF Determines 2nd Lt. Hadar Goldin, Previously Considered Captured in Gaza, Is Dead*, HAARETZ, Aug. 3, 2014, <http://www.haaretz.com/news/diplomacy-defense/1.608525>.

4. Balanced Treatment of Aggrieved Families

The ratifying bodies should accord balanced treatment and a right to a hearing to families of the kidnapped victim as well as to representatives of families injured by terrorist activity. According such status to the families of victims of terrorist activity aligns with the legal recognition of crime victims' rights in the criminal process.²⁶⁶ It may be advisable that a person, not directly involved in the negotiations, should be designated to serve as the communication channel between the families and the decision-makers.²⁶⁷

Similarly, the media should be required to provide a balanced treatment of the subject by granting sufficient time to representatives of both types of families.²⁶⁸ These measures will convey to the terrorists and the general public that there are two sides to the debate and that the political bodies are exposed to both perspectives. This indirectly conveys the message that only a fair and balanced deal can be ratified. The decision-making bodies will be able to credibly use public opinion to hold firm and strike a better deal.²⁶⁹

Let's illustrate the effects of such precommitment on Israel's bargaining power. Currently, influence on the decision-making bodies is generated almost solely from the family of the kidnapped victim. Many prime ministers, ministers, and their aides have testified that decisions are made because they cannot withstand the pressure of the victim's family,²⁷⁰ and this is exacerbated by media attention.²⁷¹ In contrast,

²⁶⁶ See, e.g., Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2011).

²⁶⁷ Thus, for example, Uri Lubrani did not meet with the families of kidnapped soldiers because he did not want to be influenced by them. Instead, Uri Slonim was appointed to be the contact person that intermediated between the families and the decision-makers. BERGMAN, *supra* note 15, at 209.

²⁶⁸ See Daphne Barak, *Freedom of Access to the Media—Balancing Interests Within the Right for Freedom of Speech*, 12 IYUNEI MISHPAT 183 (1987); Amit M. Schejter, *The Fairness Doctrine Is Dead and Living in Israel*, 51 FED. COMM. L. J. 281 (1999). Schejter explains that while the United States deserted the fairness doctrine in 1987, it is still a governing principle of media law in Israel. However, the Israeli fairness doctrine is different from the one that the United States once had.

²⁶⁹ See Schelling, *supra* note 94, at 287 (writing that public opinion may assist a government in making a credible commitment not to concede and vice versa).

²⁷⁰ See *supra* Parts I & II.

²⁷¹ See Dolnik, *supra* note 21, at 519–20 (writing that the media might have a negative impact in kidnapping situations by “increasing the perceived importance of individual hostages”); see also Jeffrey Scheuer, *Moral Dimensions of Terrorism*, 14 FLETCHER F. WORLD AFF. 145, 156–59 (1990) (writing of the media's need to restrain itself as it is an active participant in the unfolding drama of hostage taking).

families, whose loved ones were victims of the terrorists to be released as part of a prisoner swap, are not even consulted.²⁷²

This in turn leads the terrorists to tougher bargaining positions and makes striking a sensible deal more difficult.²⁷³ Knowing this, terrorists often use the media to intensify the pressure on Israeli decision-makers.²⁷⁴

The statute should thus assist societies to construct a more balanced public deliberation regarding the challenges posed by terrorist kidnapping and in turn will improve democracies' bargaining power.²⁷⁵ It will assist societies to mitigate the effects of the one-off appearance of a particular kidnap victim and her family's pressure to concede at almost any price and take into consideration repeat play considerations of the state.

5. Use of Parole or Conditional Release Rather than Pardon

States must use parole (or conditional release) rather than pardon when releasing terrorists early from prison because of prisoner swaps. This will assist states to better combat terrorism if the released prisoners were to strike again. Conditional release offers the following three advantages over pardons: *First*, a parole executive committee established by statute, rather than the President, controls the decision to release the prisoners.²⁷⁶

Second, the pardon power may be viewed as an act of mercy and a way to start over. Society thus expresses its willingness to embrace the felon again.²⁷⁷ It is questionable whether this is the message that democracies want to convey to the terrorists released in prisoner

²⁷² Keren Shahar, whose father was murdered by Samir Kuntar, criticized the government: "It's unfair that Israel is releasing . . . him. We weren't asked. No one spoke to us." (Ma'ariv, 7 July 2008). Lebel & Rochlin, *supra* note 58, at 370.

