Justice and Leadership in Early Islamic Courts

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Chapter One

The Logic of Excluding Testimony in Early Islam

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Testimony is arguably the central element of Islamic judicial practice. Determining what testimony is acceptable and what is not is consequently an important task, with repercussions for the very identity of the Islamic court system. In this paper, I examine the issue of the exclusion of potential witnesses in the second *hijrī* century—the earliest period for which sources exist—in order to provide a tentative sketch of changes in this aspect of judicial practice over the course of that century. I pay particular attention to the treatment of potential non-Muslim witnesses and the changing rationales given for their admission to, or exclusion from, Muslim courts. My analysis reveals shifts and interconnections along two axes: between communal and individual criteria of witness acceptability, and between considerations applying to Muslim witnesses and those applying to non-Muslim ones.

CONFLICTING EARLY OPINIONS

For the earliest sources on the exclusion of potential witnesses, we must look to collections of prophetic and post-prophetic reports compiled in the second and third *hijrī* centuries (eighth and ninth centuries CE), because legal treatises proper began to be authored only in the second half of the second/eighth century. The material preserved on the topic in these collections—the most important of which are the compilations of ʿAbd al-Razzāq al-Ṣanʿānī (d. 211/827) and Ibn Abī Shayba (d. 235/849)—is dominated by early second/eighth-century reports. Ibn Abī Shayba cites no prophetic *ḥadīth* concerning the exclusion of potential witnesses, and Ṣanʿānī cites just one report, according to which the Prophet Muḥammad

said: "No community may testify against another, except the community of Muḥammad."[1] The legal import of this statement, if indeed it has any,[2] is ambiguous; it seems to speak to the question of testimony across confessional lines, but is silent on the acceptance of non-Muslim testimony *per se*. More importantly, this *ḥadīth* was never picked up by jurists and was largely ignored even by *ḥadīth* scholars, who deemed its transmission history weak.[3]

There are episodes in the Prophet's biography that could have served as evidence for constructing a law of non-Muslim testimony—one instance in particular in which Muḥammad appears to have accepted the testimony of Jewish witnesses against a Jewish couple accused of adultery—but, apart from Isḥāq b. Rāhawayh (d. 238/853), no jurist seems to have considered this case as Sunnaic proof of the permissibility of such testimony.[4] In sum, on the important question of the admissibility of non-Muslim witnesses' statements in a Muslim court, early authorities such as Ṣanʿānī and Ibn Abī Shayba do not cite prophetic *ḥadīth*, but instead provide a great number of later reports, starting with the second generation of Muslims.

As is often the case, interpretation of these later reports is hampered by the fragmentary form in which they have been transmitted and the scarcity of historical data by which to contextualize them. A basic ambiguity that already struck *ḥadīth* collectors such as Ṣanʿānī lies in the phrase "the testimony of scripturalists (or 'people of the book') against each other: *shahādat ahl al-kitāb baʿḍuhum ʿalā baʿḍ*."[5] This phrase appears frequently in reports relevant to the potential exclusion of non-Muslim witnesses, but it is not intuitively clear whether the phrase refers to *all scripturalists* as a single, undifferentiated group whose members may or may not testify against each other, or whether it should be understood as applying only to members of individual confessional groups testifying against *members of the same group*.

The collectors made what sense they could of their material. Ṣanʿānī transmits two opinions from early second/eighth-century authorities. On the one hand, he cites a report in which his teacher Maʿmar b. Rāshid

1 ʿAbd al-Razzāq al-Ṣanʿānī, *Muṣannaf*, ed. Ḥabīb al-Raḥmān Aʿẓamī (Beirut: al-Majlis al-ʿIlmī, 1970), 8:356, no. 15525.

2 The statement could be related to Qurʿān 2:143, which does not seem to address testimony in court but rather refers to ethical witnessing, either in this world or in the hereafter.

3 Abū Bakr al-Bayhaqī (d. 458/1066), *Maʿrifat al-sunan waʾl-āthār*, ed. ʿAbd al-Muʿṭī Amīn Qalʿahjī (Aleppo: Dār al-Waʿī, 1991), 14:282.

4 Isḥāq b. Manṣūr al-Kawsaj al-Marwazī (comp.), *Masāʾil al-Imām Aḥmad b. Ḥanbal wa-Isḥāq b. Rāhawayh* (Medina: Islamic University, 2002), 8:4096–97.

