

## *On the Ransom of Hostages*

The Freehof Institute of Progressive Halakhah, 2023 / תשפ"ד

We write in the immediate wake of the horrific attack by Hamas terrorists upon Israel on Sh'mini Atzeret-Simchat Torah 5784 (October 7, 2023). The brutality of their act showed itself not only in the killing of many civilians, ה' ינקום דמם, but also in the seizure of many hostages. As of this writing, it is estimated that between 100 and 150 Israelis have been taken captive and are being held in Gaza. Hamas will presumably use these unfortunate men, women, and children (yes – they seized children) as human shields in an effort to dissuade Israeli military action against the organization. Alternatively, and if history is any guide to events as unprecedented as these, Hamas will certainly exploit these human beings as bargaining chips, demanding that Israel cease its offensive operations in Gaza or release many terrorists jailed in Israel. All of this raises the question of whether the government of Israel should be prepared to pay ransom, monetary or otherwise, for these hostages and if so, how much?

Similar events have happened in the past, of course, if not on such a dreadful scale. The government has agreed to exorbitant ransom demands to secure the release of individual prisoners of war taken captive during previous rounds of fighting in Gaza. Meanwhile, alongside public political debate, students of Jewish law discussed and debated whether *halakhah* offers any guidance to decision makers in such a crisis. In what follows, therefore, we are not breaking new ground. Nor, הם וחלילה, do we imagine that we are rendering any sort of *p'sak* or recommending a course of action to Israel's political and military leadership. We simply wish to point interested readers toward the halakhic sources that indicate how our tradition views the painful choices facing the citizens and government of the state of Israel at this dark hour of its – our – history. Those sources may not tell us what we need to do right now, at this moment. But they do teach us, sadly, that we have been here before.

The redemption of captives – פדיון שבויים, *pidyon sh'vuyim* – is called a *mitzvah rabah*, one of the most important of all *mitzvot*.<sup>1</sup> As Rambam puts it:

Rambam, *Mishneh Torah*, *Hilkhhot Matanot Aniyim* 8:10

פדיון שבויים קודם לפרנסת עניים ולכסותן, ואין לך מצוה גדולה כפדיון שבויים שהשבוי הרי הוא בכלל הרעבים והצמאים והערומים ועומד בסכנת נפשות, והמעלים עיניו מפדיונו הרי זה עובר על לא תאמץ את לבבך ולא תקפוץ את ירך ועל לא תעמוד על דם רעך ועל לא ירדנו בפרך לעיניך, ובטל מצות פתח תפתח את ירך לו, ומצות וחי אחיך עמך, ואהבת לרעך כמוך, והצל לקוחים למות והרבה דברים כאלו, ואין לך מצוה רבה כפדיון שבויים.

The redemption of captives takes priority over supporting and clothing the poor. There is no *mitzvah* greater than the redemption of captives, for the captive is numbered among the hungry, the thirsty, the naked, and those whose lives are in danger. One who ignores the responsibility of redeeming the captive transgresses the following negative

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<sup>1</sup> B. Bava Batra 8a-b.

commandments: “do not harden your heart and shut your hand against your needy kin” (Deuteronomy 15:7), “do not stand idly by the blood of your neighbor” (Leviticus 19:16), and “one shall not rule ruthlessly over one’s kin in your sight” (Leviticus 25:53). One nullifies the *mitzvah* “you must open your hand to him” (Deuteronomy 15:8), the *mitzvah* “your kinsperson shall live with you” (Leviticus 25:36), “you shall love your fellow as yourself” (Leviticus 19:18), “(if you refrain from) saving those taken off for death” (Proverbs 24:11), and many similar verses. No *mitzvah* is as great as *pidyon sh’vuyim*.

The *Shulḥan Arukh* repeats much of this and adds the following note of urgency:<sup>2</sup>

כל רגע שמאחר לפדות השבויים, היכא דאפשר להקדים, הוי כאילו שופך דמים.

When one delays in redeeming captives, even for a moment, it is as though one has committed bloodshed.

Simply put, *pidyon sh’vuyim* is a matter of life and death, of *pikuah nefesh*, and it therefore overrides almost every other positive obligation that the Torah imposes.