²⁷³ Thus, for example, according to the special envoy Offer Dekel, who Israel appointed to negotiate with Hezbollah, Israel was able to retrieve the body of its soldier Dueit with a low price because the family thought he drowned and did not know that Hezbollah was holding the body. Thus, there was no family and public pressure on the Israeli government to conclude a deal. BERGMAN, *supra* note 15, at 543–44.

²⁷⁴ Hezbollah, for example, revealed horrifying pictures of parts of bodies of Israeli soldiers it possessed from the Second Lebanon War to manipulate public opinion and strike a better prisoner swap in 2008. *Id.* at 544–45.

²⁷⁵ See BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2005) (on the importance of constructing public deliberation).

²⁷⁶ In the Israeli context it achieves the additional benefit that accountability rests where it belongs: with the executive branch. The Israeli President is mainly a symbolic figure like the Queen in Britain.

²⁷⁷ See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991) (distinguishing between the use of clemency for public welfare reasons and its use for justice-enhancing reasons).

swaps.²⁷⁸ These prisoners usually do not express regret and even threaten to strike again as they walk out of prison.²⁷⁹ Conditional release does not convey a message of a fresh start the way pardon does.

Third, the release is necessarily conditional and any new terrorist activity by former prisoners will require them to serve the remaining time on their sentences, in addition to any new time imposed by trial for the new offenses committed. At the same time, using such conditional release will leave the pardon institution untainted by prisoner swaps. It is the most appropriate route to follow from a rule of law perspective.

Let's illustrate the effects of such precommitment on Israel's bargaining power. Until the Shalit deal, Israel released terrorist prisoners in prisoner swaps chiefly by pardoning them.²⁸⁰ This was done to overcome a legal problem: the executive branch in these cases was intervening impermissibly in the sentences given by the judicial branch to shorten them, which violated basic separation of powers principles. Pardoning seemed like the appropriate legal device to legitimize such premature releases.

However, using the pardon device created other legal problems. *First*, the pardon is exercised while violating the principles of both individual and general pardons, as discussed in Part II above.

Second, many of the prisoners released in prisoner swaps return to terrorist activity. They are later recaptured by Israeli forces to face trial again and go to prison.²⁸¹ However, the judicial system cannot impose on them the sentences they never completed for previous acts of terror because they received pardons. These cycles use resources for trying and convicting recidivist terrorists.

The situation was rectified in January 2012, when the Knesset amended the statute to make all pardons conditional, unless the President states otherwise.²⁸² If terrorists released in prisoner swaps recidivate, the sentences they did not complete serving may be imposed on them again.²⁸³

While this is beneficial in cases of terrorists' pardons, the new default rule might hinder the fresh start a society may want to grant to a convicted person in other contexts. It is also arguable that this statutory amendment amounts to an intervention in the constitutional pardon power granted to the President under the *Basic Laws*. Thus, the

²⁷⁸ In fact, President Shimon Peres signed the pardons to enable the Shalit deal but wrote every prisoner that "he does not forget or forgive." Uri Yalon, *Signing—Only Because of Shalit*, ISR. HAYOM, Oct. 16, 2011, http://www.israelhayom.co.il/site/newsletter_article.php?id=13312.

²⁷⁹ See, e.g., BERGMAN, *supra* note 15, at 112–13.

²⁸⁰ See *supra* Part II. Terrorists who have been tried in military tribunals are treated differently.

²⁸¹ See *supra* Parts I, II.

²⁸² See Conditional Release from Prison Law, 30-2001, SH No. 410 (Isr.).

²⁸³ See Conditional Release from Prison Law (Amendment no. 11), Year-2012, SH No. 106 (Isr.).

amendment to the pardon power should have been done, if at all, through constitutional amendment and not by regular enactment.²⁸⁴

In July 2014, the Knesset amended the Government Law to require all releases of prisoners prompted by security or political considerations to be done by conditional release, not pardon.²⁸⁵ These prisoners may be imprisoned anew if they violated their release conditions or the government found that there was no further political or security interest in their release.

This statute is problematic on several grounds. *First*, it constrains the President's pardon powers without amending the Basic Law. *Second*, it amounts to a content-based restriction of conducting no deals with terrorists. This is so, since no terrorist organization will agree to a deal that Israel can renege at its own discretion. *Third*, it does not align with basic democratic principles that a person should not be reincarcerated but based on her own *new* actions, conducted since the release.

