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Relocated Doctrine: The Travel of the English Doctrine of Corroboration in Sex Offense Cases to Mandate Palestine

Dr. Orna Alyagon Darr*

INTRODUCTION

The explicit narrative of the British rulers of Mandate Palestine1 is one of the implementation of modern criminal law and the defense of women, children, and morality.2 Instituting orderly and rational administration and law was part of the British imperial “civilizing mission.”3 An examination of the mode of proof, however, as it involved the application of the corroboration rule in sex offense cases, reveals a different story. The

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1. Palestine was one of the territorial units created by post-WWI peace agreements that carved up the Middle East between France and Britain. Although the new regional units were not defined as “colonies” but, rather, as “mandates” supervised by the League of Nations, the European imperial powers made no essential distinction between the two types of administrative arrangements. LAURA ROBSON, COLONIALISM AND CHRISTIANITY IN MANDATE PALESTINE 6 (2011).

2. The ordinance modifying Ottoman sexual offenses was unambiguously titled “offences against women and children and against decency.” Criminal Law Amendment Ordinance, No. 2 (1927) [hereinafter CLAO].

common-law rule of corroboration prevents the adjudicator from convicting the accused on the basis of a single individual’s testimony, credible as the witness may be, unless an additional and independent piece of incriminating evidence is available. Some jurisdictions (Scotland, for example) require corroboration of all testimony in all criminal cases. Yet the corroboration rule in common-law jurisdictions is typically limited to cases involving the testimony of an accomplice and to cases of sexual offenses. In the first instance, the accomplice’s interest in lying to shift most of the blame onto his or her partner to the crime is the rationale behind the requirement to corroborate his or her testimony. When it comes to sexual offenses, the standard explanation for the requirement is that such crimes are often committed in private and, therefore, that special care against false accusations is warranted. This rationale has been critically attacked, for reasons that I elaborate in the following discussion.

My focus in this article is the social and cultural uses of the rule of corroboration—a rhetorical device that allows the judiciary to identify itself with desired legal traditions and a tool for constructing social and cultural credibility, or lack thereof, in certain types of witnesses. Inherent in the rule of corroboration is suspicion toward certain categories of witnesses as untrustworthy. Even when fact finders regard specific witnesses as truthful, honest, and credible, their testimony alone is insufficient for conviction, since they are members of “suspicious” groups. Analysis of the rule of corroboration in cases of sexual crimes provides an excellent opportunity to examine the social embeddedness of evidence law. The original goal of corroboration was to sift out false testimony. However, treating the members of a certain social category as potentially flawed witnesses constructed all group members as inherently flawed, and their testimony was never sufficient for conviction. Controversy about corroboration is a controversy about which categories of witnesses should be believed and under what conditions. As I argue, this is an issue of sociocultural construction and must therefore be studied within specific historical, social, and cultural contexts.

In Part 2 of this Article, I establish the backdrop of sex offense cases in Mandate Palestine (1918–1948) through a comparative legal history of Ottoman and British Mandate judicial systems and substantive criminal norms. In doing so, I introduce the inherent imperial tension between accommodation of local sensibilities and circumstances and distrust of local subjects. Part 3 explores the history of the English rule of corroboration in sexual offenses. The rationale for the rule, most famously articulated by the early modern jurist Sir Matthew Hale, was the probative

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5. For the rationale and history of accomplice corroboration, see JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 203 (2003).
difficulty presented by such private matters and the fear of fabricated charges. These concerns, which led to the development of a practice of cautionary warning to the jury in cases of sex crimes, implicitly but clearly convey the suspicious attitude of British courts toward complainants' moral reputation and truthfulness. The concept of corroboration spread with the advance of British rule throughout the empire. In Part 3, I show how, from its inception, the corroboration requirement reflected biases about the reliability of complainants in sexual assault cases, biases that persisted, evolved, and expanded when English common law was later exported abroad. Part 4 describes the practice of corroboration as applied by the British in Mandate Palestine. Initially, the British rulers of Palestine mandated corroboration of all testimony in all criminal cases. However, even after this general requirement was abolished in 1936, the local judiciary continued to demand corroboration of the testimony of complainants in cases of sexual offenses. The fact finders in Mandate Palestine, unlike lay English jurors, were professional judges whose expertise and qualifications might have been expected to call for fewer restrictions on the evidence available to them. The standard that had originally been intended as a cautionary warning to a lay jury was strictly applied by professional judges in a nonjury colonial system. The judicial rhetoric bolstering the rule repeatedly emphasized the corroborative importance of forensic and medical evidence. However, a close reading of cases in Part 5 demonstrates that the Palestine judiciary shaped the rule as an inflexible demand to corrobore the perpetrator's identity as well as the sexual act, thus significantly hindering the possibility of obtaining convictions, especially when the victim was a child. I examine the operation of the corroboration rule in Mandate Palestine as a site of political and cultural encounter between the British rulers and the inhabitants of that land. If the early development of the English rule represents a mistrust of women, its application in Palestinian cases reflects a suspicion of the inhabitants of the "East," especially of children. This socially and culturally embedded evidentiary practice reflected British rulers' biases and demonstrated a gap between their declared purposes—of protecting women and children and imposing superior moral values—and their actions.

II. SEX OFFENSES IN MANDATE PALESTINE

The British who occupied Palestine in 1918 changed both the substantive criminal law (imposing a new regime of sexual regulation) and

rules of criminal procedure and evidence. Prior to British control, Palestine had been part of the Ottoman Empire, whose 1858 Penal Code (revised twice, in 1911 and 1914) was based on the Code Napoléon,\textsuperscript{7} and the criminal procedure and evidence in the region had been controlled by the 1858 Code of Criminal Procedure, replicated from the French code,\textsuperscript{8} which did not demand corroboration.\textsuperscript{9} Ottoman law was not immediately discarded upon British occupation; rather, the British gradually replaced existing laws and modified the legal system into a common-law jurisdiction. Article 46 of the Palestine Order in Council (1922) created a mechanism to prevent automatic application of English common law and provided that it should “be in force so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty’s jurisdiction permit and subject to such qualification as local circumstances render necessary.” The British constructed a system clearly molded after the common-law model, but it was not a simulacrum. For example, they forwent a fundamental feature of the English system, the jury trial, the adoption of which would have necessitated entrusting the subjects of imperial rule with judicial decisions. The British in Palestine neither directly applied common-law rules of evidence nor followed the Indian Evidence Act of 1872 but adopted a much more limited set of evidence rules that left many of the Ottoman provisions of the Mejelle (the civil code of obligations inspired by Islamic law) in effect. The result was an Anglicized system, with traces of Islamic and French elements.\textsuperscript{10}

The overall structure of the Ottoman civil court system was retained by the British but with some modifications.\textsuperscript{11} That structure was a dual one: religious courts for each recognized denomination having jurisdiction over matters of personal status (most notably, marriage and divorce), and secular courts that heard civil and criminal matters. The civil court system was two-tiered. Lower courts handled petty criminal and civil cases, and district courts oversaw more serious criminal and civil matters and also

\textsuperscript{7} Norman Bentwich, \textit{The New Criminal Code for Palestine}, 20 J. COMP. LEGIS. & INT’L L. 71 (1938). The Mejelle, which set evidentiary rules for civil matters, however, was influenced by Islamic principles. Omri Paz, Crime, Criminals, and the Ottoman State: Anatolia Between the Late 1830s and the Late 1860s (2010) (unpublished Ph.D. dissertation, Tel Aviv University).