Given all this, it may be surprising that the *halakhah* places limits upon what we are bound to do in order to ransom hostages. But it does.

#### Mishnah Gitin 4:6

אין פודין את השבויים יותר על כדי דמיהן מפני תקון העולם.

Captives are not redeemed for more than their monetary value,<sup>3</sup> for the good of society (*mipnei tikkun olam*).

The language *mipnei tikkun olam* indicates that the ancient Rabbis enacted what amounts to a change in the law of the Torah. Where the Torah places no limits on the ransom for hostages – after all, “no *mitzvah* is as great as *pidyon sh’vuyim*” – the Rabbis determined that it was better for the community if limits were instituted. What was the benefit? The Talmud inquires:

#### B. Gitin 45a

איבעיא להו: האי מפני תיקון העולם משום דוחקא דצבורא הוא, או דילמא משום דלא לגרבו ולייתו טפי?

The question (*ba`aya*) was raised: does “for the good of society” refer to the financial burden that ransom places on the community or to the desire that robbers not be encouraged to take more hostages?

<sup>2</sup> *Shulḥan Arukh Yore De`ah* 252:3, taken from *Resp. Maharik* (R. Yosef Colon, 15<sup>th</sup>-cent. Italy), no. 7.

<sup>3</sup> Virtually all the commentators say that this refers to the value a person would have on the slave market. How we might set the monetary value of an individual today, in the (fortunate!) absence of slave markets, is something that they don’t address. It’s better to take the word דמיהן as a metaphor for “a reasonable amount of ransom” to pay for a captive, with “reasonable” to be determined according to the concerns raised by the Talmud (communal resources; the need to discourage future hostage-taking).

The Rabbis, in other words, might have had either goal in mind in enacting their *takkanah*. What difference does it make? Rashi explains:

ונפקא מינה אם יש לו אב עשיר או קרוב שרוצה לפדותו בדמים הרבה ולא יפילהו על הצבור.

The difference is this: suppose a captive has a rich father or relative who is willing to pay an exorbitant ransom and not place the burden upon the community.

If the Rabbis intended their enactment to protect the communal treasury, then their concern would be irrelevant in such a case; a rich relative would be permitted to give the captors whatever they asked. As support for this possibility, the Talmud cites a precedent:

ת"ש: דלוי בר דרגא פרקא לברתיה בתליסר אלפי דינרי זהב.

“Consider the following case: Levi bar Darga ransomed his daughter from captivity for 12,000 gold dinars!”

Rashi explains: since we assume that Levi was permitted to pay such a huge ransom, it follows that the Rabbinic *takkanah* did not apply to private individuals but was meant to protect the public from crushing financial burden. But this suggestion meets with a sharp critique:

אמר אביי : ומאן לימא לן דברצון חכמים עבד? דילמא שלא ברצון חכמים עבד.

Abaye said: How do we know that Levi acted with the concurrence of the Sages? Perhaps he acted without the concurrence of the Sages.

The fact that Levi paid the ransom does not mean that he was *permitted* to do so; his love for his daughter might well have led him to act without reference to legal strictures. And following Abaye’s statement, the Talmud drops the subject. It does not answer the question it raised: for what reason did the Rabbis impose their limitations upon the ransom paid for hostages? We still don’t know whether they did so to protect the communal treasury or to safeguard the community from further hostage-taking.

Rambam (*Mishneh Torah, Hil. Matanot Aniyyim* 8:12) opts for the second explanation.<sup>4</sup>

אין פודין את השבויים ביתר על דמיהן מפני תקון העולם, שלא יהיו האויבים רודפין אחריהם לשובתם.

Captives are not redeemed for more than their monetary value, for the good of society (*mipnei tikkun olam*), so that the enemy will not make extra effort to seize captives.

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<sup>4</sup> Why he does so isn’t entirely clear, since as his commentators (*Kesef Mishneh* and R. David ibn Zimra) note, the Talmud does not answer the question (*ba`aya*) it poses: what did the Rabbis mean by “the good of society”?).