This Article argues that the government should use conditional release (or parole), not pardon, in prisoner swaps. At the same time, the release should be conditioned only on the person released not committing new terrorist acts. Such condition aligns with democratic theory while simultaneously creating the right incentives for the person released—an incentive not to reengage in terror. The terrorist organizations could not persuasively object to such condition as it depends on *future* acts of the person released. Thus, the release is genuine, not fictitious. Were the prisoner released to recommit terrorist acts, the state would be able to impose on him the remainder old sentence, not served. Thus, such a statute will create effectual deterrence.

The Knesset further intends to restrict the government's authority to release “heavy” prisoners, who are subject to life sentence, by requiring that they serve a minimum period, before they may enjoy conditional release.²⁸⁶ This too is an undesirable amendment because it aims to limit the content of a possible transaction with the terrorists.

²⁸⁴ The Knesset may amend a *Basic Law* only by means of a *Basic Law*, and not by mere enactment. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Collective Vill., 49(4) PD 221, 406–407 [1995] (Isr.) (President Barak’s opinion), available at http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf (English translation).

²⁸⁵ Government Law (Amendment no. 9), 5774-2014, SH 730 (Isr.), available at http://knesset.gov.il/laws/data/law/2467/2467_1.pdf.

²⁸⁶ Tazkir Conditional Release From Prison Law (Various Amendments), 5774-2014 (Isr.), available at <http://index.justice.gov.il/Publikations/News/Pages/MemorandumofLawparole.aspx>.

6. Lightly Entrenched Statute

The advantages of such procedural-structural precommitment devices enumerated above are contingent on them being publicly known and credible to the terrorists and the public alike.²⁸⁷ Thus, the procedural-structural limitations should be embodied in a statute that is lightly entrenched, such that an absolute majority of the legislature (e.g., 61 out of 120 MKs in the Israeli context) would be required to amend it.²⁸⁸

Thus, the legislature and the government would not be able to easily change the procedural limitations for momentary political advantage if another kidnapping takes place. This makes these procedural limitations an effective tool in bargaining for redemption of kidnapped victims.

Let's illustrate the effects of such precommitment on Israel's bargaining power. Entrenching the limitations by statute makes the commitment to this procedure credible. Since Israel has a parliamentary system with a proportional representation election method, the government usually rules through a coalition agreement between various factions represented in the Knesset.²⁸⁹ Although the government usually enjoys majority support in the Knesset, the PM cannot be assured of a majority in favor of changing an entrenched statute, even one that requires barely an absolute majority.²⁹⁰ Moreover, especially in

²⁸⁷ See *supra* Introduction.

²⁸⁸ Requiring a supermajority (exceeding an absolute majority) to amend the statute may raise constitutional concerns about the power of the majority to limit itself in a regular statute as distinguished from a *Basic Law*. The Constitution is intended to restrict the regular legislature. In contrast, regular statutes should be subject to majority rule to enable the last will of the legislature to prevail. See Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349, 361–62 (2012). Requiring an absolute majority to amend the statute, on the other hand, will most likely pass constitutional scrutiny since Israel has already required absolute majorities to amend regular statutes. The Knesset's opinion is that this practice is constitutional. Furthermore, one may argue that an absolute majority requirement does not amount to true entrenchment since it merely requires the regular majority needed to enact statutes if all members of Knesset were present and voting. It is therefore more akin to an attendance requirement than to entrenchment. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Collective Vill., 49(4) PD 221, 406–07 [1995] (Isr.) (Cheshin, J., dissenting), available at http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf (English translation).

²⁸⁹ See Rivka Weill, *Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters*, 45 VAND. J. TRANSNAT'L L. 1381 (2012) (discussing Israel's proportional representation election method and its effects on the stability of government).

²⁹⁰ It is interesting to note that most of Israel's *Basic Laws* are not entrenched and may be amended by simple majorities. See Weill, *supra* note 288, at 372–73. Furthermore, though *Basic Law: Human Dignity and Freedom* may be amended by simple majorities and is the main cause for the exercise of judicial review over primary legislation, it enjoys stability.

the field of prisoner swaps, the divisions among the Israeli public are not clearly aligned with party affiliations.²⁹¹

This Section concludes that western democratic countries, including Israel, should consider adopting in statute the above procedural-structural devices. Such a statute may assist countries to better deal with terrorist kidnapping.