\textsuperscript{8} RICHARD VOLGER, A WORLD VIEW OF CRIMINAL JUSTICE (2005).

\textsuperscript{9} By 1918, criminal matters in the Ottoman Empire were not subject to the two-eyewitnesses demand. L. Sebba, \textit{The Requirement of Corroboration in Sex Offences}, 3 ISRAEL L. REV. 67, 75 (1968). The Ottomans relied heavily on the concept of competency to weed out unreliable witnesses. Article 146 of the Ottoman Criminal Procedure Code provided that “[t]he accused person’s ascendants, descendants, brothers, sisters, collaterals in the same degree, wife or husband, even when divorced, cannot be called or heard as witnesses, but the admission of their evidence is not a ground for quashing the case when neither the prosecutor, the civil claimant or the accused have taken objection to the evidence being heard.” The English translation of this article appears in S. G. KERMACK, A HANDBOOK OF THE LAW OF CRIMINAL PROCEDURE IN PALESTINE 131 (1928).

\textsuperscript{10} ASSAF LIKHOVSKI, LAW AND IDENTITY IN MANDATE PALESTINE 23 (2006).

\textsuperscript{11} Palestine Order in Council, Art. 39 (1922).
heard appeals of lower court decisions. In the British reworking, appeals from the district courts were taken to the Supreme Court in Jerusalem, sitting in a tribunal that included first at least two, and later at least one, senior British judge. In certain civil matters the judgments of the Supreme Court could be reviewed by the Privy Council in London.

The sex offenses discussed in this Article were typically initiated by complaint to the police, who conducted an investigation. Subsequently, the charges and the investigatory materials were brought before a local magistrate who held a preliminary inquiry and decided whether the case should be tried at the district level. Sex offenses, the punishment for which exceeded three years' imprisonment, were triable in district court before the British president of the court and two other judges. The witnesses in these cases thus gave a triple account: before the police, the magistrate, and the district court. The criminal files examined for this Article sometimes contained materials from each procedural stage (the statements to the police were submitted at the preliminary investigation, the records of the latter were frequently attached to the district court file, and the transcript of the district court proceeding was customarily attached to appeals to the Supreme Court). When it was established in 1948, the State of Israel largely retained the structure of the Mandate judicial system. Unfortunately, most Mandate court files did not survive the transfer to the new administration, apparently through disorder and neglect. However, I was able to locate sixty-nine files at the Israel Archives. Most of these materials had not yet been catalogued and were being made available by the archive for the first time.

The British presented themselves as the protectors of women and children in the land entrusted to their care by a League of Nations mandate, although their aspirations for reform were consciously constrained by considerations of local norms and customs. The British regulated matters such as child labor and child marriage, and their ideology was also expressed by their criminal legislation. Part of their civilizing mission was to institute a new regulatory regime of sexuality, distinct from the Ottoman one, as was manifested in different legal terminology and categories pertaining to sex offenses. The Ottomans
categorized sex offenders as "persons who violate honour," whereas the British framed sex offenses as "offences against women and children and against decency" and, later, as "offences against morality." "Honor" in this context is a patriarchal value that defines a woman's virtue as essential to the men of her family. "Decency" and "morality" also focus on the regulation of sexuality but suggest a different set of concerns, the enforcement of more-universal moral values within society.

One significant change in substantive law was in the treatment of same-sex sexual activity. The British introduced the offense of "sodomy" (committed with "any person") as a criminalized activity distinct from rape (committed on a female). The purged language of the Ottoman Penal Code (OPC) blurred gender differences, and the same provision applied to both male and female victims. Consensual homosexual relations between adults, not banned by the OPC, were criminalized by the British in Palestine. The legal ban on homosexuality was a long-standing British norm. Regardless of recurring policy statements about reluctance to interfere with local norms and customs, same-sex sexual activity, consensual or not, was criminalized across the colonies of the British Empire.

The wish to regulate sexuality stood in conflict with another British notion, the fear of perjury by colonial subjects. Michael McDonnell, chief justice of Palestine (1927–1936), described the conflicting attitudes of his fellow judges regarding the enactment of a prohibition against sodomy:

19. CLAO, supra note 2.
20. The title adopted in the Criminal Code Ordinance (1936) [hereinafter CCO]. The CCO was published in September 1936, and went into effect in February 1937.
22. Section 2 of the CLAO repealed articles 197-200 and 202 of the OPC and the remaining articles continued to coexist until the enactment of the 1936 CCO.
23. Article 198 of the OPC read as follows: "If a man does the abominable act to a person, that is to say violates his honour, by force he is placed in kyurek temporarily." The main purpose of this phrasing may have been to avoid the discussion of same-sex relations. See DROR ZEEVI, PRODUCING DESIRE: CHANGING SEXUAL DISCOURSE IN THE OTTOMAN MIDDLE EAST, 1500-1900, at 73 (2006).
24. Section 152(2)(c) of the CCO.
25. Same-sex sexual activity was outlawed long before the Victorian Criminal Law Amendment Act of 1885, which set forth various categories of sex offenses. The roots of the prohibition date back to a 1533 Henrician statute adapted around the eighteenth century to criminalize homosexual activity. HARRY G. COCKS, NAMELESS OFFENCES: HOMOSEXUAL DESIRE IN THE NINETEENTH CENTURY 17 (2003).
26. Michael Kirby, The Sodomy Offence: England's Least Lovely Criminal Law Export?, 1 J. COMMONWEALTH CRIM. L. 22, 28 (2011). The gap between claims of adherence to a "status quo" and the actual execution of legal, political, and social changes was typical of British imperial routine, in Palestine as well as in India and Africa. ROBSON, supra note 1, at 9, 44-45.
27. Letter from Michael McDonnell to the high commissioner (Mar. 7, 1929) (on file with Israel State Archives RG 2/M/265/7) [hereinafter McDonnell's letter]. The letter contains remarks regarding
The clause as it stands assimilates the law to that of England. Judge Kermack states that he thinks the chance of making false charges given by this clause is probably greater than the good that might be done by it.

Judge Copland, on the other hand, considers that it is time that something should be done to stop the offence of sodomy which is appallingly rife, so he states, in his District amongst all classes. He writes that he has tried 40 cases of this offence or attempt to commit it last year. Others with longer experience than I have of the East will say whether there is a danger of legislating in advance of public opinion.  

