Introduction

In 1944 the Haifa District Court in Mandate Palestine acquitted twenty-five-year-old Nimr Razek of attempting to commit an indecent act upon nineteen-year-old Nafiseh, a married woman from his village of Kafr Kare.[1] Nafiseh testified that on the night of 16 June 1944, while her husband was away, she had been sleeping with her baby daughter on the roof of her house. She had been awakened by a man who grabbed her and tried to take off her 'drawers', and she had recognized his voice as that of her neighbour, Nimr Razek. Nafiseh began to shout profusely and managed to tear Nimr's shirt as he escaped. In addition to her testimony, the evidence introduced at trial included a torn shirt, the testimony of her father, to whom Nafiseh immediately reported the attack, and the testimony of Khalil, Nafiseh's husband's brother. Khalil testified that he had been sleeping in the family compound and had been awakened by Nafiseh's loud screams. He saw a man running from Nafiseh's roof to Nimr's house. He then heard Nimr's mother ask 'Who is that?' followed by Nimr urging her to be quiet. The court did not believe Nafiseh's story. In a revealing paragraph, the British President of the Haifa District Court, Judge Curry, reasoned as follows:

> The story of the complainant I find strange in one or two particulars. It seems to me unusual for a married woman to be sleeping alone although I appreciate it is not impossible, but I feel it is strange for a man in the middle of the night, to come to commit an indecent act upon a woman unless there has been some friendship or some encouragement to hope that he would not be badly received. Naturally if they were together with her consent and something happened to alarm her, she would give the alarm, to save her own honour.[2]

Clearly, Judge Curry's considerations were not strictly legalistic. But what made him find Nafiseh's story unconvincing? Why did the story of a courtship that crossed the line and ended with a fabricated accusation make more sense to him? Was the 'plot' of Nafiseh's testimony deficient in some way? Was her story contradicted by other evidence? Judge Curry was a high-ranking figure in the British colonial administration, and Nafiseh was

[1] ISA/RG 30/Law 2036 (original docket # Cr.C 208/44).
[2] See the judgment given 16 December 1944.

a young Muslim villager and a colonial subject. Did their respective political positions and ethnic identities influence the judge's assessment of the young woman's testimony and, if so, how? To what extent was the scrutiny of Nafiseh's story conditioned by gendered patterns? Was Judge Curry's incredulity anchored in the particularities of her story, in his presumptions regarding the sexual mores of Arab villagers in Palestine or in his more general beliefs about the way the world operates?

In this book I attempt to determine what makes one story convincing and another doubtful, inside and outside the criminal courtroom. In doing so, I employ 'plausibility' as an analytical framework that provides valuable insight into the practice of factual determination. In theory, the establishment of true facts inside the courtroom is based on information and materials that are admitted through proper application of the rules of evidence. The doctrinal rules, however, only partially explain what stories make sense in practice. Nafiseh's story, although supported by other pieces of evidence, was found implausible. Why? Because, I contend, its plausibility depended to a large degree on the social context in which it was told. I argue that persuasion relies on socially constructed knowledge, reasoning and sentiments that are shared by the members of a given society in a given time and place. Therefore, rather than seek to define plausibility in universally applicable human psychological or philosophical terms, my research takes a 'law in action' approach that deciphers persuasion in a particular historical and socio-cultural setting.

Evidence and procedure are typically perceived as quite technical in nature, while substantive norms are widely recognized as expressing broad social interests and values. The socio-legal history of plausibility can shed light on actual practice as an integral mechanism in the process of proof, and it highlights the socially constructed nature of the supposedly neutral and technical mode of factual determination. Despite extensive awareness of the distinction between 'law on the books' and actual practice, evidence scholars usually shun 'in action' analysis of legal proof and evidence law and of their role in legitimizing social institutions and in disguising the interests behind legal regimes.[3]