B. *Why Prefer Procedural Limitations to “No Regulations”?*

This Section discusses why procedural limitations may be preferable to the absence of regulation in western democratic societies in general. Procedural limitations achieve many of the benefits associated with having an ex-ante approach to a balancing dilemma, as discussed below.²⁹² The next Section discusses why they are preferable to content-based limitations.

1. Enhancing Bargaining Power

Predetermined two-tier processes serve to caution decision-makers to obtain internal consent before making any concessions. This will enhance a state's bargaining position vis-à-vis the terrorists by adding a layer of approval for the deal to be consummated. The current power of the head of state to act unilaterally reduces the advantage that an institutional repeat player should have over the one-time victim. By diffusing power, states may buttress the predictable temptation to capitulate. This also gives the head of state a game theoretic advantage in the actual negotiations. Not having the principal at the table is always an advantage because it gives the negotiators the ability to bargain but say “We are not sure we can sell this.”²⁹³ This also supports putting non-elected parties (e.g., heads of the intelligence services) in the formal decision-making role. Thus, no longer will the negotiations be solely about what the terrorists want; rather they will also be about the terms that the government may be able to ratify at home.²⁹⁴

²⁹¹ For example, Tzipi Livni, who was the head of the center-left-wing opposition during most of the term of the 18th Knesset, has publicly stated her principled opinion against prisoner swaps. Jonathan Lis, *Israel Opposition Leader Livni: I Opposed Shalit Prisoner Swap*, HAARETZ, Oct. 24, 2011, <http://www.haaretz.com/print-edition/news/israel-opposition-leader-livni-i-opposed-shalit-prisoner-swap-1.391622>.

²⁹² See Yael Aridor Bar-Ilan, *Justice: When Do We Decide?*, 39 CONN. L. REV. 923 (2007) (discussing the merits and demerits of having an ex-ante regulation of torture).

²⁹³ See *supra* Part V.A.

²⁹⁴ See *supra* Part V.B.

Comparative experience shows that governments have been able to persuade terrorists to compromise on some demands when they could credibly assert that constitutional barriers prevented them from conceding to all demands. Constitutional barriers mean that the government is not authorized under the Constitution to make certain concessions.²⁹⁵ This comparative experience may serve as further evidence that *legal limitations* on negotiators' *authority* may alter the course of negotiations to benefit civilized society. To be able to do so, such precommitment devices must be perceived by the terrorists as credible.²⁹⁶

2. Deliberating

A predetermined process requires reaching a principled decision on how the state will respond to a specific terrorist kidnapping incident. Such a decision will require informed debate among the representative bodies, principally the legislative and executive branches. The deliberation itself among representative bodies will encourage them to contemplate the public interest.²⁹⁷ Given that the designated deliberating bodies are composed of people with diverse backgrounds, their deliberations will also produce better decisions, from an epistemic point of view.²⁹⁸

Deliberation requires arguments and counter-arguments to be weighed, structures a dialogue between the various elements of the representative bodies, and in time enables compromise among the different constituencies based on consent. This in turn will increase the democratic legitimacy of any actions taken on behalf of kidnapped victims.²⁹⁹

²⁹⁵ For example, when Iran demanded that the Carter administration confiscate the Shah's assets and hand them over to Iran, the United States administration was able to persuade the Iranians that this was impossible, *inter alia*, because the Constitution requires due process of law before confiscating property. Combs, *supra* note 141, at 327–28. In 1977 when the Hanafi Muslim sect seized City Hall, the Islamic Center, and the B'nai B'rith headquarters in Washington D.C., taking 134 hostages, officials were able to persuade the terrorists that they were not constitutionally authorized to fulfill the terrorists' demand to stop showing a film that was offensive to Islam entitled *Muhammad: Messenger of God*. The terrorists accepted that the constitutional provision for free speech overrode this demand. Fowler, *supra* note 26, at 280–82. In both examples it was not the content of the constitutional restrictions that mattered, but rather the fact that the government's authority was constitutionally restricted from abiding to terrorists' demands.

²⁹⁶ See Elster, *supra* note 13.

²⁹⁷ See JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (Prometheus Books ed., 1991).

²⁹⁸ See ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* (2009).

²⁹⁹ On the benefits of deliberation, see ACKERMAN & FISHKIN, *supra* note 275; *see also* JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1996).

Without such a statute requiring deliberation among the representative bodies, the discussion regarding possible deals is silenced each time anew (e.g., by censorship bodies). Those in charge of the negotiations may claim that discourse will impair possible deals. As a result, by the time the public or the opposition learns of the details of the deal, it is too late for the public discourse to affect the deal's content.³⁰⁰ It should be emphasized that this Article does not assert that the details of the proposed deal should be discussed in the public domain, for this may compromise state security interests. Rather, this Article argues that the contents of such a deal should be discussed also with and by a subcommittee of the legislature rather than by the government alone.

