

*Abstract: Reason and Morals in Hostage Negotiations*

Claire Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy

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Kidnapping for ransom or political demands by Islamic militants has become an increasingly serious problem in international security in recent years, both because of the greater frequency of kidnappings and the escalating severity and likelihood of harm to kidnapping victims. U.S. policy has forbidden negotiating with hostage takers for many years, and this ban on hostage negotiations has extended to unofficial outreach on the part of family members and loved ones. Though based on the understandable desire to deter kidnapping, the result of the no-negotiation policy is often tragic. In January of 2015, for example, Warren Weinstein, an American hostage held by al-Qaeda in Pakistan, was killed along with an Italian hostage by a U.S. drone strike.<sup>1</sup> The U.S. has apologized and will pay reparations to the families.

In addition to a mounting toll of failed rescue attempts such as Weinstein's, however, the U.S. is sometimes badly out of step with the families of victims, many of whom attempt to take the matter into their own hands. In December, 2014, U.S. hostage Luke Somers, held by al-Qaeda in Yemen, was killed alongside a South African hostage only hours before they were due to be released following negotiations conducted by their families.<sup>2</sup> The State Department was supposedly unaware of the fact that their captors had agreed to their release, because the families feared notifying the U.S. government would interfere their efforts given that they were acting against official U.S. policy. The State Department has recently relaxed the ban on negotiations

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<sup>1</sup> <http://news.yahoo.com/u-acknowledges-jIn-January-of-2015,-Warren-Weinstein,-an-American-hostage-operation-killed-american-italian-hostages-135243897.html>.

<sup>2</sup> <http://www.cbsnews.com/news/american-hostage-luke-somers-killed-in-yemen-rescue-attempt/>.

by family members, but official U.S. policy remains steadfast in its refusal to negotiate with hostage-takers.

Such cases pose a set of pointed ethical and legal dilemmas for national security law and policy. Not only are the policy imperatives unclear in such cases, but the ethical conundrum posed by such a situation is seemingly intractable. While negotiating with hostage-takers poses the very real danger of increasing incentives for kidnapping and thus endangers American military and civilians in areas of strife, there is a case to be made that an American citizen has a right that his government use all reasonably effective means to secure his release for foreign militants. This is all the more so in regions where U.S. policy has contributed to producing the anti-American sentiment that helps place American nationals at risk abroad. The conflict between utilitarian considerations of deterrence and individual deontological rights in such cases is arguably as stark as it is anywhere in national security policy. As such resolving this question both in theory and practice may provide an important precedent for such conflicts elsewhere in the law and morality of national security ethics.

In this paper I will consider this problem through the lens of contractarian theory, on the grounds that it may be helpful to reflect on how an individual would settle such conflicts *ex ante*, before knowing whether he was going to be taken hostage or regard his life as subject to increase threat by a weak deterrence policy with regard to potential hostage takers. The question I shall explore is whether individuals selecting a hostage policy for a new society in an *ex ante* position, and without knowledge of the challenges they will confront, would choose to have a policy of negotiation or a ban on negotiating with hostage-takers. While the case for the ban, based on deterrence considerations, has always seemed formidable, arguments for this position fail to take into account the perspective of the person held captive in its full complexity.

Begin by assuming we are dealing with a most straightforward kind of kidnapping, namely kidnapping for ransom consisting in economic gain. Assuming that such kidnappings are entirely economically motivated and victims are nearly always released if the ransom money is provided. Because law enforcement is weak and the chances of prosecution low, the victims are virtually certain to be killed if the ransom is not provided. In this kind of setting, deterrence *could* be nearly entirely effective if the ban on negotiating were consistently adopted, there would be fewer kidnappings in that country. It is equally clear, however, that once one is the victim of such a kidnapping, one would desperately hope that one's country did *not* follow a no-cooperation-with-kidnappers policy. What this kind of case reminds us, then, is that there is a potentially significant gap that obtains between *personal* utility and *social* utility calculations. There appears to be no particular reason to assume that the maximizing solution from the standpoint of social utility will be the same solution that rational agents seeking to maximize their own utility would adopt, if unanimous or close to unanimous agreement is required. For this reason, the utilitarian and the contractarian solutions to social problems will often diverge.

In this case, the utilitarian solution would likely support a no-cooperation-with-kidnappers policy. But what would the contractarian solution suggest? The relevant question, once again, is what a rational agent would say about the decision to adopt the no-cooperation policy if asked *prior* to being kidnapped, knowing there is a certain likelihood of finding himself a kidnapping victim with no other way. On the one hand he must consider the effects on future kidnapping victims of entering into bargains with kidnappers, as well as contemplate the likelihood that he would be among them. With only these two factors to consider, it would not be surprising if he reached the same conclusion as the utilitarian social planner, given that the loss of deterrence might be severe, while the chances of being kidnapped for a single individual

might remain low. But when, on the other hand, he considers the gravity of the potential evil, as well as the importance of preserving his ability to buy his way out of a kidnapping situation, he may reach a very different conclusion. In light of these considerations, it is far from obvious that from an *ex ante* perspective one would side with the more abstract social policy considerations over one's personal preferences as one imagines them to be *ex post*, even though the individual is also the beneficiary of the social policy.

A further argument, however, may transform the nature of the perceived benefit and provide a definitive reason for the rational agent to favor protecting his ability to save himself from dire, but unlikely situations, and hence to reject the consequentialist approach. In many situations it seems possible to achieve the deterrent effect one seeks from a policy of non-cooperation or non-enforcement by simply increasing the penalties for the initial coercion itself. Assuming that penalties can always be further increased, there is no reason to think that the deterrent benefit on which the utilitarian argument depends *must* come from invalidating the contract (as though invalidation were the only available way to create disincentives). In cases in which independent punitive measures are possible, the individual utilities from allowing coercive contracts can be assessed quite separately from the deterrent benefits from invalidating coercive contracts. There would then be little individual benefit to banning negotiations with kidnappers, and, on the other side, significant individual security from retaining the ability to enter into such contracts or engage in such negotiations. This paper will consider the competing considerations that apply to such situations with the aid of a rational, consent-based model for policy determinations.