

## MORAL HAZARD

### The Margin

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#### 1. THE CONCUBINE OF GIVAH

**TB Gittin 6b** discusses the incident that set in motion the *Pilegash Be’Givah* (Concubine of Givah) story (**Shoftim 19**). Two opinions are given as to what prompted the man to act in such a way as to cause the concubine to run away from the man’s house:

Rabbi Evyatar says, “He found a fly [in his bowl (**Rashi**)].” Rabbi Yonatan says, “He found a hair.” [According to Rav Yehudah, the hair was on her body; according to ‘others’, the hair was also found in his food (discussed a few lines later in the *gemara*).] Rabbi Evyatar met Eliyahu (Elijah the prophet). Rabbi Evyatar asked Eliyahu, “What is God doing?” Eliyahu answered, “He is involved with [the story of the] *Pilegash Be’Givah*.” “And what is He saying?” Eliyahu answered, “[God is saying,] ‘My son Evyatar says like this, My son Yonatan says like this.’” Rabbi Evyatar said to Eliyahu, “God forbid! Is there a doubt in Heaven?” Eliyahu said, “*Eilu ve’eilu* [these and these] are the words of the living God. He [the husband of the concubine] found a fly and did not become angry; he found a hair and became angry.”

(Note that the commentators deal extensively with the fact that this *gemara* veers significantly from the generally accepted literal reading of the text in Nach, but that is beyond the parameters of this article.)

#### 2. 3 QUESTIONS

This *gemara* is troubling for a few reasons.

First: the concept of *eilu ve’eilu* generally refers to a case in which there is a question about *halachic* theory, not practical reality. The argument over what caused the man to be angry with his concubine seems to be an argument over facts. (Furthermore, on principle, we generally avoid defining *halachic* disagreements as revolving around matters of fact, *mitziot*.)

Second: *eilu ve'eilu* is appropriate in situations in which mutually exclusive viewpoints are presented and, ultimately, deemed acceptable. For example, if one rabbi rules that a certain food is kosher while another rabbi rules it is not kosher, assuming both rabbis are accepted authorities, we do not say that one is right and one is wrong (even though, practically speaking, we can't act in accordance with both). Rather, '*eilu ve'eilu*,' 'these and these' have validity as representatives of the Word of God. The conclusion of our *gemara*, however, seems to confirm the validity of both opinions: there was a fly *and* there was a hair.

Third: perhaps most troubling, Eliyahu's final statement implies that, in essence, Rabbi Yonatan is right and Rabbi Evyatar is wrong: the source of the man's anger was the hair, not the fly (albeit there was a fly). Even if we say that *eilu ve'eilu* applies to disagreements in facts, and even if we say that both opinions have some validity, it is certainly not in accordance with the concept of *eilu ve'eilu* to render one opinion correct and the other opinion incorrect. How could *eilu ve'eilu* possibly apply to a case in which a final and absolute verdict is given?

### 3. CONTEXT – LEADING INTO THE STORY

To gain clarity, it is essential to look at this *gemara* in context.

The *gemara* is not discussing the story of the *Pilegesh Be'Givah* for its own sake. It has a specific purpose in mind. It is Abaye who quotes the above story. He does so in order to clear Rabbi Evyatar's name. During the course of a long discussion dealing with divorce procedures, Rabbi Evyatar's opinion is mentioned. Rav Yosef suggests that Rabbi Evyatar's opinion may not be reliable. Abaye states that Rabbi Evyatar was approved by God and cites the story involving Eliyahu as proof. (This is an oversimplified summary but sufficient for these purposes.)

So even without the introduction of *eilu ve'eilu*, it is difficult to accept that God dismisses Rabbi Evyatar's opinion entirely since the story is quoted with the express intention of showing something positive about Rabbi Evyatar. It is unclear from the text of the *gemara*,

however, what specific part of this story proves Rabbi Evyatar's greatness. The simplest answer is that his greatness is indicated by the fact that he is conversing with Eliyahu. The specifics of the story, according to this model, are irrelevant. Maybe that is why I was unable to find a commentary that suggested this approach: if the specifics are irrelevant, why include them? **Rashi, d.h. de'askim**, explains that the story proves that Rabbi Evyatar knew 'a secret (*sod*).' As is often the case, **Rashi's** clarification requires clarification. He may be referring to Rabbi Evyatar's knowledge of the fly or his understanding of the verse or the 'secret' told to him by Eliyahu regarding God's interest in the dispute. (See **Eitz Yoseph, d.h. Eilu**, even though this Rashi is not explicitly discussed there.)