McDonnell postulates that better balance between progressive British legislation and local norms might be suggested by others with longer experience of “the East.” He uses this vague geographical term, rather than specifically mention Mandate Palestine. The choice of the word “East” not only insinuates an array of ideas about the Orient, “its sensuality, its tendency to despotism, its aberrant mentality, its habits of inaccuracy, its backwardness,” but also a hierarchical distinction between the British and their Palestinian subjects. The judges’ contradictory attitudes toward the regulation of sodomy reveal manifold tensions regarding the inexplicable and shadowy “East,” laden with images of uncontrolled sexuality, as expressed in “appallingly rife” sodomy and deceitful, extortion-minded locals of undeveloped mentality who were prone to make illicit use of the precious gift of British law. The redefinition of sexual offenses allowed the British to present themselves as the protectors of women and children and the bearers of high moral values, a maneuver of substantial declaratory value, both for British and international public opinion and for the local community in Palestine.  

The split between the declared goals of regulating sexuality and protecting women and children on the one hand, and deep distrust toward the complaints of locals about sexual assault on the other, is embodied in the practice of corroboration. To decipher the complex social and cultural sphere surrounding this evidentiary practice, it is first necessary to travel back a few centuries, to the early modern roots of the concept of corroboration.

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30. On the British use of progressive legislation for international, domestic, and local political purposes, see LIKHOVSKI, supra note 10, at ch. 4.
III. THE HISTORICAL ROOTS OF THE CORROBORATION REQUIREMENT

A long British common-law tradition pointed to the evidentiary difficulties inherent in proving sexual crimes and demanded evidentiary precautions that would prevent false convictions on the basis of fabricated charges. Any conviction that rested on a single person's testimony with no supporting evidence could create doubts.\(^{31}\) Sex offenses, however, stood out as particularly problematic to prove. The renowned judge Sir Matthew Hale referred to both rape and witchcraft as crimes that give the greatest difficulty . . . wherein many times persons are really guilty, yet such an evidence, as is satisfactory to prove it, can hardly be found; and on the other side persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt.\(^{32}\)

Hale also maintained that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."\(^{33}\) His assertion later became the target of much criticism on the grounds of inaccuracy\(^{34}\) and prejudice against female accusers.\(^{35}\) The criticism for inaccuracy was double edged. First, critics called the fear of false convictions unwarranted, pointing to the low prosecution rate and to the high acquittal rate in rape cases during Hale's time.\(^{36}\) Second, accusations of sexual assault were not that easy to make, as the accuser was likely to be embarrassed or criticized and scrutinized for sexual frivolity.\(^{37}\) Another deterrent to bringing rape charges in early modern England was the expense, as the accusing party had to bear the costs of legal action.\(^{38}\) Given all these obstacles, Laurie Edelstein doubts that rape was a crime that would have been chosen for malicious charges.\(^{39}\)

Yet those who have criticized Hale as showing "concern for the male defendant and a prejudicial attitude toward his female accuser"\(^{40}\) or, more

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32. 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 290 (1736). For more about Hale on rape, see also GILBERT GEIS & IVAN BUNN, A TRIAL OF WITCHES: A SEVENTEENTH-CENTURY WITCHCRAFT PROSECUTION 121 (1997).
33. 1 HALE, supra note 32, at 631.
35. Kolsky, supra note 6, at 111.
37. Geis, supra note 34, at 27; Edelstein, supra note 36, at 364.
38. Id. at 373.
39. Id. at 375.
40. Kolsky, supra note 6, at 111.
blatantly, as a "misogynist"\(^{41}\) may have unjustly caricatured his analysis. Judging a seventeenth-century jurist by feminist standards formed 400 years later is clearly biased and oversimplifies Hale's argument. It should be remembered that Hale also cautioned against false convictions in witchcraft cases, in which most defendants were women. Hale did not state that female accusers in rape cases should be assumed to have made false accusations (in fact, he listed several rules that enhanced the possibility of achieving convictions in cases of rape under the contemporary law).\(^{42}\) He also made clear that female victims of rape were competent witnesses.\(^{43}\) His view was that children "of tender years," who were too young to take an oath (the testimony of children under fourteen was generally inadmissible), should still be heard by the court; however, their testimony should be corroborated.\(^{44}\) Whereas Hale's use of corroboration was aimed at giving children more leeway to testify, application of the rule in the courts of Mandate Palestine resulted in routine rejection of their testimony. Notably, Hale's recommendation of corroboration was limited to witnesses who were children. He creatively constructed corroboration as a device allowing their otherwise inadmissible testimony. In Hale's opinion, the secretive nature of the offense justified a departure from the standard evidentiary mode. Yet Hale differentiated between competence and credibility and asserted that the latter should be a matter for the jury. He also listed circumstances that might support the credibility of the witness or raise doubts about her reliability. These early modern criteria took root in English common law and persisted for many years to come:

For instance, if the witness be of good fame, if she presently discovered the offense made pursuit after the offender,\(^{45}\) shewed circumstances and signes of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it;

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\(^{41}\) Geis, supra note 34, at 27.

\(^{42}\) For example, despite the Elizabethan prohibition against "carnally know[ing]" a girl under ten years of age, 18 Eliz. Ch. 7 (1576), Hale maintained that the age of consent was twelve. Although the conviction of rape demanded proof of penetration, Hale asserted that anyone present, aiding and abetting, should be punished like the principal offender; he also maintained that a consent obtained by threat of death is no consent, that despite the presumption of matrimonial consent, the Crown may indict a man for prostituting his wife, that a woman can bring charges of rape against a man who compelled her to marry him once the marriage was dissolved, and that the Crown and the victim's relatives may bring charges even when the woman gives her consent after the rape. 1 HALE, supra note 32, at 628. See also Edelstein, supra note 36, at 356.

\(^{43}\) 1 HALE, supra note 32, at 633.

\(^{44}\) Id. at 634.

\(^{45}\) The requirement for immediate complaint in rape cases was reiterated by other early modern writers. See MICHAEL DALTON, THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE, AS WELL IN AND OUT OF THE SESSIONS GATHERED 392 (1715).
these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.

But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned. 46

Considering that it was possible to err in both directions—false conviction or unjustified acquittal—Hale clearly preferred to acquit the real perpetrator than to spill the blood of the innocent. He cautioned against discretion clouded by the abhorrent nature of the crime and false witnesses. 47 He did not presume that all female victims were liars but merely considered the possibility that some accusers might lie. In short, Hale recognized that the secretive nature of rape entailed a special challenge of proof. Although Hale himself advocated for corroboration only with regard to children’s testimony, his articulation of the general probative problem and of the criteria of reliability underpinned the corroboration rule for adult victims as well in centuries to come.

The troublesome issue of proving rape continued to occupy English jurists throughout the modern era. Victorian treatment of sexual offenses reflected a transformation of early modern ideas and included changes in the substantive law, criminal procedure, and evidence that facilitated proof and conviction in cases of rape. Juries’ reluctance to convict was softened by the removal of the death penalty and by allowing lesser charges to be brought together with the primary charge of rape. 48 The Victorian courts developed an interpretative framework narrowing the notion of women’s consent, including limiting inquiry about the victim’s sexual past and demanding less resistance on her part, thus broadening the scope of situations that were considered nonconsensual and that warranted conviction for rape. 49 Proof was also facilitated by the abandonment of the

46. 1 HALE, supra note 32, at 633. William Blackstone drew on Hale in his analysis of the evidence required to prove the crime of rape. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769).