3. Taking Control

Procedural limitations offer a planned approach to dealing with terrorist kidnapping and thus lessen the "surprise" associated with this catastrophic event. They enable the authorities to make informed decisions throughout the negotiations process, knowing who must be convinced and what must be done as preconditions to any possible deal with the terrorists. Instead of feeling helpless and paralyzed when confronted with terrorist kidnapping,³⁰¹ such predetermined processes may give decision-makers a sense of control over the situation, which will greatly enhance the state's bargaining position.

Furthermore, one of the main characteristics of terrorism is its element of surprise. Surprise often creates more panic than is justified, because people overestimate the risks associated with terrorism.³⁰² Having a plan of action is a way to reduce the surprise and thus the effectiveness of terrorist kidnapping.

³⁰⁰ BERGMAN, *supra* note 15, at 114–15. Bergman writes that the families of the kidnapped Israeli soldiers were able to affect the Jibril deal because the censorship prevented leakage of the deal's details until it was too late to prevent the deal, even when it became clear the public was against it. *Id.*

³⁰¹ *Id.* at 577 (describing the feeling of impotency leading the Israeli public to demonstrate against the status quo of having Shalit in captivity); Scheuer, *supra* note 271, at 154 ("[A]s recent hostage crises have demonstrated, American presidents can and have become helpless giants.").

³⁰² People are more concerned with terrorism than with bee stings even though "[o]n an annual basis, more Americans die from bee stings than from terrorist attacks." Scheuer, *supra* note 271, at 157. In Israel, people fear terror more than they fear car accidents, even though "the number of Israeli casualties due to terror attacks was always below the number of Israeli casualties by car accidents." Gary S. Becker & Yona Rubinstein, *Fear and Response to Terrorism: An Economic Analysis* (Brown U., Working Paper 2011), available at http://www.econ.brown.edu/fac/yona_rubinstein/Research/Working%20Papers/BR_FEB_2011.pdf.

4. Reflecting True Preferences

If such legislation is adopted, this will happen behind a quasi-“veil of ignorance,” since the state does not know who will be the next victims of terrorist attacks.³⁰³ At the time the statute is adopted, decision-makers will not know who will be kidnapped (and want concessions) or who will be victims of released terrorists (and thus resist concessions). Thus, formulating a statute while there is nothing immediately at stake will produce a decision that better reflects the preferences of society, unbiased by a particular victim of terrorist kidnapping. The legislation will be adopted at times of “Philip sober” rather than “Philip drunk.”³⁰⁴ That is to say, the legislation will be adopted when society is calm and able to think rationally about its true preferences.³⁰⁵

Currently, decisions are made under great pressure in democratic societies. President Carter acted under great despair in the Iran hostage crisis.³⁰⁶ Similarly, PM Rabin viewed the Jibril transaction, in which he released numerous terrorists, as the most difficult moment of his career. This was his largest “trauma.”³⁰⁷ These feelings reflect the climate under which leaders reach decisions regarding the fate of individuals kidnapped.

5. Treating Victims Equally

Reacting on an ad hoc basis to terrorist kidnapping, as states currently do, invites biased decision-making. Knowing the identity of the victim and allowing society to develop empathies towards her affects the societal decision on how much to concede, if at all. It may matter, for example, whether the victim is a member of the social spheres to which the majority belongs. It may matter whether the victim has a family or not.³⁰⁸ These considerations, even if unspoken, may mean that the state does not treat kidnapped people equally. A statute that is adopted in anticipation of terrorist kidnapping will require the society to act in a more principled and equal way to various victims of terrorist kidnapping.

³⁰³ Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999).

³⁰⁴ A.V. Dicey, *The Referendum and Its Critics*, 212 Q. REV. 538, 559 (1910); see also Elster, *supra* note 13, at 1765.

³⁰⁵ See, e.g., Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73 (2002) (elaborating advantages of legislative self-entrenchment).

³⁰⁶ See *supra* Part II.

³⁰⁷ BERGMAN, *supra* note 15, at 219 (relying on Tamar Golan).

³⁰⁸ On the effects of the identity of the victim on society’s willingness to protect him, see Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087 (2013).