[3] While no mainstream evidence scholars have engaged in full-blown 'in action' analysis, a few leading scholars have questioned the basic axiom of the truth-finding rationale and have offered a contextual rather than a strictly doctrinal perspective. Alex Stein, for example, points to risk sharing by and cost reduction for contending parties as major considerations in the constitution of evidence law. However, Stein perceives society as a homogenous entity, whose members share similar ideas about the constitution of well-being as well as similar concepts of 'utility', 'fairness' and 'morality'. Another exceptional voice is that of Ian Dennis, who regards legitimization, and not truth-finding, as the ultimate basis of evidence law. By pointing to legitimization, Dennis implies that power relations constitute evidence law, but he does not pursue the significance of his conclusion, as he does not explain who seeks legitimization, by what means and for what purpose. Most contextual is the work of William Twining, who calls for a multi-disciplinary study of evidence from a broad theoretical and historical perspective. See I. H. Dennis, *The Law of Evidence*, 4th ed. (Sweet & Maxwell: London, 2010); Alex Stein, *The Foundations of Evidence Law* (Oxford: Oxford University Press, 2005); William Twining, *Rethinking Evidence: Exploratory Essays* (Cambridge: Cambridge University Press, 2006).

Although a broad treatment of proof 'in action' is still wanting in the field of evidence law, several legal historians point to the gap between doctrine and practice and the social and cultural foundation and uses of legal proof.[4] Legal historians who study sex offences have been particularly sensitive to proof as a locus that reveals the gap between 'law on the books' and 'law in action' and have underlined proof's embodiment of cultural norms and social interests. In her study of illicit sex crimes in Ottoman Aleppo, Semerdjian demonstrates that a flexible use of evidence (sometimes to the extent of bending Sharia rules by allowing hearsay and circumstantial evidence) was a significant channel through which the court accommodated the local community.[5] Kolsky's examination of evidentiary standards in rape cases in colonial India demonstrates how the requirement of 'corroboration' through application of medico-legal standards was based upon ethnical and gendered prejudices against native female complainants, which made it difficult for victims to successfully prove their complaints. The proof of rape allegations, Kolsky shows, was not merely a technical legal issue but part of colonial and gendered politics.[6] Backhouse's work on the history of sexual assault law in Canada and Australia analyses corroboration as a doctrine that lends credence to guilty men at the expense of female and child victims.[7]

Awareness of the social role of evidence in the area of sex offences was first raised by feminist theoreticians who explored rape as a means of subjugating women and who scrutinized cultural myths scaffolding the patriarchal treatment of sexual assault. Consequently, feminist critique of evidentiary

[4] Several scholars have placed the historical study of evidence law at the heart of their research. Mnookin examines criteria of admissibility of scientific evidence such as DNA and fingerprints in relation to cultural beliefs about the reliability and legitimacy of various ways of knowing. She also analyses the relation between the structure of the adversarial system and the nature of scientific evidence (and, more specifically, the problems of partisanship and epistemic competence of expert witnesses). See Jennifer L. Mnookin, 'Fingerprint Evidence in an Age of DNA Profiling', *Brooklyn Law Review* 67, no. 1 (2001); 'Expert Evidence, Partisanship, and Epistemic Competence', *Brooklyn Law Review* 73, no. 3 (2008). Sengoopta explores the cultural context in which fingerprinting was developed in India under the Raj and was then exported to Victorian England. See Chandak Sengoopta, *Imprint of the Raj: How Fingerprinting Was Born in Colonial India* (London: Macmillan, 2003). Blum concludes that procedural and evidence rules in Mandate Palestine reflect colonial authorities' changing ideas about and stereotypes of the natives as well as their own evolving political interests. See Binyamin Blum, 'Evidence Rules of Colonial Difference: Identity, Legitimacy and Power in the Law of Mandate Palestine, 1917–1939' (JSD dissertation, Stanford University, 2011). My own work has investigated the affiliation between socio-cultural context and the development of evidentiary techniques in early modern English witch trials. See Orna Alyagon Darr, *Marks of an Absolute Witch: Evidentiary Dilemmas in Early Modern England* (Farnham, UK: Ashgate, 2011).