However Rashi is understood, it is clear that Rabbi Evyatar's opinion cannot be dismissed as simply wrong, for what then would be the value of his secret? But in any of the above-suggested readings of Rashi, no obvious solution is presented as to the problem of how *eilu ve'eilu* is an applicable phrase for Eliyahu to use (unless you answer that *eilu ve'eilu*, as a term, is being used here loosely or irregularly).

#### 4. CONTEXT – FOLLOWING THE STORY

To further contextualize our *gemara*, consideration should be given to that which immediately follows the story of Eliyahu and Rabbi Evyatar. Due to the digression that began with Rav Yosef's critique of Rabbi Evyatar and Abaye's ensuing defence, several new issues are raised and discussed by the *gemara*. It is not until 7b that the *gemara* returns to the discussion of divorce law.

Immediately following the story (and bleeding onto 7a), the *gemara* discusses a lesson that can be learnt from the *Pilegish Be'Givah* story, starting with a statement by Rav Chisda:

Rav Chisda said, "A person should never inculcate an excessive amount of fear within [the people of] his house, because the *pilegish be'Givah's* husband inculcated excessive fear within her, and she [ran away which] caused many of Israel to die."

The *gemara* then goes on to discuss further the dangers of instilling excessive fear in the members of one's household. What the *gemara* does not do is define the term 'excess.'

#### 5. A HALACHIC MODEL FOR EXCESS

It is important to note that the *gemara* does not say, "...because the *pilegash be'Givah's* husband inculcated fear within her..." It says, specifically, "**excessive** fear." **Eiyun Yackov, d.h. le'olam** writes, "The fact that it says excessive fear (*ayma yeteira*) indicates that fear that is not excessive is entirely permissible." (See **TB Shabbat 105b**, quoted by Eiyun Yackov here. The *gemara* there discusses cases where *ayma* is 'constructive' for the purposes of prohibition on Shabbat. It lists examples of what certain Rabbis did to cause fear in their households. This type of fear, it seems, is desirable, and actions that lead to it are commendable.)

But how are we to know what quality or action demonstrates excess? Would the *gemara* tell us to refrain from doing something without including at least some indication of what it is we're supposed to be refraining from? 'Excessive fear' is a vague term that probably means something different to each of us. Is there a more concrete *halachic* definition of 'excess' in this context?

Examining the facts, we know from this *gemara* that the *pilegash be'Givah's* husband was excessive. Could this then be the *halachic* model? Indeed, **Rav Moshe Feinstein, Dibrot Moshe, Ha'arah 63**, states that even though the husband did not act properly in response to his concubine, we can learn something from his actions, namely, we can learn about causing excessive fear. The husband, then, becomes the model for someone who inculcated excessive fear in his household.

If the husband is the model, what part of his actions indicates excess?

#### 6. BUILDING THE MODEL

**P'nei Yehoshua, d.h. Rabbi Evyatar** explains that the husband's actions can only be called 'excessive' due to the fact that the concubine did not (unlike the literal implication of the

text in Shoftim—see **Rashi** there) commit adultery. For had she been unfaithful, “the appropriate response (*mitzvah*) would be to hate her and divorce her.”

The words of the Pnei Yehoshua seem obvious but they bring to light a very significant factor: excess in regard to that which brings about fear cannot be defined by a single *shiyur* (measurement). In other words, we cannot say, “To yell at someone is appropriate but to hate him/her is excessive.” It is a case-by-case matter.

With this in mind, we can deduce that if anything practical is to be learnt from this *gemara*, it is not going to be something explicit in the actions of the concubine’s husband *in a vacuum* but rather something inherent in his actions *as a response to provocation*.

To understand the nature of excess in a general sense, we need to ask: what aspect of the man’s actions was excessive (generating his concubine’s excessive fear) and what would have been the proper response (generating the appropriate amount of fear)?

This, in my opinion, is the heart of the argument between Rabbi Evyatar and Rabbi Yonatan. It is not a fact-based disagreement; it is a *halachic* disagreement. Rabbi Evyatar defines excessive fear one way while Rabbi Yonatan defines excessive fear differently.

Their disagreement deals with a crucial economic concept: the margin.

