Jewish Justice and #MeToo – Handout

# Example

# Exodus 23:7

From a false thing, keep your distance; and the righteous and the innocent, do not kill, because I will not justify the wicked.

# Mishnah Makkot 1:10

If someone whose judgement was final, and ran away but came back to the same Beit Din, we do not re-evaluate his old judgment. Any time that two witnesses came and say, "We testify that this person had a judgement passed against him in a certain court," so and so were the witnesses, we execute him. A Sanhedrin that would execute somebody once in seven years would be considered destructive. Rabbi Elazar ben Azariah says: "Once in seventy years." Rabbi Tarfon and Rabbi Akiva said: "If we were on the Sanhedrin, nobody would have ever been executed." Rabban Shimon ben Gamliel said: "They too would have increased spillers of blood in Israel."

# Sefer HaMitzvot, Negative Commandments 290:1

The 290th prohibition is that we are forbidden from punishing someone based on our estimation [without actual testimony], even if his guilt is virtually certain. An example of this is a person who was chasing after his enemy to kill him. The pursued escaped into a house and the pursuer entered the house after him. We enter the house after them and find the victim lying murdered, with the pursuer standing over him holding a knife, with both covered with blood.

The Sanhedrin may not inflict the death penalty on this pursuer since there were no witnesses who actually saw the murder.

And it is preferable and more proper that even a thousand guilty people be set free than to someday execute even one innocent person.

# Blackstone, Chapter XXVII: Of Trial and Conviction, 359

…for the law holds that it is better that ten guilty persons escape than that one innocent suffer.

# Damages

# Mishnah Bava Kamma 8:1

One who injures his fellow is liable concerning him for five categories [of payment]: damages (*nezek*), pain (*tza’ar*), medical costs (*repuy*), unemployment (*shevet*), and shame (*boshet*).

For damages, how [is this calculated?] One who puts out his eye, cuts off his hand, breaks his leg—we see him as if he were a slave sold in the marketplace, and we evaluate how much he was worth [the injury] and how much he is worth now.

Pain? When he burned him with a spit or a nail—even on his fingernail—anything where there is no [permanent] wound, we evaluate how much a similar person would want to pay to be spared this [pain].

Medical costs? When he strikes him, he is liable for his medical costs. If swellings arose on him, if they were because of the strike, then he is liable; but if it was not because of the strike, he is exempt. If the swelling healed and then reopened and then healed and reopened, he is liable for his medical costs. If it healed entirely, he is exempt from his healing.

Unemployment? We see him as if he were a guard of gourds, since he already gave him the value [for the loss] of his hand or his leg.

Shame? All depends on the one who shames and the one who is shamed. One who shames a naked person, a blind person or a sleeping person is liable. If a sleeping person embarrasses, he is exempt. One who falls from the roof and caused damage and shamed, he is liable for damages and exempt for shame, as it is written, "When two men fight and the wife of one comes out to save her husband, and she puts out her hand and seizes his genitals (lit. “his shame”) you shall cut off her hand" (Deuteronomy 25:11-12). No one is liable for shame unless one intended to cause it.

# Due Process

# Bavli, Sanhedrin 7a

And R. Samuel b. Nahmani said R. Jonathan said: A judge who unjustly takes the possessions of one and gives then to another unlawfully, the Holy One, blessed be He, takes his soul from him, for it is written: “Rob not the weak, because he is weak, neither crush the poor in the gate; for the Lord will plead their cause and despoil of life those who despoil them” (Proverbs 22:22-23)

# Bavli, Sanhedrin 6b

Judges should also know whom they are judging, before whom they are judging, and who will call them to account, as it is written: “God stands in the Congregation of God (Psalms 82:1)

# Mishneh Torah, The Sanhedrin and the Penalties within their Jurisdiction 23:8

A judge should ever regard himself as if a sword were placed upon his neck, with *Gehinnom* gaping under him. He should know whom he is judging, before whom he is judging, and who will punish him for deviating from the line of truth, as it is written: "God stands in the divine assembly, in the midst of the judges" (Psalm 82:1).

# Principle: Impartial Judges

# Deuteronomy 16:19

You shall not judge unfairly: you shall show no partiality; you shall not take bribes, for bribes blind the eyes of the discerning and upset the plea of the just.

# Exodus 23:2-3

You shall neither side with the mighty to do wrong—you shall not give perverse testimony in a dispute so as to pervert it in favor of the mighty nor shall you show deference to a poor man in his dispute.

# Mekhilta d'Rabbi Yishmael, Chapter 23:6

"You shall not incline the judgment of your needy one in his quarrel" (Exodus 23:6). What is the intent of this? From "You shall not honor a poor man in his quarrel," I would know only of a poor man. Whence do I derive a needy pauper? From "You shall not incline the judgment of your needy one." Abba Channan says in the name of R. Eliezer: Scripture here speaks of an evildoer. Do not say: Since he is an evildoer I will incline the judgment against him. This is the intent of "You shall not incline the judgment of your needy one in his quarrel" — one who is "needy" in mitzvot.