47. “[W]e may be more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses.” 1 HALE, supra note 32, at 636.


49. Id. at 92.
requirement that emission of semen be shown. Another significant change was the conceptual shift from the notion of “against her will” to “without her consent,” the former being a concealed element and, therefore, hard to prove. The result was that, despite expanding legal representation, the likelihood of conviction rose markedly in comparison with earlier times (although conviction rates remained relatively low for some years into the nineteenth century). Although Victorian judges facilitated proof of rape, complainants in sexual offense cases continued to be scrutinized more closely than victims of other offences, and their testimony still required corroboration.

It is noteworthy that when the charges related to same-sex sexual activity, the requirement for corroboration of the testimony of the accomplice and that of the victim coalesced. Consensual homosexual relations were criminalized in Victorian England. The rationale behind the demand for corroboration in other sex offenses, the enhanced danger of false charges brought about by the difficulty of proving intimate relations, was especially relevant to same-sex activity. However, in cases of homosexuality, an additional rationale applied: the witness was also an accomplice, a partner to a criminal liaison, who might want to exaggerate the actions of the defendant to shift blame away from himself. Homosexuality was an offense in which the partner was simultaneously an accomplice and a victim. It is not surprising that one of the important precedents concerning corroboration emerged from a charge of “gross indecency,” a term that was widely interpreted to mean homosexual activity. In that case, Mr. Baskerville was charged with committing indecency with several boys, and one may surmise that the homosexuality charges were a practical substitute for more severe sexual charges that could not be proved. The case of R. v. Baskerville (1916), which influenced the British Commonwealth for decades, held that corroboration must come from an independent source and that it should implicate the accused by confirming in some material particular not only the evidence that the crime had been committed but also that the accused had committed it. The rationale behind the demand for corroboration, explicitly voiced in cases of homosexuality, was hidden and disguised in

50. Id. at 89.
51. Id.
52. Id. at 77.
53. See supra note 25.
55. COCKS, supra note 25, at 33. Baskerville precursors include the cases of Tate and Meunier, which acknowledged the well-settled practice of corroboration, although opinion diverged about whether conviction subsequent to a failure to caution the jury amounted to miscarriage of justice justifying a reversal. R. v. Tate, [1908] 2 K.B. 680; R. v. Meunier, [1894] 2 Q.B. 415.
cases of sexual assault—the victim as some sort of an accomplice, a willing party in the commission of the crime. The demand for corroboration, which implies categorical distrust of complainants of sexual assaults, is another manifestation of the suspicion underlying their treatment.

By the time the British occupied Palestine, the elements of reliability listed by Hale had become rooted in English law. It became the practice to warn the jury about the necessity of corroborating the testimony of the alleged victim. The requirement for corroboration was not essential by law but was required in practice, and it spread with the British Empire to other jurisdictions that adhered to the common law, including Mandate Palestine. Hale’s mistrust of female complainants is just one example of the ways procedural and evidentiary rules encode social bias. In Palestine, this evidentiary tool was infused with a new dimension of bias that designated legal participants in some categories as less worthy than others.

IV. CORROBORATION IN MANDATE PALESTINE

Evidence was one of the first issues targeted after the League of Nations granted Britain the mandate to rule Palestine. The imperial policy pledging to preserve the legal “status quo” and to accommodate local circumstances was stressed with relation to substantive law but much less so in respect to procedural law. The Evidence Ordinance that went into effect in the colony contained a mere thirteen articles (far fewer than the exhaustive

57. For an analysis of the elements of rape as a reflection of defenses available to women who were charged in cases of fornication and adultery, see Anne M. Coughlin, Sex and Guilt, 84 VA. L. REV. 1 (1998).

58. The 25th edition of Archbold, published in 1922, states criteria similar to those listed by Hale two centuries earlier: “If the witness is of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But, on the other hand, if she is of evil fame, and stands unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the act was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned.” JOHN FREDERICK ARCHBOLD ET AL., ARCHBOLD’S PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 1022 (26th ed. 1922).

59. GLANVILLE WILLIAMS, THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL 117 (1955). By that time, corroboration was required not only for rape but for any sexual offenses including indecent assault and homosexuality. Id. at 117.

60. ARCHBOLD ET AL., supra note 58.

61. Hale’s phrasing continued to echo in Palestine’s judgments. See CrimA 118/42 Abu Zeid v. A.G., ASC. 472, [1942], at 1 (“Rape is one of those offences a charge of which it is very easy to make and which, although entirely innocent, an accused may find it very difficult to refute.”); CrimA 54/38 Shafiq George Halaby v. A.G. [1938] (“[C]harges could be made which it might be very difficult for an innocent person to refute.”); ISAIRG 30/Law 268/54, CrimA 54/38 Shafiq Halaby v. A.G. [1938], at 3.

62. As to this policy elsewhere in the British empire, see James Q. Whitman, Western Legal Imperialism: Thinking About the Deep Historical Roots, 10 THEORETICAL INQUIRIES L. 305, 329 (2009).
167 articles of the Indian Evidence Act of 1872).\textsuperscript{63} It declared that “all persons are competent to give evidence in all cases.”\textsuperscript{64} The ordinance also maintained that “[n]o judgment shall be given in any case on the evidence of a single witness.”\textsuperscript{65} This requirement mandated that all testimony in both civil and criminal cases be corroborated (unless it was satisfactorily proven that the criminal accused made a “free and voluntary” admission).\textsuperscript{66}

The blanket demand for corroboration did not exist in English law, and the motivation for such a demand in Palestine was probably British fear of widespread perjury by the local population.\textsuperscript{67} In the words of the attorney general, “I do not consider that the standard of credibility of witnesses in Palestine is very high.”\textsuperscript{68} The drop in conviction rates during the Arab revolt was the backdrop for an amendment that obliterated the statutory corroboration requirement in criminal cases.\textsuperscript{69} Crossing out the corroboration requirement in criminal cases could have resulted in enhanced judiciary discretion. However, judges continued to apply English precedents and to demand that single-witness testimony in sexual offenses be corroborated.\textsuperscript{70} The British judges did not perceive the amendment as an opportunity for freer evaluation of testimony but, rather, as a signal that English case law should be applied. By letter, Harry Herbert Trusted, the chief justice of the Supreme Court at the time of the publication of the amendment, instructed lower-court judges as follows:

I would draw your attention to the notice published in Gazette No. 725 of the 4th of October, bringing into operation the Law of Evidence (Amendment) Ordinance, 1936.

Prima facie, the effect of this would seem to be that English Common Law of Evidence will apply in criminal cases.

I think it well that the attention of Palestinian Judges and

\textsuperscript{63} Evidence Ordinance No. 11 of 1922, No. 13 of 1924, No. 28 of 1924, No. 17 of 1928, and No. 19 of 1928 [hereinafter Evidence Ordinance].

\textsuperscript{64} Evidence Ordinance, Art. 3. The ordinance contained two exceptions: 1) parents and children and 2) spouses were not competent to testify against each other.