5 The question of which faiths, precisely, are included in the category "scripturalist" (*ahl al-kitāb*) lies beyond the scope of this discussion, but Christians and Jews were usually the archetypal referents.

(d. 153/770) asks Ibn Shihāb al-Zuhrī (d. 124/742) about "the testimony of scripturalists against each other" and receives the response: "It is permissible." Ṣanʿānī follows this report with another that he heard from Maʿmar regarding a statement by Qatāda b. Diʿāma (d. 117/735) and Rabīʿa b. Abī ʿAbd al-Raḥmān Farrūkh (d. 130/747 or 136/753) to the effect that "The testimony of a Jew against a Christian or of a Christian against a Jew is not permissible." Ṣanʿānī comments: "I consider this to be an explanation of the report by Maʿmar from Zuhrī." In other words, Ṣanʿānī believed that Zuhrī also considered the testimony of adherents of *different* scriptural faiths against each other inadmissible, in contrast to testimony by members of the same community. But, on the other hand, another report preserved by Ṣanʿānī claims that Caliph ʿUmar II (ʿUmar b. ʿAbd al-ʿAzīz, d. 101/720) allowed a Zoroastrian to testify against a Christian, and that his judge in Kūfa, ʿĀmir b. Sharāḥīl al-Shaʿbī (d. after 100/718), permitted the testimony of a Christian against a Jew.[6] Both scenarios permit non-Muslims to testify against other non-Muslims in a Muslim court, but they differ on whether such testimony is possible across confessional lines or whether it is limited to testimony against litigants within a single religious community.

Although the dearth of sources on this issue makes any theory conjectural, I propose that there may be a historical explanation for the difference between the two opinions. Maʿmar b. Rāshid, who transmitted the report from Zuhrī, studied with the latter at the court of the Umayyad caliph Hishām (r. 105–125/724–743) in Ruṣāfa.[7] This means that Zuhrī's opinion, which prohibits cross-confessional testimony, postdates that of ʿUmar II and Shaʿbī, which permits it. Why did the acceptability of non-Muslim testimony come to be limited to cases involving coreligionists? The first clue lies in another statement transmitted from Zuhrī on the matter: "The testimony of a Jew against a Christian or of a Christian against a Jew is not permitted given the enmity (ʿ*adāwa*) between them that God mentions, saying, 'We have placed enmity between them until the day of resurrection.'"[8] This report is significant because it proposes an explicit reason for the impermissibility of cross-confessional testimony—namely,

6 See, e.g., Ṣanʿānī, *Muṣannaf*, 6:129, no. 10232. Bukhārī claims that Shaʿbī held the opposite opinion, but he gives no *isnād* for this claim. See his chapter "Bāb lā yusʾal ahl al-shirk ʿan al-shahāda wa-ghayrihā," in his *Jāmiʿ al-ṣaḥīḥ*, ed. Muḥammad Zuhayr al-Nāṣir (Beirut: Dār Ṭawq al-Najāh, 2001), 3:181. A Christian source claims that ʿUmar II forbade the testimony of Christians against Muslims, suggesting that such testimony had not been unheard of previously. See Luke Yarbrough, "Did ʿUmar b. ʿAbd al-ʿAzīz Issue an Edict Concerning Non-Muslim Officials?," in *Christians and Others in the Umayyad State*, ed. Antoine Borrut and Fred M. Donner (Chicago: Oriental Institute, 2016), 173–206, esp. 180.

7 See the introduction to Maʿmar b. Rāshid (d. 153/770), *The Expeditions: An Early Biography of Muḥammad*, trans. Sean Anthony (New York: New York University Press, 2014), xxiv–xxv.

8 Ṣanʿānī, *Muṣannaf*, no. 15526. The quoted verse is Q. 5:64.

communal enmity or bias. Ibn Wahb (d. 197/813, an Egyptian student of Mālik (d. 179/795), picked up this motif of communal bias among Jews and Christians, and cited it explicitly as the reason for prohibiting the sale of Jewish slaves to Christians or of Christian slaves to Jews. It likewise provided the rationale for his view that Jews and Christians could not testify against one another.[9] Ibn Rushd II (d. 595/1198) would later argue that this prohibition was particular to Jews and Christians because of the historical rivalry between these two communities, and thus that it did not apply to Zoroastrians.[10]

The same logic seems to be at work in another instance of excluded testimony, this time in an intra-Muslim context: Tawba b. Namir, who served as a judge in Egypt between 115/733 and 120/738, prohibited the testimony of Qaysī Arabs against Yamanī Arabs and vice versa.[11] No explicit reason for the exclusion is given, but most likely the escalating conflicts between the two tribal groups, which had plagued and weakened Umayyad rule in the first decades of the second Islamic century, had begun to also affect the judicial process, with tribesmen seeking to co-opt the courts and concomitant state power in the service of their own side in the conflicts.[12] Tawba's response was to refer any disputes between Qaysīs and Yamanīs to out-of-court arbitration (*ṣulḥ*) between the disputing parties' tribes.