# Bavli, Shevuot 30a

Rabbi Yehuda said: I heard that if the judges wished to seat both of the litigants, they may seat them. What, then, is prohibited for the judges? They must ensure that there will not be a situation where one litigant is standing and one litigant is sitting or a situation where one litigant says everything that he needs to say to present his case and one litigant, the judge says to him: Curtail your statement.

# Principle: Burden of Proof

# Bavli, Bava Kama 46a

Rav Yehuda says Shmuel says: This is the statement of Sumakhos, who says: Property of uncertain ownership is divided. But the Rabbis say this is the great principle of law: The burden of proof rests upon the claimant.

# Principle: Necessity of Two Witnesses

# Deuteronomy 19:15

לֹא יָקוּם עֵד אֶחָד בְּאִישׁ, לְכָל-עָוֺן וּלְכָל-חַטָּאת, בְּכָל-חֵטְא, אֲשֶׁר יֶחֱטָא: עַל פִּי שְׁנֵי עֵדִים, אוֹ עַל פִּי שְׁלֹשָׁה עֵדִים יָקוּם דָּבָר

One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sins; at the mouth of two witnesses, or at the mouth of three witnesses, shall a matter be established.

# Rashi on Deuteronomy 19:15

ONE WITNESS — This is the classic passage from which the general principle is derived that wherever the term “witness” (עד) occurs in the Torah, it means two witnesses, unless it specifically mentions in connection with it the word אחד

# Bavli, Shevuot 40a

R. Hiyya taught in support of Rav: ‘A sela’ of mine you have in your possession.’ — ‘I have of yours in my possession only a sela’, less two ma'ahs,’ he is liable; ‘less one ma'ah’, he is exempt

Rav Naḥman bar Yitzḥak says Shmuel says: They did not teach this except in the case of a claim of a creditor and admission of a portion on the part of the debtor; but in the case of a claim of a creditor and the testimony of one witness, even if he claimed only a perutah, he is liable.

# Bavli, Pesahim 113b

This is like that incident where Tuveya sinned and Zigud came alone to testify about him before Rav Pappa. Rav Pappa instructed that Zigud be lashed. Zigud said to him: “Tuveya sinned and Zigud is lashed?” He said to him: Yes, as it is written: “One witness shall not rise up against a man” (Deuteronomy 19:15), and you testified against him alone. You have merely given him a bad reputation.

# Bavli, Shevuot 31a

From where is it derived with regard to two individuals who came to judgment, one dressed in rags and one dressed in a garment worth one hundred times one hundred dinars, that the judges say to the wealthy person: Dress like the poor person or dress the poor person in a garment like yours? It is derived as the verse states: “Distance yourself from a false matter” (Exodus 23:6)

When individuals would come before Rava bar Rav Huna for judgment he would say to them: Remove your fine shoes and descend for judgment.

# Exceptions to Due Process

# Bavli, Shabbat 119a

Rava said: May I receive my reward because when a young Torah scholar comes before me for judgment, I do not put my head on the pillow until I seek as many of his merits as possible. Mar bar Rav Ashi said: I am disqualified to sit in judgment of a young Torah scholar. What is the reason? It is because the Torah scholar is as beloved to me as my own self, and a person does not find fault in himself.

# Ketubot 85a

There was a certain woman who was obligated to take an oath [in order to avoid payment] in Rava’s court. The daughter of Rav Ḥisda said: I know that she is suspect with regard to taking a false oath. Rava reversed the obligation of the oath so that it fell onto the other party.

On another occasion, Rav Pappa and Rav Adda bar Mattana were sitting before Rava. A certain document was brought before Rava. Rav Pappa said: I know about this document, that it has been paid. Rava said to him: Is there another person with the Master? He said to him: No. Rava said to him: Although there is the Master, one witness is nothing.

Rav Adda bar Mattana said to Rava: And should Rav Pappa not be like Rav Ḥisda’s daughter? Rava replied: Rav Ḥisda’s daughter I know with certainty about her; Master I do not know with certainty about him.

# Mishneh Torah, The Sanhedrin and the Penalties within their Jurisdiction 24:1

A judge may adjudicate cases involving monetary law bases on factors that he is inclined to regard as true and concerning which he feels strongly in his heart are correct even though he does not have proof of the matters. Needless to say, that if he personally knows that a matter is true, he may judge the case according to his knowledge.

What is implied? A person was obligated to take an oath by the court. A person who the judge regards as trustworthy and upon whose word the judge relies tells him that this person is suspect to take a false oath. The judge may reverse the obligation for the oath and place it on the other litigant, allowing him to take an oath and collect his claim because the judge relied on the statements of this person.

Moreover, even if he regards a woman or a servant as trustworthy, should he feel strongly that the matter about which they are speaking is correct, he may rely on their statement and judge accordingly. Needless to say, if he himself knows that a person is suspect to take a false oath, he may judge accordingly.

These matters are solely given over to the heart of the judge to decide according to what he perceives as being a true judgment. Why then did the Torah require two witnesses? Because when two witnesses appear before a judge, he must judge according to their testimony whether or not he knows it to be true.

# Mishnah Sotah 1:1

A man who warns his wife: Rabbi Eliezer says: he warns her on the testimony of two, and he makes her drink on the testimony of one witness or by his own testimony. Rabbi Yehoshua says: he warns her on the testimony of two and makes her drink on the testimony of two