6. Setting Expectations or Defining the Social Contract

Currently, there are those who argue that soldiers fight because they know that, were they to be kidnapped, the state will redeem them for any price.³⁰⁹ Having a statute that defines the terms of the exchange makes the social contract explicit on this point. In turn, it will help define the legitimate expectations that members of society develop and when reliance on governmental action is justified.

7. Accountability

The statute will necessarily allocate decision-making power and responsibility among the representative bodies. It will determine where responsibility lies for handling the kidnapping. The current governmental “yes-no” binary decision will be supplanted by a two-tier system in which it is possible to affect the contents of the deal.³¹⁰ Furthermore, the statute will set checks and balances in the decision-making process to approve prisoner swaps by involving more partners in the process than just the head of state, as discussed above.³¹¹

8. Creating the Right Incentives

A statute that defines the process for responding to terrorist kidnapping will also create better incentives for potential victims to guard against terrorist kidnapping and reduce morally hazardous behavior.³¹² The statute will convey the message: conceding to terrorists comes at too great a price and thus it will not be done lightly.

This Article concludes that procedural limitations will enable flexibility to react to a specific kidnapping case while addressing better the prices associated with the current status quo of reacting ad hoc to the situation. That is, it can assist negotiators in reaching deals with the terrorists that are good enough to be approved by the terrorists but not too good as to encourage them to strike again.

³⁰⁹ See *supra* Part IV.

³¹⁰ See LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION 53–80 (2000) (providing an empirical analysis of United States treaties and executive agreements and finding that the legislature influences international cooperation in numerous ways).

³¹¹ See, e.g., Philippe C. Schmitter, *The Ambiguous Virtues of Accountability*, 15 J. DEMOCRACY 47 (2004).

³¹² See *supra* Part II.

C. *Why Are Procedural Limitations Preferable to Content-Based Limitations?*

Even though states have adopted content-based precommitment strategies, procedural-structural limitations enjoy advantages over content-based restrictions from utilitarian, legitimacy, and legal perspectives. Structural-procedural limitations offer the right balance between rigidity and flexibility in this highly sensitive topic of terrorist kidnapping.³¹³

1. Utilitarian Considerations

A state does not know what it will face in the next kidnapping case, and thus content-based limitations that might seem reasonable now may not be tenable in future cases.³¹⁴ Furthermore, content-based restrictions will lead both parties to a “test of wills” to prove who has the upper hand. Such content-based limitations may even encourage terrorists to step up their game and cause more horrific attacks in the hope that they can force the state to abandon its own limitations. If it is not enough to capture one soldier, then maybe a few, or they might try to kidnap children or sons of leaders.³¹⁵

Moreover, western democracies have proven themselves unable to abide by their own predefined content-based red lines because of the cumulative factors discussed in Part IV above. It is easier for the state to precommit on behalf of others, as with the Italian freezing of assets held by private persons. It is hard to precommit oneself substantively. Thus it is hard to commit to losing weight by an exact amount, but somewhat easier to agree to process mechanisms, such as not having fatty foods in the house or padlocking the refrigerator.³¹⁶

Structural limitations of the kind outlined in this Article give decision-makers enough room to negotiate the best deal that fits the specific circumstances at stake. They offer flexibility with credible limits. They thus credibly convey to the terrorists that there are limits to what may be conceded because the government’s hands are tied by multiple procedures and political bodies that must be persuaded that the transaction is reasonable.

³¹³ See The Winograd Report, *supra* note 19, at 508 (writing of the need for such a solution that balances between flexibility and self-restraint).

³¹⁴ ENDERS & SANDLER, *supra* note 21, at 162 (“The effectiveness of a no-negotiation policy depends on many unstated assumptions that may not hold in practice, thus leading governments to renege on their pledge in practice.”).

³¹⁵ See Fowler, *supra* note 26, at 266–67.

³¹⁶ See Arnold Lobel, *Cookies*, in FROG AND TOAD TOGETHER 30 (1972).