[5] Elyse Semerdjian, *'Off the Straight Path': Illicit Sex, Law, and Community in Ottoman Aleppo* (New York: Syracuse University Press, 2008), xxiv, 87, 97–98, 138, 147, 150.

[6] Elizabeth Kolsky, '"The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860–1947', *Gender & History* 22, no. 1 (2010); 'The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805–57', *The Journal of Asian Studies* 69, no. 4 (2010).

[7] Constance Backhouse, 'The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia', *Queen's Law Journal* 26 (2001); *Carnal Crimes: Sexual Assault Law in Canada, 1900–1975* (Toronto: Osgoode Society 2008),173–83,190–92.

mechanisms based on 'rape myths' highlighted the social embeddedness of the process of proof of sex crimes. Feminist writing pointed to the proof of consent, corroboration, the recent complaint requirement and other evidentiary doctrines and methods as gendered and as part of the social power grid.[8] Some works pointed to the intersection of gender, race and colonial difference in the manner of proof.[9]

In this book, I explore persuasion in the context of sex offences in Mandate Palestine. The site and the topic offer several methodological advantages. Both legal history and feminist scholarship demonstrate that sexual crimes are fertile ground for the study of social embeddedness of legal proof. The criminal prohibitions regulating sexuality are soaked in moral and cultural perceptions and therefore provide a convenient platform for conducting socio-legal research. In the arena of sexuality, social, cultural and religious norms and practices are no less binding than the criminal law is, and perhaps are even more so. They are pertinent to a variety of issues: Who is a legitimate partner for sex? Under what conditions? What sexual practices are permissible? What practices are considered illegitimate? What establishes consent to a sexual act? The answers may depend on social attributes of the participants in an act, such as their age, gender, religion, nationality, race, ethnic origin, marital status and social status. The answers given by law and culture can overlap, conflict or diverge. Socially constructed perceptions of sexuality and sexual offences can shape both the finding of facts and the application of legal rules, as demonstrated in Judge Curry's opinion above.

Mandate Palestine (1918–1948) offers a socially and culturally heterogeneous site for research into plausibility. The territory's residents included British citizens, Jews and Arabs; Muslims and Christians; people of religious conviction and atheists; urban dwellers and peasants; colonial rulers and their subjects. In this land of social, ethnic and political cleavages, one can expect to find a range of attitudes towards, beliefs about and perceptions of sexuality and its regulation. In this complex environment, with a plurality of narrators and audiences, the question of what establishes a convincing as opposed to an unconvincing story becomes acute. Moreover, the region's different ethnic and national communities, to a large extent, were socially and culturally distinct

[8] For a collection which contains articles on the practice of evidence from a feminist perspective, see Mary Childs and Louise Ellison, eds., *Feminist Perspectives on Evidence* (London: Cavendish, 2000). A prolific writer on the gendered regime of evidence is Aviva Orenstein, whose work includes: Aviva Orenstein, '"My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule', *California Law Review* 85, no. 1 (1997); 'Special Issues Raised by Rape Trial', *Fordham Law Review* 76, no. 3 (2007); 'The Seductive Power of Patriarchal Stories', *Howard Law Journal* 58, no. 2 (2015); Aviva A. Orenstein, 'No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials', *Hastings Law Journal* 49 (1998). See also Kathy Mack, 'Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process', *Criminal Law Forum* 4, no. 2 (1993).

[9] Kathy Mack, 'An Australian Perspective on Feminism, Race and Evidence', *Southwestern University Law Review* 28 (1999); Christine Stewart, 'Men Behaving Badly: Sodomy Cases in the Colonial Courts of Papua New Guinea', *Journal of Pacific History* 43, no. 1 (2008).

and often even hostile to each other. The colonial framework and national tensions sharpened and accentuated the differences. With its heterogeneous population, Mandate Palestine makes a perfect setting for the study of plausibility in a multi-cultural environment.