### 7. THINKING AT THE MARGIN

It is a basic tenet of economic theory that rational people make decisions at the margin. For example, imagine that there are two events occurring not far from each other and someone is trying to decide which event to attend. The irrational person would say, “It’s either five hours here or five hours there.” But the rational person makes decisions at the margin: “I can go for fifteen minutes and then reconsider.” Choosing which party to attend for fifteen minutes is a more manageable decision than choosing which party to attend for five hours. Making these kinds of incremental choices is called ‘thinking at the margin.’

This is a straightforward concept that applies to all decisions. Don't think, "Should I go for my doctorate or drop out of the first grade?" Think, "Should I stay for an additional semester?" Don't think, "Do I want all blue socks or all red socks?" Think, "Do I want one more pair of red socks or one more pair of blue socks?" (Or, depending on your preferences, perhaps marginal thinking for you occurs at the single-sock level.) Don't think, "The large pizza is too expensive." Think, "The large pizza is \$2.00 more than the medium pizza." Et cetera.

#### 8. LIMITATIONS OF MARGINAL ANALYSIS

But a strict approach to marginal analysis can sometimes produce undesired (though, arguably, economically rational) results. Particularly when dealing with legal matters, thinking at the margin can be deceptive. For example, marginally speaking, the straw that broke the camel's back should be held accountable for the damage that occurred. Realistically, however, does it make sense to punish the person who put a straw on the camel's back or the person who put the bricks on the camel's back? It probably depends on the circumstances but it's fair to say that marginal analysis alone is not sufficient.

[There is a (secular) legal rule, known as Cause-In-Fact, which basically states that a person cannot be held accountable for damages unless it can be proven that 'but for' his/her actions the damage would not have happened. This essentially means that it must be proven that the damage is the marginal result of the person's actions. However, Cause-In-Fact is not enough to render someone guilty. There are additional factors involved. So, although according to this rule you cannot be guilty unless you are marginally responsible, proving that a person's actions had the marginal result of causing damage may not necessarily be sufficient to render the person guilty. (For more on the economics of Cause-In-Fact, see Thomas J. Miceli, 'The Economic Approach to Law', Chap. 2.)]

Marginal analysis also has limitations when dealing with emotions. Consider a case in which every fifteen minutes someone flicks your earlobe with his/her finger. The pain from one hit is fully healed by the time the person hits you again but your frustration builds gradually over time. Marginally speaking, each hit should engender an equal reaction since

each hit is just as marginally effective as the last hit. But our emotions do not generally respond in such a way. The first hit may be forgiven quickly whereas by the third or fourth hit you have probably grown significantly annoyed.

You can imagine, therefore, that when an issue deals with the legality of an emotional reaction, such as in our case dealing with excessive fear, marginal analysis can be particularly complex.

### 9. THE FLY AND THE HAIR

When the man caused his concubine to feel excessive fear it was due to his reaction to her actions. As we know from the Eiyun Yackov, there was an appropriate response but he failed to respond in that way. What would have been an appropriate response and how did the concubine's husband overstep this marker?

Although the simple reading of the *gemara* supports the contention that Rabbi Evyatar and Rabbi Yonatan are disagreeing about facts, the current analysis has lead us away from that approach. The facts of the case, according to our present hypothesis, are simple and undisputed: "He found a fly and did not become angry; he found a hair and became angry." (Certain commentators suggest—including the Eitz Yoseph—that Rabbi Evyatar's greatness was indicated by his exclusive knowledge of the fly. Obviously, this approach is inconsistent with what is now being advanced in this article.)

What is the significance of the fly? Certainly a fly in your bowl cannot be seen as a good thing. However we are told that the man did not become angry. It wasn't until he found the hair that he became angry. We can assume that the man was bothered by the fly but, for some reason, didn't react. However he could not (or would not) control his anger when he found the hair. Somehow, his reaction was excessive and caused the concubine to flee.

Did the man truly dismiss the fly, forgiving his concubine entirely, or did he suppress his reaction only temporarily? Due to the fact that the fly was mentioned, it's reasonable to assume that the fly had an effect on the outcome. For some reason, the man did not feel

sufficiently provoked to respond with anger to the concubine when he saw the fly, but whatever anger he felt as a result of the fly was carried over to the moment when he saw the hair (see **Tosfot HaRosh**). Rav Moshe (ibid.) explains that the man figured that the woman's carelessness in regard to the fly was not indicative of general carelessness. When he found the hair, however, he reconsidered his impression of her. The anger he expressed when he saw the hair, therefore, was the combined effect of the fly and the hair.