Procedural precommitment enables enough flexibility to enable incentives to play out in a way that rigid rules of content cannot accomplish. Procedural-structural limitations serve as a strategic precommitment device that will in time affect the terrorist behavior, if adopted now and adhered to later.³¹⁷ Procedural constraints will make precommitment time consistent by imposing such costs on the government to deviate from them that it would not capitulate.³¹⁸ At the same time, since the limitations involve precommitment to a procedure rather than to content, they do not create a remedy that is worse than the disease. To paraphrase Justice Robert Jackson, the limitations do not amount to a suicide pact, but rather prevent suicide committed by unrestrained action.³¹⁹

A different example may be found in the field of economics. Research indicates that a state may control inflation best by adopting ex-ante a rule that is flexible enough to relate the size of the inflation to the size of the shock. If the rule adopted is too rigid and commits to a constant low level of inflation, it will not achieve its desired results since people will treat it as unreliable. On the other hand, having no rule and granting full discretion to decision-makers will not enable the state to control the inflation. In Avinash Dixit's words:

The general principle is the superiority of flexible rules over inflexible rules on the one hand, and ruleless discretion on the other. It is important to have flexibility to respond to special circumstances, but the way in which the flexibility will be used . . . has to be announced in advance and adhered to ex post. Of course, this can be done only if the state is publicly and objectively verifiable. This general principle is applicable not only to monetary policy, but also to several other kinds of policies.³²⁰

This Article suggests that applying the idea of precommitment to a flexible rule to terrorist kidnapping means that limitations must be procedural rather than content-based.³²¹

³¹⁷ See Elster, *supra* note 13, at 1761–65; Schelling, *supra* note 94, at 282, 294.

³¹⁸ See Lapan & Sandler, *supra* note 162, at 20 (writing that “[c]onstitutional constraints or congressional hearings imposing huge perceived cost on those officeholders who capitulate may be the only means of raising h [i.e., the costs of capitulating] sufficiently to make precommitment time consistent”).

³¹⁹ While constitutions are considered precommitments to prevent nations from suicide at insane moments, Justice Jackson warned against achieving more than was desired of the Constitution. That is, turning the constitution itself into a suicide pact. See *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

³²⁰ Avinash Dixit, *Some Lessons from Transaction-Cost Politics for Less-Developed Countries*, 15 *ECON. & POL.* 107, 118 (2003).

³²¹ Navin Bapat studied both hostage-taking and kidnapping scenarios. He found that when the terrorists are subject to a constraint by a host state that is reliable but not too rigid, their own bargaining power is enhanced. This is so, since the states that were subject to a terrorist attack can more credibly rely that the terrorists will fulfill their part of the deal to avoid sanctions by the host

2. Legitimacy Concerns

Content-based restrictions may be perceived by both the public and the terrorist organizations as less legitimate than process based restrictions. From the public's perspective, content-based limitations lose legitimacy when they are defined *ex-ante*, since they may not fit the specifics of the case at hand. For example, the Israeli public pressure is always focused on the content of the negotiations, not the process of concluding the deal.

Procedural limitations, on the other hand, are never arbitrary. The opposite: they ensure that the decision is cleared through multiple channels and bodies. They do not try to balance between the relevant rights and interests before those rights and interests are known.

From the terrorists' perspective, procedural limits will not be perceived as an attempt to dictate the terms of the deal before negotiations have even begun. Indeed, they are not outcome oriented. The procedure itself is external to the issues that are discussed at the negotiation table and is within the sole prerogative of each side to the transaction. Because procedural limitations are more justified both in terms of their utilitarian benefit and in their overall legitimacy, western democratic societies may be able to abide by such limitations.

3. Legal Perspective

Despite the utilitarian and legitimacy justifications discussed above, one may still argue that states will not abide by procedural limitations just as they were unable to abide by content-based restrictions.

While this is a forceful argument, this Article asserts that in the final analysis, if the elected branches will not abide by the procedural limitations despite their internal utilitarian and legitimacy justifications, then the courts may serve as guardians. The courts may enforce the procedural restrictions and require the elected branches to abide by them. While the courts may find it difficult, if not impossible, to review the contents of deals, they can definitely enforce processes.³²² In fact, to some extent, the Israeli Supreme Court has already begun to require the government to abide by procedural restraints when dealing with prisoner swaps. It even expressed the opinion that while it will not

state if they renege. On the other hand, Bapat shows that, if the constraint is too powerful, it will reduce the likelihood of reaching an agreement because terrorists will worry that the target state will renege on its part of the deal. Bapat, *supra* note 143, at 221.