Furthermore, in a colonial context, one might expect the colonizers' hegemonic view of native subjects and their sexuality to be more transparent and explicit than in the home country. Given the differences between their beliefs and perceptions and those of their subjects, and their sense of superiority over the natives, colonizers are likely to explicate their worldview to an extent that would not be deemed necessary at home, where judges and other participants in legal proceedings, diverse as they might be, share many cultural and ideological attributes. Such transparency, which was evident in British colonial courts, assists in the exploration of stories that did and did not make sense in the period under study and renders some the mechanisms of plausibility more visible. Methodologically, the degree of separation between communities in Mandate Palestine facilitates the tracing of distinctive ethnic voices and interpretations in court records. Nevertheless, while Mandate Palestine makes an excellent site for the study of plausibility, one must keep in mind that socially constructed phenomena may take different forms across time, cultures and places. While the general mechanisms of plausibility may be similar from society to society, their particular manifestations may vary across cultural and national boundaries. The primary materials on which this book leans offer another methodological advantage. The Mandate court records contain information about the ethnic and national groups to which the participants in legal proceedings belonged. With only a few exceptions, the ethnic origin of the participants practically leaps off the pages of the court files: it can be easily deduced from names (most are identifiably Arab, Jewish or British), and often the religion of a witness or a party is plainly noted in trial transcripts, investigative reports or indictments. Thus, the attempt to affiliate ethnicity or nationality with notions of plausibility is much facilitated.

Law and society are not distinct or separate spheres but are interconnected and mutually influence each other.[10] While this study assumes that the process of proof is socially and culturally embedded, I make no presuppositions regarding the particular manner in which the culture and norms of any one social group or segment are manifested in the process of proof. When I inquire what makes a particular story plausible, I do not make assumptions based on what is already known about the social players under study in terms of their

[10] For discussion of their interconnectivity, see Assaf Likhovski, 'Chasing Ghosts: On Writing Cultural Histories of Tax Law', *UC Irvine Law Review* 1, no. 3 (2011); Robert W. Gordon, 'Critical Legal Histories', *Stanford Law Review* 36, no. 1/2 (1984); Christopher Tomlins, 'How Autonomous Is Law?', *Annual Review of Law & Social Science* 3, no. 1 (2007); Austin Sarat and Thomas R. Kearns, 'The Cultural Lives of Law', in *Law in the Domains of Culture*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 2001); Naomi Mezey, 'Law as Culture', *Yale Journal of Law & the Humanities* 13, no. 1 (2001)

social and cultural identity. Rather, my aim is to detect indications of socially embedded elements of plausibility within the primary documentary sources. I use secondary literature on the norms or cultures of various groups merely to evaluate and further probe my findings, which are always grounded in the primary sources. Research into plausibility focuses on the meeting point of culture and law within the process of proof.

At the centre of this investigation of how stories make sense in the law lies the term 'plausibility', through which I study the traits that make one story appealing and another unconvincing. In so doing, I also probe the meaning of the term 'plausibility' itself, to which the legal literature often relates in an indiscriminate and incoherent manner. The scholarly uses of the terms 'plausibility' and 'implausibility' vary and are often theoretically indistinct. These terms may play into the chances of the prosecution to convict,[11] theories of a crime[12] or the proportionality of a prison sentence.[13] In this book I call for more precise use of 'plausibility' to denote a rhetorical quality that pertains to whether a story makes sense, whether it is persuasive.

Indeed, the plausibility of a story describing an alleged crime can vary when that story is considered by different actors in different sites and from various angles. Substantive law sets forth the elements of the offence, and no finding of guilt can be made unless each element is substantiated by evidence. The fact finders determine which witnesses should be believed and which evidence is unreliable. Police investigators' intuition as to the likelihood of an occurrence may influence the direction of an investigation or the sifting of cases before they reach court.[14] Media coverage embraces and propagates some storylines while rejecting others. Which stories of alleged crimes make sense? Can the same story strike one audience as implausible and make sense to others? Which stories are explicitly told and which are implicitly transmitted? The answers to these questions, as we shall see, draw on criminal law, procedure and evidence as well as on social and cultural narratives and norms.