Is such a response necessarily flawed? Marginal analysis will help to answer that question.

#### 10. MARGINAL ANGER: EMOTION VS. ACTION

**Rambam, Mishneh Torah, Hilchot De'ot 1:3** states that anger, even when it is appropriate, should only be artificially manifested. As such, he explains that the appropriate anger outlined by the *gemara* in Shabbat refers to cases in which it is proper to *appear* angry, but certainly not to actually *be* angry. Our *gemara*, on its own, does not state whether the man's actions (overreactions) were sincere in relation to his emotions or falsely crafted specifically to instill fear in the heart of the concubine. Although the simple reading might be that the man was overtaken by his emotions, one could also learn that the man was faking his anger for the purpose of reprimanding the concubine. While I believe that both readings have validity and would result in the same basic conclusions, I will follow the latter understanding as it allows for a stronger focus on the process of decision-making. (I will leave it to the reader to work through the other formulation.)

Let's say that there is a point—we'll call it X—that represents the correct circumstances for a person to display anger (even though, according to this model, the anger should not actually be felt) with the intent to instill fear in another person and, thereby, compel him/her to alter his/her behaviour. If the person has reached a level below X, the resultant anger expressed is 0. If the person has reached a level equal to or greater than X, the resultant anger expressed is Y or Y+ (a variable depending on how much anger is required).

In our case, the man did not express anger after seeing the fly. Therefore we know that he was at a level below X producing an anger response of 0. After the man saw the hair, he

expressed his anger. So we know that the combined effect of the fly and the hair produced a level equal to or greater than X, resulting in a response of Y or Y+. The factual marginal effect of the hair, then, is the full value of Y (or Y+) since the man had a marginal response of 0 after seeing the fly. But this marginal analysis does not accurately represent the full story since it disregards the fly.

#### 11. MARGINAL ANALYSIS OF THE FLY

The man did not reach a point of X when seeing the fly so he responded with an anger level of 0. This does not mean, however, that he felt nothing wrong had occurred. In fact we know that he felt disappointment because, as was said above, it was the combined effect of the fly and the hair that caused the man to react the way he did. Is it fair, then, to say that the hair should take full responsibility for the man's reaction? Even though it was the marginal effect of the hair that caused the man to react as he did, can we 'forgive' the fly entirely?

#### 12. MARGINAL ANALYSIS OF THE HAIR

Let's eliminate the fly from our story. Imagine that all the man had seen was the hair. What would have been his reaction? The fact is, we don't know. Perhaps the hair would have raised the man to a level of X on its own or perhaps it would have fallen short of X, resulting in a response of 0. What if the order of events had been reversed: the hair first and the fly second? How would the man have reacted? Again, we can't answer. If the hair had brought the man to a level of X on its own, then the man would have become angry with the concubine as soon as he saw the hair. This anger would have been in line with the man's true marginal reaction to the hair. But if the hair caused the man to feel disappointment below the level of X, it would not have been until he saw the fly that he reacted. His anger level in this second permutation would have been equivalent to his reaction in the real story. (It is also possible that there was something particular about the progression from fly to hair, in which case speculation about the reverse is certainly ungrounded.)

### 13. COMPARING ACTIVE AND CONSCIOUS MARGINAL REACTIONS

Our inability to answer these questions is an indication that there is a discrepancy between the man's active marginal reaction and his conscious marginal reaction. Although the fly has no perceivable marginal effect and the hair has the marginal effect of causing the man to be angry, the marginal reaction as witnessed by the concubine is distinct from the marginal reaction as it occurred in the man's head. With the fly, the active marginal reaction understates the conscious marginal reaction (since he is bothered by the fly but determines that it is not an appropriate time to show anger), whereas with the hair, the active marginal reaction overstates the conscious marginal reaction (since the anger he displays is based on his reaction to the combination of the fly and the hair, not just the hair).

The excess, then, can be defined as the difference between the active marginal reaction and the conscious marginal reaction. (Support for this definition can be found in Tosfot HaRosh, Eitz Yoseph, and Rav Moshe, *loco citato*.) However, Rabbi Evyatar and Rabbi Yonatan disagree as to which specific formulation represents excess. (Although several sources discuss the nature of the man's excess, it was difficult to find a source that differentiated between the opinions of Rabbi Evyatar and Rabbi Yonatan. I have interpreted the *machloket* according to my own analysis. For a different interpretation of the disagreement between Rabbi Evyatar and Rabbi Yonatan, see the **Maharal, d.h. Kah** on this *gemara*.)