³²² See Issacharoff & Pildes, *supra* note 229.

intervene in the decision itself, the Court will examine the process through which the decision was made.³²³

Furthermore, from a legal perspective, procedural limitations are preferable to content-based restrictions, which might not withstand constitutional scrutiny, as has happened in Colombia.³²⁴ They may raise constitutional challenges because of their rigid nature; they may infringe the constitutional rights of the kidnapped victims to life, liberty, dignity, and bodily integrity in a disproportional way in a given case.³²⁵ In contrast, procedural-structural restrictions allow for context-driven decisions, so they do not raise the same constitutional concerns as content-based restrictions. Indeed, by setting the process for dealing with terrorist kidnapping, they serve important constitutional values of accountability, deliberation, equality, and rule of law.³²⁶

Another argument against adopting a precommitment statute is that states may want to keep the judiciary out of the negotiations process. It has been said that dealing with terrorist kidnapping is an issue that should be dealt exclusively by the executive branch, because the matter is clearly within its core constitutional authority.³²⁷ The judiciary's involvement may obstruct the process of negotiations for release of kidnapped victims.

The difficulty with this argument is that it is illusory to believe that the law is not already involved in the negotiations process. It requires democratic states to allow the Red Cross to visit terrorists held, even though no similar treatment is accorded to western citizens and soldiers who have been kidnapped.³²⁸ It forbids governments to hold prisoners as bargaining chips for future deals since such an act negates both international norms and the constitutional obligation to treat people with dignity.³²⁹

³²³ Thus, for example, the Israeli Supreme Court required the government to publish the names of terrorists about to be released early enough to enable those affected to petition against the decision. H CJ 10578/08 Mashlat-Legal Inst. for the Study of Terrorism v. The Gov't of Isr. (Nov. 3, 2009) ¶¶ 7, 16, Nevo Legal Database (by subscription) (Isr.). It also required the government to assess the dangerousness of the terrorists to be released before reaching a decision. *Id.* at ¶ 14.

³²⁴ See discussion *supra* Part III.A.4.

³²⁵ See discussion *supra* Part III.

³²⁶ See discussion *supra* Part V.B.

³²⁷ The Israeli Supreme Court is close to holding such a view. Though it denies petitions against prisoner swaps on the merits, it justifies this position by asserting that this is a topic in which the government enjoys broad discretion. See, e.g., H CJ 7523/11 Almagor Terror Victims Ass'n v. Prime Minister (Oct. 17, 2011), Nevo Legal Database (by subscription) (Isr.) (dismissing the petition against the Shalit deal).

³²⁸ For the international norms, see *supra* note 53 and accompanying text.

³²⁹ The Israeli government may hold terrorists in custody and even in administrative detention, but only if their release will pose danger to the state's security. It cannot hold people in detention just as a means to pressure terrorist organizations to release Israel's kidnapped soldiers. Crim FH 7048/97 John Does v. Ministry of Defense, 54(1) PD 721 [2000] (Isr.), available at http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdfm (English translation).

In the Israeli context, the law's involvement is even greater. The Israeli Supreme Court regularly hears petitions by the families of terrorist victims against prisoner swaps. The Court usually denies such petitions on the merits, concluding that the deals are reasonable and within the government's authority. It does not deny the petitions as raising political questions.³³⁰

This Article thus argues that the law is already involved in this sensitive field, and it is time that it is used as a tool to increase, rather than diminish, democratic states' bargaining power.

CONCLUSION

Terrorist kidnapping is a rising phenomenon worldwide. Terrorists engaging in kidnapping enjoy a high logistical success rate, and they reap substantial benefits to their organizations as the result of their activity. Often, the terrorists exploit kidnapping to coerce governments to concede to their demands, whether in the form of ransom, prisoner swaps, or other political goals. Since kidnapping is relatively successful and lucrative from the terrorists' perspective, society should expect the numbers of kidnappings to rise.

By their nature, democracies are porous, meaning that there are multiple entry points for highly motivated interests. It is in the nature of a democratic society that it will predictably not deal well with terrorist kidnapping. The problem is compounded by an inflation effect in that each concession becomes the baseline for the next. Democracies may find themselves in a vicious cycle where the higher the expected price, the greater the incentive toward kidnapping.

So far, the world has tested only content-based approaches to terrorist kidnapping. Various countries attempted to set content-based limitations, setting red lines regarding what "prices" they will not pay in return for their kidnapped citizens and soldiers. These attempts have largely failed to constrain these governments' concessions to terrorists. This Article offers a novel process-based approach that has never been proposed or tested in the world. It explains why a structural approach to redemption of captives may succeed where content-based strategies have failed. The Article offers an exemplary statute that may serve as a model for democracies dealing with terrorist kidnapping.

³³⁰ See *supra* note 328.

CARDOZO LAW REVIEW