This book explores various planes of plausibility, a domain that involves complex relations between law and society. The term 'plausibility' should be distinguished from the juridical terms 'credibility' and 'probability', which also set standards for the evaluation of statements and facts. In the next two sections, I clarify the differences between these related concepts, which are widely used in the legal arena.

[11] Willem Albert Wagenaar, P. J. van Koppen and Henricus Florentine Maria Crombag, *Anchored Narratives: The Psychology of Criminal Evidence* (Hemel Hempstead, UK: Harvester Wheatsheaf, 1993), 62.

[12] Travis Hirschi and Michael Gottfredson, 'Age and the Explanation of Crime', *American Journal of Sociology* 89, no. 3 (1983): 567.

[13] Andrew Ashworth, *Sentencing and Criminal Justice*, 6th ed. (Cambridge: Cambridge University Press, 2015), 290.

[14] Racial profiling is an extreme case in point.

The Difference between 'Probability' and 'Plausibility'

Despite its statistical ring, in its common legal usage the term 'probability' is not a quantitative measure of likelihood, and the mathematical formula is a metaphor for desired certainty rather than a computational tool.[15] The logician Jonathan Cohen even claims that the mathematicist analysis of probability is not applicable to judicial proof in Anglo-American courts acting in accordance with existing legal standards and procedures.[16] Cohen believes that ordinary jurors and judges are competent to assess judicial proof on the basis of inductivist analysis and practical commonsense reasoning.[17]

The term 'probability' conveys two opposed notions regarding the possibility of knowing facts with certainty. On the one hand, it implies the impossibility of absolute certainty. Knowledge of a 'probable' fact is necessarily an inference. On the other hand, probability implies the possibility of reaching a high level of assurance about facts not directly observed. Shapiro describes how these notions, which the ancient Greeks and Romans perceived as dichotomous, became less distinct in early modern England.[18] 'Science' in that setting was no longer strictly syllogistic or mathematical, and knowledge had become more empirical and more concerned with matters of fact. English thinkers in different fields no longer believed that absolute certitude was humanly possible. By the end of the seventeenth century, satisfying knowledge of the 'truth' could be highly probabilistic, relying on observation of facts and experience.[19] Early modern English legal thought shared this epistemological turn, reflected in growing emphasis on assessments of probability, degrees of certainty and the formation of standards such as 'reasonable doubt'.[20]

The rise of empiricist thought coincided with a significant procedural change transferring adjudication from the hands of God to those of lay jurors. Resolving questions of proof and evidence involved acknowledging human fallibility and the impossibility of possessing certain knowledge. In the early days of jury trials, self-informed jurors could reach a decision based on their knowledge of most of the facts, common sense and common knowledge.[21] However, growing reliance on witnesses made necessary the assessment of

[15] For references to evidence scholars lamenting the innumeracy of lawyers and judges, see William Twining, 'Narrative and Generalizations in Argumentation About Questions of Fact', *South Texas Law Review* 40 (1999): 353 fn. 7.

[16] L. Jonathan Cohen, *The Probable and the Provable* (Oxford: Clarendon Press, 1977),117–18, §§ 14–39.

[17] Ibid., 274–275. Cohen distinguishes between Pascalian and Baconian probability. Pascalian probability estimates chances on the basis of the frequency of examined occurrences in a given set of cases or on the basis of the personal experience of the fact finder. Baconian inductive probability expresses a degree of belief and evaluates the extent to which the available evidence in a particular case corresponds to the issues under review. See also Stein, 41–44.

[18] Barbara J. Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (Princeton, NJ: Princeton University Press, 1983), 1.