\textsuperscript{65} Id. at Art. 6. For a review of the Arab revolt, see Matthew Hughes, The Banality of Brutality: British Armed Forces and the Repression of the Arab Revolt in Palestine, 1936–39, 124 ENG. HIST. REV. 313 (2009).

\textsuperscript{66} Sebba, supra note 9, at 75.

\textsuperscript{67} Id. It is also possible that a British misreading of the Ottoman two-witnesses rule and a wish to adopt Mejelle’s sufficiency standards led to the adoption of the general corroboration requirement.

\textsuperscript{68} Id., a fine example of English understatement.

\textsuperscript{69} ELIAHU HARNON, LAW OF EVIDENCE § 2 (1977). Evidence Ordinance No. 68 of 1936 replaced section 6 with the following provision: “Corroboration in civil cases. 6. No judgment shall be given in any civil case on the evidence of a single witness unless such evidence is uncontradicted or is corroborated by some other material evidence which, in the opinion of the Court, is sufficient to establish the truth.” The amended ordinance demanded corroboration in civil cases only and was put into effect on October 11, 1937.

Magistrates should be called to this notice and, in cases where you think it necessary, the general provisions of the English Law explained, particular regard being had as to necessity of corroboration of an accomplice, of a young child, and of the prosecutrix in sexual offences.\(^7\)

Justice Trusted, however, in an instruction that sounds like a default to familiar rules, misstated the English law,\(^7\) which, as noted, merely obligated a cautionary warning to the jury against accepting the testimony of a single witness unless it was supported by other incriminating evidence. In England, facts are found by laymen, the jurors, who give unreasoned verdict. Corroboration, like many other common law evidentiary rules, was created to facilitate the processing of the evidence by laypersons. It is not obvious why a jury-related evidentiary concept should be grafted onto local law when the fact finders were professional judges. Corroboration, even in England, was not mandatory, and a jury properly directed could still have convicted solely on the basis of uncorroborated testimony.\(^7\)

Although the written law, as it was amended in 1936, made no such explicit demand, the Mandate judges routinely required corroboration in cases of sexual offenses. They presumed that corroboration was mandatory, and the question became what could constitute the necessary corroboration and what could not.

According to Hale, the immediacy of a complaint lent it more probability, and vice versa. The courts of Mandate Palestine considered a delayed complaint less credible than an immediate one but did not regard immediacy as corroboration.\(^7\) In other words, the criterion of immediacy could be used only to devalue the complainant, not to constitute corroboration.\(^7\) It was usually assumed that the corroboration had to be

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71. I found the original undated letter to the presidents of the District Court and the chief magistrates in Jerusalem, Jaffa, Haifa, Nablus, and Tel Aviv, marked No. J1/10, affixed to p. 84 of a library copy (University of Haifa KA792.P3 1943) of THE LAW OF CRIMINAL PROCEDURE IN PALESTINE (H. Kantrovitch ed., 1943). The volume bears the stamps “the Supreme Court Jerusalem Feb. 1943” and “The District Court Haifa Palestine 1 Mar. 1943,” indicating that it was used by the Mandate judges.

72. This misapprehension was also expressed in Justice Trusted’s judgments. For example: “It is quite clear that according to English Law which for this purpose now applies, in order to convict for sexual offences, the evidence of the complainant must be, to some extent, corroborated.” ISA/RG 30/ Law 268/54, CrimA 54/38 Shafiq Halaby v. A.G. [1938], at 3.

73. The statutory corroboration requirement in cases of procurement of women by threats, false pretenses, or administering drugs to obtain or facilitate intercourse, Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, §§ 2-4, was repealed in 1994. In some exceptional cases the Court of Criminal Appeal refrained from quashing a conviction despite the lack of warning. Sebbra, supra note 9, at 77.


75. One extreme example is the case of Rachel Levine, who was separated from her friends by
external to the testimony of the victim. The Mandate judges clarified that identification of the rapist by the victim in an identification parade or the complainant’s statements to others also constituted insufficient corroboration:

Corroboration may of course be found in the appearance of the prosecutrix, the state of her clothes, the result of an examination by a medical man, or the conduct or statement of the prisoner. Evidence of a complaint made by the girl or woman shortly after the alleged offence is not the required corroboration of her story as it does not come from an independent quarter. Putting it in other words she cannot corroborate herself.

Medical reports and forensic evidence figured prominently in the rhetoric related to corroboration. Physical evidence “spoke for itself,” and scientific evidence was seemingly objective, unconnected to witnesses of suspicious reliability, and therefore particularly probative. Furthermore, such evidence fit well into the colonial narrative of the British as the avatars of progress. Some judges explicitly stated that

In rape cases the most usual and most important corroborative evidence is that of a doctor. . . . [O]ne would expect if her story is true, medical evidence showing that intercourse had in fact taken place; evidence of stains of semen on her underclothes; evidence of bruises on her thighs and other parts of her body when she resisted and struggled. If a doctor did examine her and found no such signs, it would be very strong evidence indeed to discredit her complaint.

Yet a close reading of rape cases demonstrates that even ample medical and forensic evidence was often insufficient to corroborate the victim’s testimony. Poor record survival makes comprehensive statistical analyses impossible. However, I was able to find sixty-nine rape and sodomy cases (sixty-seven court cases and two police files) that were heard either in the District or in the Supreme Court. The majority of the cases (forty-one) involved sexual assaults of minors. The victim was a female in thirty-three cases and a male in thirty-six cases (the remaining case involved bestiality). Examination of the actual implementation of the armed assailants and gang-raped behind some bushes for thirty to forty minutes. When Rachel was allowed to return to her friends, they did not need to ask her what had happened. Rachel reported the incident upon their return home. The minority judge hearing the appeal, however, found her testimony lacking credibility because she did not make a statement to her friends who saw her immediately after the rape. ISA/RG 30/Law 441/31, CrimA 31/47 Khatem & Ahmed v. A.G. [1947], at 12 (Acting Justice Curry’s minority opinion).

76. ISA/RG 30/Law 268/54, CrimA 54/38 Shafiq Halaby v. A.G. [1938], at 4.
79. For a similar observation regarding Australia, see Backhouse, supra note 6, at 311.
doctrine of corroboration reveals recurring gaps between the narrative of instituting progressive criminal law, protecting women and children, and relying on scientific evidence on the one hand, and on the other, the low trust of local complainants and insufficiency of medical and forensic evidence as corroborating evidence.