The rule, repeated in the *Shulhan Arukh*,<sup>5</sup> is that the security of the community takes precedence over the private desire and ability to rescue captured loved ones. The point is not that we never negotiate with hostage-takers. We *do* negotiate - *pidyon sh'vuyim* is, after all, a *mitzvah rabah* - but there is a limit to what we are required to pay them to free the hostages. In stark terms, this means that the community has the option to leave the captives to their fate if it determines that paying an exorbitant ransom would endanger everybody else.

But if it *is* a rule, it admits of significant exceptions. Tosafot (*Gitin* 45a, s.v. *d'la*) points us to a discussion in *B. Ketubot* 52a-b, which concludes that a husband must redeem his captive wife for up to ten times her monetary value. Since one may pay an unlimited sum to redeem *oneself* from captivity,<sup>6</sup> and since one's spouse is considered "like oneself," no limit is imposed.<sup>7</sup> It also notes the case (*B. Gitin* 58a) of R. Yehoshua b. Hananyah, who paid a great sum to redeem a captive child who was thought to be a Torah scholar. And the most important exception of all: Tosafot declares *כי איכא סכנת נפשות פודין שבויין יותר על כדי דמיהן*, "in cases of danger to life, captives may be redeemed for more than their monetary value."<sup>8</sup> And while this last exception is not picked up by the major codes, it does lead us to wonder whether the rule has any relevance to our present situation, since hostages seized by Hamas by definition face mortal danger.

There is much discussion in the halakhic literature seeking to resolve the rule with the exceptions.<sup>9</sup> For our part, we would suggest that the rule itself does not exist. More precisely, the text in *M. Gitin* 4:6 and *B. Gitin* 45a yields not a rule but a *standard*. As legal theorists explain the difference, a rule is a clear statement of that which is permitted or prohibited, while a standard is a general statement of expectation that requires the exercise of judgment.<sup>10</sup> When we call this *halakhah* a standard rather than a rule, we mean that it does not determine the action of the governing authorities in any particular case. It tells them instead to exercise their best judgment to draw the proper balance between the *mitzvah* of *pidyon sh'vuyim*, which would encourage them to meet the demands of the captors, and the safety and welfare of the community, which argues in favor of limiting the amount of ransom they will agree to pay. The tension between these two goals, each of which is enshrined in the *halakhah*, cannot be conclusively resolved once and for all. *Every* situation must be judged according to its own unique circumstances.

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<sup>5</sup> *Shulhan Arukh Yore De'ah* 252:4.

<sup>6</sup> Tosafot explains that the Rabbinic *takkanah* placing limits upon ransom never applied to one ransoming oneself. See also *Hilkhot HaRosh*, *Ketubot* 4:22 and *Shulhan Arukh Yore De'ah* 252:4: אבל אדם יכול לפדות את עצמו בכל מה שירצה.

<sup>7</sup> The *Shulhan Arukh* (*Even Ha'ezer* 78:2) tries to compromise the two viewpoints: while a husband *may* redeem his wife at a high price, he is not *obligated* to pay more than would be paid for other captives. On the rule *אשתו כגופו*, see *B. B'rakhot* 24a and parallels.

<sup>8</sup> Tosafot, *Gitin* 58a, s.v. *kol mamon*.

<sup>9</sup> For an extensive discussion see R. Natan Ortner, "Haḥzarat m'ḥablim t'murat ḥatuf y'hudi," *T'humin* 13 (1992-1993), pp. 257-263).

<sup>10</sup> For discussion and literature see Mark Washofsky, "Halakhah as Translation: On the Custody of Children in Jewish Law," in Walter Jacob, ed., *The Modern Child and Jewish Law* (Pittsburgh: Rodef Shalom Press, 2017), pp. 1-63. See especially at p. 8, the section "Rules vs. Standards": "Rules are definite, applying in a more or less automatic fashion to a set of specific circumstances ('driving at a faster rate of speed than 55 MPH on this road is prohibited'); standards are general, 'open-textured,' and apply only upon an act of judgment ('drivers on this road are required to operate their vehicles at a reasonable rate of speed')."