[19] Ibid., 2–3, 9–10. [20] Ibid., 11. [21] Ibid., 177.

evidence. The fact finder could not be certain of some fact merely because a witness had attested to it. In the words of Stein, '[a]djudicative fact-finding is about probabilities, not about certainties'.[22]

Although English jurors were permitted to base their verdicts on circumstantial evidence, in their attempt to grade the value of evidence, they borrowed from their Continental counterparts the concept of the classification of proof. Roman-canon doctrine, dating at least as far back as the 1150s, ranked presumptions with respect to three evidentiary levels, customarily named 'violent', 'probable' and 'light'.[23] Ironically, Continental juridical terminology of degrees of certitude was employed to facilitate convictions in hard-to-prove cases such as witchcraft.[24] Short of direct evidence, conviction on the basis of aggregated fragments of proof was made possible. The notion of degrees of certainty legitimized the use of circumstantial evidence and enabled its classification according to varying degrees of probative strength. In fact, James Whitman argues that the nascent standard requiring assurance 'beyond a reasonable doubt', despite its certitude-conveying rhetoric, actually enabled fact finders to soothe their consciences when convicting despite lingering uncertainty. Through the application of this standard jurors could convict without risking the salvation of their souls.[25]

By the beginning of the eighteenth century the basic rules of evidence had formed.[26] Thereafter, the Anglo-American legal system gradually developed an intricate matrix of evidentiary rules, with exclusionary mechanisms, many exceptions and exceptions to the exceptions. To enter the record, evidence must be admissible. In addition, its credibility and weight must also be considered. Prevailing legal theory regards the rules of evidence as a rational and objective means of getting closer to truth.[27] The view of probability as a means of evaluating an empirical truth is rooted in basic concepts and standards such as 'reasonable doubt', 'balance of probabilities' and 'probable cause'.

Assessments of probability are made by fact finders whose minds are 'stocked with a vast number of commonplace generalizations about human acts, attitudes, intentions, etc., about the more familiar features of the human environment, and about the interactions between these two kinds of factor,

[22] Stein, 35. [23] Alyagon Darr, 80. [24] Ibid., 81–85.
[25] James O. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven, CT: Yale University Press, 2008).
[26] John H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford Studies in Modern Legal History (Oxford: Oxford University Press, 2003).
[27] As expressed in the classic treatise by John Henry Wigmore, *Evidence in Trials at Common Law*, 4th ed., 10 vols., Vol. 1, *Wigmore on Evidence* (Boston: Little, Brown and Company, 1983), xx, 8, see also 9, fn. 5. While the discovery of truth is the paramount objective, other values entrenched in the rules are 'economizing of resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, adding to the efficiency of the entire legal system, and tranquilizing disputants' (Judge Weinstein as quoted by Stein, 36).

together with an awareness of many of the kinds of circumstances that are favourable or unfavourable to the application of each such generalization'.[28] These generalizations are the product of culture and socialization.[29]

Like plausibility, probability is predicated on communality, and both concepts hinge on shared societal knowledge. However, while probability pertains to 'truth', the correspondence of the evidence with empirical reality, plausibility addresses the rhetorical level and the ability to persuade. Determination of probability rests on factual finding that is inferred from the evidence. The analysis of plausibility examines this process of inference and probes the communality on which inferences rely. Inferences, which may be accurate or mistaken, are based on socially valid knowledge that establishes plausibility. This book thus maps out the various elements that establish plausibility; the question it addresses is not what makes a story real or true but what makes a story acceptable or convincing.

The Difference between 'Credibility' and 'Plausibility'

Another concept that is closely related to but that should be distinguished from 'plausibility' is 'credibility', or 'reliability'. The credibility of a witness guarantees the accuracy and truthfulness of his or her testimony. It speaks to the witness's perception, intelligence, communication skills and honesty. The assessment of credibility is intended to ensure that fact finding and judicial decisions rest upon truthful witnesses.