V. INFLEXIBLE DEMAND FOR CORROBORATION (NOTWITHSTANDING MEDICAL/FORENSIC EVIDENCE)

Jamila was the seven-year-old daughter of a Haifa shoemaker who had his own shop near the Istiklal mosque downtown. On the afternoon of June 14, 1938, while Jamila was playing outside with her three-year-old brother, Yusef, and another boy, a man approached the children. He gave Jamila two piasters and told her to accompany him to buy sweets for her brother. He then took her outside the area, to a spot near a Jewish neighborhood, put her in a pit, and raped her. Jamila’s parents noticed her unusual appearance upon her return and took her to be medically examined. Jamila recognized her rapist as Mahmoud Khalil, a man who sometimes visited the family’s neighbors. He was arrested and charged with rape. Mahmoud, a Jenin resident, was a chauffer and electrician by his own account and was employed by the Haifa lawyer Fuad Atallah, who provided him with food in lieu of wages. He denied the rape charge and claimed an alibi, which was rejected by the District Court. The evidence included the testimony of Jamila and her parents, the testimony of a boy (too young to be sworn) who saw the accused taking Jamila by the hand on the day in question and who later picked him out of an identification parade, and a physician who testified about the physical injury caused by the rape. Despite the significant medical evidence, the conviction of the accused was nevertheless overturned by the Supreme Court for insufficient corroboration. There was no doubt that little Jamila was raped. The severe injuries she sustained necessitated surgery. The issue that required corroboration was the identity of the accused. Jamila’s identification of her attacker was not considered sufficient corroboration nor was the testimony of an unsworn boy. The medical evidence could affirm the occurrence of rape but not the identity of the rapist.

Similar reasoning underlay the acquittal of Mohammad Youssef, originally from the Jenin area, who was charged with committing sodomy.

80. Unless otherwise mentioned, the details of the cases described in this article are taken from the legal files in the Israel Archives. For this case, see the contents of ISA/RG 30/269/79, CrimA 79/38 Khalil v. A.G. [1938].
81. His employer testified in his defense at the hearing in the District Court and also argued before the Supreme Court in his appeal.
82. See the transcripts of Cr.C 94/38 (Haifa District Court) in ISA/RG 30/269/79.
83. Judgment of the Supreme Court in CrimA 79/38.
on eight-year-old Nizar, the son of his employer, a well-to-do Haifa pharmacist. The events described by Nizar happened in the busy pharmacy, where five people worked (Nizar’s father, the father’s brother, and three other employees, including the accused). Nizar’s mother described Mohammad’s position as that of “servant.” He had started working for the family when he was a boy himself (one of the disputed issues at the trial was whether he was seventeen, as he claimed, or over eighteen, as the prosecution argued; the court held the latter). At first, he had also worked at the family’s house, later working only at the pharmacy as an errand boy. He was “promoted” to work in the storage room after a new servant boy, a fifteen-year-old boy from Africa, replaced him in running errands. This boy, also named Mohammed and, therefore, dubbed by the family “the other Mohammad,” later testified that he sometimes saw Nizar and his brother sitting in the accused’s lap while he was teaching them the Arabic alphabet. The brothers grew up in a protective environment. They did not go out much, and servants escorted them to school and back. Only their mother and a servant helped them to get dressed. In the words of Nizar’s mother, “I permit no one to look after my children except myself.” Nizar, a first-year school pupil, asserted that the accused sometimes took him and his younger brother to a back room in the pharmacy in which medicines, bottles, and goods for sale were stored, and, there, took off Nizar’s pants and committed sodomy on him. Mohammad Youssef had been employed by Nizar’s father for eight years and had known Nizar since he was a baby. Among the witnesses for the prosecution were the boy, his parents, “the other Mohammad,” who had seen the accused playing with the children, and a doctor who examined both the child (finding indications of sodomy) and the accused (to verify his age and ability to commit the offense). Again, the conviction of the Haifa District Court was quashed for insufficient corroboration. Medical proof of the sex offense was not enough. The Supreme Court stated that “[t]he fact that the mother saw bruises on the child is corroboration of an offence having been committed, but not necessarily that the accused had committed the offence.” It did not even mention the medical evidence. The identification of the accused, according to the court, remained uncorroborated. It did not matter that Nizar could not have mistakenly identified someone he had known since he was a baby. The concern behind the insistence on corroboration was probably not the fear of an honest mistake but rather of a deliberate lie. Despite the medical evidence, the Supreme Court did “not think that there is corroboration of the child’s tale.” Nizar’s story was merely a “tale.” The judgment further states that

84. ISA/RG 30/Law 269/71, CrimA 71/38 Mohammad Abdel Ghani v. A.G. [1938].
86. See Cr.C 27/38 (Haifa District Court) and CrimA 71/38 in ISA/RG 30/Law 269/71.
“[i]t may be that sodomy is one of the cases which are difficult to prove, but difficulty in proof does not dispense with the proof.” The built-in mistrust that made sex offenses very hard to prove is presented here as necessary for establishing facts.

Similar reasoning was voiced in a third case, that of Muhammad Agha, who was charged with raping Samiha, his thirteen-year-old daughter. The family lived in the old city of Jaffa. Samiha’s mother had died, and her father had been divorced for a few years from his second wife, Zahara. Muhammad’s marriage to Zahara was part of an arrangement that included the marriage of his son to Zahara’s daughter. Following the divorce of their parents, the son and the daughter-in-law had to move from the house of the accused, and Zahara remarried her first husband. Familial tensions formed the backdrop of the case. Samiha’s household was poor and did not have enough mattresses for everyone to sleep on, so Samiha had to share a mattress with her father. Two younger brothers slept in the same room with them. Samiha said that, one night, after arriving home late from the café, her father took off her underwear and had intercourse with her. In the morning, weeping, Samiha went to the house of her married brother and told his wife about the incident. Her brother took her to a doctor and then to the police station. The next day, a policeman took the girl to another doctor for examination. The doctor who examined the girl at the police’s request testified that her hymen was recently ruptured. The first doctor testified for the defense. His opinion was that her hymen had been ruptured about fifteen days prior to his examination and that scratches in the vagina could have been caused up to ten hours before the examination. The District Court regarded the testimonies of both doctors as corroboration (since the question was not when the girl’s hymen was ruptured but whether she was subjected to sexual intercourse). The picture changed at the Supreme Court, however, which held that the medical evidence alone was insufficient to corroborate the girl’s complaint against her father. The Supreme Court agreed the girl was probably sexually assaulted but found insufficient corroboration of the identity of the attacker. The father’s admission that he slept on the same mattress with his daughter was not regarded as sufficient corroboration. Again, corroboration was required not just of the sexual assault but also of the identity of the perpetrator. The requirement that the identification made by the victim be corroborated when the accused was familiar (here, the girl’s

88. The judgment in CrimA 122/43 Agha v. A.G. [1943], at 1, stated, “[I]t was a most unfortunate and deplorable matter in which the young daughter of the appellant, a girl of some 13 years of age, had apparently been assaulted by some person. The question, of course which we have to consider, is whether there is sufficient corroborative evidence to implicate the accused as being that person.” See ISA/RG 30/Law 353/122.
89. Id.
own father) demonstrates that the court's concern was not the possibility of mistaken identification but fabricated charges. Rape was very hard to prosecute against the backdrop of such mistrust. The court stated that it was "a most unfortunate and deplorable matter in which the young daughter of the appellant, a girl of some 13 years of age, had apparently been assaulted by some person." Despite its acceptance of Samiha's claim that she had been raped, the court was reluctant to abandon the rule of corroboration and believe her statement that her father was the perpetrator. In this case, the court was offered an opportunity to moderate the rule, the attorney general advocate urging that, as a matter of law, corroboration was not required in cases of sexual offenses in Palestine. The Supreme Court rejected the argument, saying "[t]hat may or may not be so, but we are of opinion that, at the very least as a matter of practice followed, and rightly followed, by Courts in these matters in this class of cases corroboration implicating the accused is necessary." In all the cases described above it seems clear that the Supreme Court did not regard corroboration as limiting its capacity to convict the guilty but, rather, as a justified and necessary tool.