[https://www.freehofinstitute.org/uploads/1/2/0/6/120631295/halakhah\\_as\\_translation.pdf](https://www.freehofinstitute.org/uploads/1/2/0/6/120631295/halakhah_as_translation.pdf)

As an example of this tension, consider the words of R. Shaul Yisraeli (d. 1995), a leading halakhist in the *dati le'umi* (Orthodox Zionist) community during the first decades of Israel's existence. In a 1975 article on the issue of ransoming prisoners of war,<sup>11</sup> he offers a halakhic theory that permits the government to pay exorbitant ransoms despite the rule that limits such payments. He begins with the following hypothetical: an individual buys an insurance policy that guarantees payment of an exorbitant ransom in the event they are kidnapped. Since, as we've seen, the *halakhah* does not limit the amount that one may pay to redeem oneself from captivity, the insurance company, which operates as the policy holder's agent, is also not prevented by the Rabbinic *takkanah* from paying that sum.<sup>12</sup> Yisraeli draws an analogy from the hypothetical insurance company to the government:

כיון שאלה יצאו למלחמה בשליחות המדינה ומטעמה, להגנת העם היושב בציון, הרי קיימת ועומדת התחייבות בלתי כתובה, אבל מובנת מאליה, שכל טצדקי שיש בידי המדינה לעשות (בגבולות סבירים שאינם פוגעים בבטחונה הכללי) כדי לפדותם במקרה שיפלו בשבי. וכשם שקיימת התחייבות מעין זו לדאוג לרפואתם והבראתם במקרה של פציעה ונכות... כן לא נופל מזה החיוב לנקוט כל פעולה שהיא לשם הוצאתם מן השבי.

Since these soldiers went to war as emissaries of the state, to defend the people that dwells in Zion, the state bears a binding obligation, unwritten but understood, to use whatever means lie at its disposal (within reasonable limits that do not adversely affect national security) to redeem them in the event they are taken captive. And just as there exists a similar obligation to provide for their medical care and rehabilitation should they be wounded or disabled... there is an equal obligation to take whatever action is necessary to release them from captivity.

The soldier's military service confers upon the state an obligation similar to that of the insurance company. Just as the *halakhah* permits the soldier to spend an unlimited amount to ransom him- or herself from captivity, it enjoins the state, as the soldier's agent, to do the same. It would not be difficult to extend this analogy to Israeli civilians, since they, too, defend the state's existence by contributing to its life and welfare. Yet notice the parenthetical phrase: "within reasonable limits that do not adversely affect national security." Here Yisraeli is channeling the Talmud's language שלא יהיו האויבים רודפין, משום דלא לגרבו ולייתו טפי, which Rambam translates: "so that the enemy will not make extra effort to seize captives." Whatever obligation of rescue the state owes to its soldiers or other citizens when they fall captive must fit within those "reasonable limits." But just what counts as "reasonable" and "national security" in any specific case cannot be determined in advance by any halakhic text. As a *standard*, rather than a rule of conduct, it requires the exercise of judgment.

The *halakhah*, then, does not tell the government the decision it must make in a situation such as this. It does declare the values that ought to shape its thinking: we are bound by the *mitzvah rabah* called *pidyon sh'vuyim* to redeem those taken captive, while the extent of that obligation is defined by the duty to defend the nation. The decision makers must exercise their judgment to

<sup>11</sup> R. Shaul Yisraeli, "Ha'im yesh l'he' anot l'sahtanut b'fidyon sh'vuyim uv'nei arubah?" *Torah sheb'al peh* 17 (1975), pp. 69-76. The passage quoted below is at p. 74.

<sup>12</sup> "One's agent is like oneself" (שלוחו של אדם כמותו); *B. Kiddushin* 41b and parallels.

reconcile between these values. And since none of the options at their disposal are good ones – that is, whatever course they adopt will exact a painful price – the answer at which they arrive will necessarily be controversial. Still, no matter how much it hurts, Jewish law imposes that duty upon them and supports them in their decision.

We can but pray that their decision will ultimately bring peace to Israel and comfort to those who suffer and mourn.

נעבור את זה ביחד.