### 14. EXCESS ACCORDING TO RABBI YONATAN

Rabbi Yonatan's viewpoint is straightforward. He is concerned with the hair. It was the hair that had the marginal effect of making the man express anger. The excess occurs due to the fact that the conscious marginal effect of the hair is actually not as strong as the active marginal effect: the man appears to be as angry as he is due to the hair but he is in fact responding to the combination of the hair and the fly. According to Rabbi Yonatan, the man should have told the concubine that he was responding to both the fly and the hair. By making it seem like he was reacting this way exclusively because of the hair, he instilled a fear in her that exceeded an appropriate amount of fear. She was now far too afraid of letting the man see that hair again, much more afraid than the proper reaction to the hair

would have instilled in her. His goal was to scare her so that she would act properly; but since he was not explicit about what she had done (not just the hair but also the fly), he scared her excessively.

#### 15. EXCESS ACCORDING TO RABBI EYATAR

According to Rabbi Evyatar, the focus is the fly. As soon as the man's conscious marginal reaction fails to produce an equal active marginal reaction, he has violated the prohibition of instilling excessive fear. Why? The concubine was not foolish. She was aware that the fly bothered her husband. But he showed no response. The concubine knew that the active marginal reaction understated the conscious marginal reaction, but she had no way of knowing by how much it understated it. Imagine, for example, that  $X$ , for the man, equals 10. So at a 'disappointment' level of 10, the man reacts. Otherwise, he shows no signs of anger. If the fly brought the man to a 'disappointment' level of 3, he would react with an anger response of 0. But from the concubine's perspective, it is unclear how angry the man truly is. She knows that at some point she will do something else that will combine with the fly and cause the man's anger to surface (obviously she does not know that the anger is falsified—if she knew, it would defeat the purpose of the anger). She lives in fear because she has no way of knowing how angry the man will be. But she is afraid of a reaction that (in this case) is far greater than what will actually occur. In reality, the man has only reached an anger level of 3 but she has no way of knowing this. Her fear, therefore, is excessive. (It can be asked, according to this interpretation of Rabbi Evyatar, how is it possible that a woman who is excessively afraid of her husband would follow the error with the fly with an error with the hair? Perhaps this is the point: if the woman had felt an appropriate level of fear, she never would have erred with the hair. But since she felt excessive levels of fear, her judgment was weakened. This is in agreement with general psychology: a certain amount of anxiety can assist in the completion of a given task; once anxiety levels go beyond that point, however, efficiency lessens. The *gemara* clearly indicates that excessive fear can lead to the violation of *Halacha*, even though the very purpose of instilling fear in one's household is to get them to follow *Halacha*. In economics, this could be compared to a 'backwards bending' curve: as fear increases, efficiency increases, up to a certain level, at which point as fear increases, efficiency decreases.)

## 16. REVISITING THE GEMARA

These two approaches to excessive fear are distinct. According to Rabbi Evyatar, to avoid instilling excessive amounts of fear in your household, you should inform your household of your conscious response even if you don't feel that you've reached a point that demands an external reaction (you are below X). According to Rabbi Yonatan, you can wait to react until you are compelled consciously (until you reach X) but when you react you should be clear about what it is that's eliciting your reaction.

Essentially, Rabbi Evyatar demands an active marginal response that indicates the conscious marginal response (so that even if it's not anger that is expressed, some disappointment is still conveyed). Rabbi Yonatan requires that the active marginal response be explained according to its various combined elements in the conscious marginal causes.

This reading of the *gemara* solves all three of the *eilu ve'eilu* questions from above:

1. This is a *halachic* issue.
2. The opinions are mutually exclusive
3. Eliyahu's closing statement regarding the facts of the story is not related to the disagreement about *halacha*. It is not meant to rule according to either side as both Rabbi Evyatar and Rabbi Yonatan agree with the statement. (No *psak* is given. This statement is necessary, however, to clarify the facts surrounding the specifics of their disagreement.)

## 17. CONCLUSION

Marginal analysis is a crucial part of decision-making. Therefore, it cannot be discounted when rendering *halachic* rulings. But, as was shown by the *machloket* between Rabbi Evyatar and Rabbi Yonatan, understanding the practical marginal effect is not always enough to unearth the underlying principles of proper action.