Distressed appearance, disarranged clothes, or a bruised body, similarly, could not confirm the rapist's identity, as illustrated by another case. Batia, a fifteen and a half-year-old girl, complained against a man who offered her a ride while she was waiting for a bus in Tel Aviv one night. She accepted and climbed into the Dodge, driven by George Halaby from Jaffa, a grocer's chauffer and a recidivist sex offender. Batia testified that instead of driving her where she wanted to go, the man drove in the direction of Jerusalem, stopped the car near an orange grove, and attacked her. He threw her to the ground, beat her, and threatened her with a knife. Batia struggled fiercely, and the man did not manage to complete the act. After she returned with the attacker to Tel Aviv, a friend noticed her injuries, her disorganized appearance, and her distress. Batia told her friend what had happened, and the following morning he accompanied her to the police station, where she gave a detailed description of the suspect and the car. After George was arrested later that day, Batia identified him in an identification parade and picked his car out of a group of vehicles she was shown. Batia also underwent a medical examination. The Supreme Court overturned George's conviction, explaining that the girl's

90. Two of George's four previous convictions were for sex offenses, and local newspapers had reported on his violent treatment of women. On August 28, 1934, he reportedly offered a young woman a ride, took her to a secluded spot, and attempted to assault her. On July 4, 1935, papers reported that a Jewish immigrant from Germany committed suicide after Halaby raped her. Again, he had picked her up and driven her to a distant place, where he attacked her. According to the news account, the police officer who received the complaint knew immediately who Halaby was, since many similar complaints about him had been made in the past. Driver Charged with Violence, PALESTINE POST, Aug. 28, 1934, at 5; An Act of Rape Prompted a Suicide, DAVAR, July 4, 1935, at 8; ISA/RG 30/ Law 268/54, CrimA 54/38 Shafiq Halaby v. A.G. [1938].
statement to her friend that she could identify the suspect and the friend’s testimony that she was distressed and had a wound in her eye, disarranged clothes, disordered hair, and blood on her hand were “not sufficient to corroborate her story.” It is noteworthy that the Supreme Court completely ignored the testimony of the physician who examined Batia and found bruises and marks on her body. Batia’s distress was not considered corroboration of her assault; lack of distress on her part, however, could have been seen as undermining her credibility.

A complainant could fare worse than facing mere disbelief. Such was the fate of twelve-year-old Mohammad, from Acre, who complained about a seventy-year-old man’s attempt to sodomize him. Mohammad told the inquiring magistrate that the suspect, a coachman, asked him to bring a bucket of water for his horses. After the boy entered the stable, the suspect closed the door and tried to attack him, but the boy shouted, and two men came to the rescue. The boy was found to be too young to take an oath, and he signed his statement with a thumbprint. Shortly thereafter, Mohammad was transformed from accuser to accused and charged with giving false evidence because his statement in court diverged from the one he gave to the police in two details. He told the police that the suspect had taken off his underpants by force and that the man lay on top of him. To the magistrate, Mohammad said he had not been wearing underpants and that the suspect had not touched his body. Mohammad was convicted in Haifa District Court and sentenced to three years in a reformatory institution for boys. The probation report discloses that Mohammad’s father, a fisherman and “a reputed drunkard,” had deserted his family about a year earlier after ongoing quarrels with the mother, who was “a simple and ignorant woman” with “a bad indecent character of bad fame and immoral reputation.” The neglectful mother was rarely at home, leaving her destitute children to “spend their time loitering about and roaming streets.” Shabby Mohammad had never been to school. He worked at a café and “has a bad name from [sic] moral point of view” (i.e. he lends himself to sodomites for sodomy and copulation acts). He represents the destitute and spoiled type of boy.” The Supreme Court quashed the boy’s conviction on several legal grounds and rescinded Mohammad’s detention order, but the judges clearly were unsatisfied with the boy’s prospects and ordered the authorities to further investigate whether he should be placed under proper care.

This last case differs from the others I have discussed in illuminating

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91. ISA/RG 30/ Law 268/54, CrimA 54/38 Shafiq Halaby v. A.G. [1938], at 3.
92. As was the case in CrimA 31/47 Khatem & Ahmed v. A.G. (Acting Justice Curry’s minority opinion, at 12).
the cultural role of corroboration when individualized suspicions against the complainants were lacking. Mohammad was disbelieved because of his incoherence and possibly because of what was perceived to be his murky social and familial background. From a complainant, he turned into the accused in a perjury case (in which corroboration was not necessary). The complainants in the other cases were disbelieved not for any personal reasons but because they belonged to a category of witnesses that was, by definition, suspicious: non-English children. Despite pervasive judicial rhetoric about the corroborative significance of medical and forensic evidence in cases of sexual assault, even when such evidence was submitted, and even when no individualized suspicion against the complainants existed, their stories were rejected as insufficient to convict. The inflexible demand to corroborate the identity of the perpetrator (notwithstanding the improbability of a mistake when the accused was a familiar person) undermined the significance of the available medical and forensic evidence.

**DISCUSSION AND CONCLUSIONS**

The doctrine of corroboration as applied by the Palestinian judiciary was more than a mere technical and neutral mode of ascertaining guilt in hard-to-prove sex offense cases. It was also a means of establishing and legitimizing colonial difference. At the explicit, rhetorical level, the doctrine was a tool for promoting justice. Ostensibly, it was a transplant from centuries-old English doctrine that aimed to prevent false convictions. An emphasis on the corroborative significance of medical and forensic evidence buttressed an image of the British as spreading progress and modernization in the land entrusted to its care. The substantive law explicitly defined protection of women and children as one of its primary aims. However, an examination of actual practice reveals that corroboration constructed local victims of sexual crimes as unreliable, and convictions were very hard to obtain. An examination of the manner in which the doctrine was applied in Palestine reveals that it was not a legal transplant precisely replicating the original doctrine but, rather, that it acquired its meaning in the context of the cross-cultural colonial encounter.

Corroboration in sex offense cases was not a neutral evidentiary tool but, rather, a tool for signifying "others," those belonging to a category of social players who should not be believed. In England, those "others" were females and homosexuals, and in the colonial context, they were non-English, especially non-English children. Ostensibly, the requirement of corroboration in cases of sexual assault was intended to solve the evidentiary challenge posed by such hard-to-prove crimes. The probative difficulty related to sexual charges should not be underestimated,
especially in cases in which the only available evidence was the word of the alleged victim against the word of the defendant. Even when sexual relations were proven, it might be difficult to distinguish consensual from nonconsensual activity. Although rape was defined as a “conduct” crime, in which its mens rea did not require proof of specific intent, the accused’s understanding and interpretations of “consent” were crucial. Nevertheless, he-said-she-said situations might occur in nonsexual crimes as well. Perpetrators of all sorts of offenses try to avoid eyewitnesses as much as possible. Yet the application of the evidentiary solution of corroboration was not universal.