To achieve the goal of keeping liars out of the courtroom, the old common law relied mainly on competence.[30] 'Infamous witnesses' who belonged to a list of dubious categories were not qualified to testify under oath.[31] As it was given without oath, their testimony had little value. The English judicial notion of truthfulness was transformed during the early modern era in response to growing doubts about the value of oath-taking and a rising empiricist worldview that emphasized observers' ability to perceive facts and convey their observations accurately. As early as the seventeenth century, Matthew Hale, while still referring to categories of incompetence,[32] made a distinction between the competency and the credit of testimony.[33] The emergent concept

[28] Cohen, 274. [29] Ibid., 275.
[30] Colin Tapper, *Cross & Tapper on Evidence*, 12th ed. (Oxford: Oxford University Press, 2010), 223.
[31] Among these categories were infidels, convicted felons, those convicted of perjury or conspiracy, the insane, those 'not of discretion', interested parties, and champions in a writ of right who became recreant or coward. William Nelson, *The Law of Evidence*, 1st ed. (London: B. Gosling, 1717), 20.
[32] Sir Matthew Hale, *Pleas of the Crown* (London: William Shrewsbury and John Leigh, 1678), 263.
[33] Sir Matthew Hale, *Historia Placitorum Coronae. The History of the Pleas of the Crown, by Sir Matthew Hale . . . Now First Published from His Lordship's Original Manuscript, and the Several References to the Records Examined by the Originals, with Large Notes. By Sollom Emlyn . . .*

of credibility emphasized the individual qualities of the witness rather than stereotypes attached to social categories. Most of these categories were formally abolished by the Evidence Act 1843 (6 & 7 Vict c. 85). Matters of fact had to be based on credible witnesses, and mere oath was no longer sufficient to establish reliability. Nevertheless, a true story from the mouth of a credible witness was not necessarily a plausible one.

Despite the plummeting significance of the competency rules, credibility of witnesses is still partly socially constructed. It is still predicated not only on individual qualities such as intelligence and perceptiveness but also on the plausibility of the narrative the witness unfolds and of his or her role in it. For example, in a judgment rendered while sitting on the Palestine Supreme Court, Judge Curry doubted the testimony of a female rape victim who did not become hysterical and was not reduced to tears after the alleged rape.[34] In this example, plausibility depended on the social identity of the witness (a female complainant in a rape case) and the cultural expectation about how she should fulfil her social role. Credibility, one may say, is predicated on both individual qualities (such as the ability to perceive) and roles and expectations that are attributed to the social category to which the witness belongs. The latter of these two factors belongs to the realm of the 'plausible'. In other words, 'plausibility' is that part of the credible that is socially constructed.

While both probability and credibility relate to 'true' stories, plausibility pertains to stories that make sense. Twining points to several attributes of 'good' stories: internal structure and coherence, fitness for purpose, and effect on an audience. A story may also be appealing if it fits into a familiar pattern. A story may not strike hearers as good if it ends in an anti-climax, ceases to have a point or is not memorable, truthful as it may be.[35] The narrative conventions apply to storylines and stock characters.[36] In a criminal trial, when fact finders need to choose between alternative narratives, they may prefer the one that appears to better solve the crime.[37] The same logic applies to journalistic crime stories – interesting and persuasive ones may be preferred over factually accurate and boring ones.[38]

To Which Is Added a Table of the Principal Matters. In Two Volumes. . . . (London: F. Gyles, T. Woodward, and C. Davis, 1736), I 635.

[34] 'I am extremely surprised that a girl of 19½ was not in a much more distressed state after having been raped by three ruffians than this girl apparently was. One would have expected the reaction to have made her hysterical and to have reduced her to tears . . . '. See the minority opinion of Acting Justice Curry from the Palestine Supreme Court in Cr.A 31/47.

[35] Twining, 'Narrative and Generalizations in Argumentation About Questions of Fact', 360, fn. 38.

[36] Joseph E. Davis, *Accounts of Innocence: Sexual Abuse, Trauma, and the Self* (Chicago: University of Chicago Press, 2005), 15.

[37] Wagenaar, Koppen and Crombag, 59.

[38] Twining, 'Narrative and Generalizations in Argumentation About Questions of Fact', 360, fn. 38.