The difficulty of proving rape charges, most famously articulated by Matthew Hale, does not necessarily disappear when medical and forensic evidence is available. During the Mandate era, such evidence could prove the occurrence of intercourse or bodily injuries but not the identity of the offender, corroboration of which was required even when the sexual assault was not disputed. The doctrine was not jurisprudentially essential in Palestine. It is not self-evident that a cautionary warning to the jury should have been transplanted to a nonjury system, run by professional judges, in the form of a rigid rule with no exceptions. The special insistence on corroboration in cases of sexual assault and not in other types of hard-to-prove cases suggests that the reason lies not in purely probative difficulties but, rather, elsewhere.

I suggest that the explanation lies partly in the social attributes of the complainants. Mistrust of the complainant’s testimony, as expressed through the doctrine of corroboration (and also through the doctrine of immediate complaint), has an apparent gendered aspect. In Mandate Palestine, however, complainants were not predominantly female (in the cases I was able to trace, thirty-six complainants were male and thirty-three female). The Mandate British judges did not explicitly voice bias against women for their supposed lack of veracity, unlike the American evidence law scholar, John Henry Wigmore, whose writings warned against the credibility of female complainants in sexual cases on the basis of perverse psychological pathology. The Mandate judges did not refer to Wigmore’s theories, nor did they rely on Glanville Williams, who, writing a few decades later, cautioned against female complainants who might be motivated to cry rape by emotions of jealousy or revenge or who were affected by pathological psychology. These theories built on early modern fears of women’s illicit use of sexuality.

Originally based on a gendered prejudice against female complainants in cases of sexual offenses, the rule of corroboration applied in the

94. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 736 § 3A (Little, Brown 1970) (1923). For a criticism of Wigmore, see BACKHOUSE, supra note 34, at 382.
colonial setting of Mandate Palestine expressed prejudice concerning the truthfulness of the locals, especially the young. British perceptions of the locals could not help but affect what went on inside the courtroom, and, in sexual offense cases, they heightened judges’ lack of trust in complainants and led to a stricter application of the rule of corroboration. It should be noted that the British Mandate was created at an era of significant shift in imperial policy. The aggrandizing colonialism that had characterized the occupation of eighteenth-century India was no longer acceptable at the beginning of the twentieth century, and the Mandate was shaped by a goal of developing a local population not yet ripe for independence and civilized self-government. 96 Norman Bentwich, the first attorney general in Mandate Palestine, clearly regarded the system of mandates as intended to provide an internationally controlled system of national responsibility for government, and a system in which the guardianship of peoples resembles the guardianship of minors. 97 One can speculate whether the latent British view of the “natives” as minors, led to the stricter application of the corroboration rule when the victims were both oriental “natives” and “children.” The practice of corroboration in that setting epitomized British anxiety toward the dubious and threatening Orient, a world of loathsome sexuality, backward mentality, and deceit (the reaction to which tensions converges in the practice of corroboration). The fear of uncontrollable and perverted sexuality and its Siamese twin, the fear of false charges motivated by revenge or blackmail, intensified in the colonial context of the mysterious “East.” Corroboration, as it was used in Mandate Palestine, incorporated mistrust toward local complainants in sexual assault cases not only on the basis of gender but also on the basis of ethnic origin. It is also evident that children were treated as much less credible than adults. Children were the victims in all of the cases in which the court explicitly acquitted for lack of sufficient corroboration. 98

Palestine’s British rulers represented themselves as the protectors of women and children, the weak inhabitants of the land entrusted to them by a mandate from the League of Nations. They took pride in the British legal tradition and believed it was superior to that of their Ottoman predecessors in Palestine. However, their explicit discourse was at odds with the actual practice of the courts and with their reluctance to believe local victims of sexual assaults, most notably, children. While claiming to proffer superior moral values and expressing repulsion toward allegedly widespread sexual immorality in Palestine, the British judiciary adopted an evidentiary

96. ROBSON, supra note 1, at 50; JOHN STRAWSON, PARTITIONING PALESTINE: LEGAL FUNDAMENTALISM IN THE PALESTINIAN-ISRAELI CONFLICT 66 (2010).
97. STRAWSON, supra note 96, at 68.
standard of corroboration that was often hard to meet. In many cases, including severe sexual assaults of children, the demand for corroboration led to the acquittal of the accused.

In setting a high evidentiary standard in cases of sexual assault, the corroboration rule portrays the legal system as prudent and just (preferring, when in doubt, to acquit the guilty rather than convict the innocent). In other words, it enhances the legitimization of the criminal proceedings in cases of sexual offenses. In acquitting Mohammad Youssef of the sodomy of an eight-year-old boy for lack of corroboration, the Supreme Court noted that a “difficulty in proof does not dispense with the proof,” portraying its decision as cautious, objective, and therefore just. The view of corroboration as just an evidentiary tool in sexual cases, however, relies on an array of social stereotypes attached to the credibility of the complainants, and, at the same time, perpetuates existing relations of power and legitimizes them as objective, just, and neutral. In the context of Mandate Palestine, the British view that rigid corroboration, though possibly not required as a matter of law, was “rightly followed” (as the Supreme Court put it when acquitting Muhammad Agha of the rape of his minor daughter) is predicated on the perceived inferiority and unreliability of the local witnesses, especially the young, in cases of sexual assault. In private correspondence, as I have noted, Mandate judges disclosed their biases regarding the loathsome sexuality and dishonesty of Palestine’s inhabitants. The judges were more careful in their public pronouncements (especially when there was no individualized suspicion against a complainant). However, an occasional derisive remark sometimes slipped out, as in the minority opinion of Acting Supreme Court Justice Curry in the rape-cum-robbery case involving nineteen year-old Rachel and her companions. Curry held that the evidence corroborating Rachel’s rape testimony was inadequate. He further asserted that “[i]t is quite a common thing in this country for complainants to add a charge of rape to one of assault or robbery and it is not easy for an accused to defend himself successfully against such a fabricated charge.”

John Hamilton Baker poses the question, “What is law for the purpose of legal history?” Examination of how the rule of corroboration was applied in Mandate Palestine demonstrates that law is not merely an accumulation of written rules or precedents but rather part of a hermeneutic system of rules that acquire their meaning in a given historical and cultural context. Moreover, even when those rules originate in another jurisdiction, they are not fixed “transplants” that reproduce the

99. ISA Division 30 (Supreme Court Files), File B/441, original docket # Cr.A 31/47 Fahed Kathem & Musa Ahmed v. A.G. [1947].
original rules. Transplantation of legal rules, as Pierre Legrand suggests, is not detached from social and cultural context. But it is not only in the subjectivities of the recipients of the new rule that the meaning of the transplanted law is shaped but also in the subjectivities of the colonial agents who impose the rule on the territories they administer. The biases and prejudice of the latter may inject new meanings into the law.