The appearance of a connection between intra-Muslim rifts and the perception of tensions among non-Muslim communities is strengthened by the fact that the same scholars who transmit reports in which enmity (*ʿadāwa*) among non-Muslims is described as a reason to exclude non-Muslim testimony also transmit reports that thematize enmity among Muslims. One such report depicts Caliph ʿUmar I (d. 23/644) breaking into tears when the riches of the conquered territories are brought into his presence. When he is asked why such a joyous occasion makes him cry, he exclaims: "Nay; when such opulence besets a people, God casts enmity

9 Ibn Abī Zayd al-Qayrawānī (d. 386/996), *al-Nawādir waʾl-ziyādāt ʿalā mā fī al-Mudawwana min ghayrihā min al-ummahāt*, ed. ʿAbd al-Fattāḥ al-Ḥulw et al. (Beirut: Dār al-Gharb al-Islāmī, 1999), 6:183.

10 Ibn Rushd, *al-Bayān waʾl-taḥṣīl waʾl-sharḥ waʾl-tawjīh waʾl-taʿlīl fī masāʾil al-Mustakhraja* (Beirut: Dār al-Gharb al-Islāmī, 1984), 7:511.

11 Muḥammad b. Yūsuf al-Kindī (d. 350/961), *The Governors and Judges of Egypt, or Kitāb el umarāʾ (el wulāh) wa Kitāb el quḍāh of el Kindī*, ed. Rhuvon Guest (Leiden: Brill, 1912), 346.

12 The tensions persisted even after the downfall of the Umayyads: when the governor of Basra ʿUqba b. Salm (in office 149–50/766–67) was threatened by the judge Sawār b. ʿAbd Allāh b. Qudāma (in office 138–56/755–73) to release an unjustly imprisoned man, the governor was advised not to pick a fight with Sawār, since the latter was from Muḍar (i.e., a Qaysī) while the governor from Yaman, which lacked strong support in Basra. See Muḥammad b. Khalaf al-Wakīʿ (d. 306/918), *Akhbār al-quḍāt*, ed. ʿAbd al-ʿAzīz al-Marāghī (Cairo: al-Maktaba al-Tijāriyya al-Kubrā, 1947), 2:59.

and hatred in their midst!"[13] Such reports provided an explanation for the disintegration of the close-knit community of Muslims in the post-conquest era and a justification for the progressive limitation of the right to give testimony, culminating in the establishment of a category of professional witnesses.[14]

THE CLASSICAL POSITIONS EMERGE

Over the course of the second *hijrī* century, the "enmity" rationale for excluding testimony underwent a significant transformation. Most importantly, it was divorced from the communal context and came to be applied to individuals, rather than groups. The first to take this step appears to have been the aforementioned Medinan jurist Rabīʿa b. Abī ʿAbd al-Raḥmān, who was a contemporary of Zuhrī and Tawba. Rabīʿa argued that individual bias (again using the term ʿ*adāwa*) on the part of a potential witness against any of the parties to a lawsuit constituted grounds to reject the testimony of that witness.[15] But changes in the theorization of bias and non-Muslim testimony alike are most evident in the detailed and systematic treatment of the various issues surrounding the exclusion of testimony in the *Kitāb al-Umm* of Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820), which was composed around the year 200 AH.

As a general rule, Shāfiʿī asserts that "We do not permit the testimony of an enemy against his enemy: *lā nujīz shahādat ʿaduww ʿalā ʿaduwwih*."[16] He does not mention the specific case of Qays vs. Yaman—understandably, since by his time the conflict had long ago lost its political explosiveness. But he does discuss factionalism (ʿ*aṣabiyya*) among Muslims as a cause for excluding testimony. According to Shāfiʿī, although it is not blameworthy to be more attached to one's own people than to others, hating others solely on the basis of their tribal affiliations constitutes unacceptable factionalism, even if it does not translate into actually fighting those others. Shāfiʿī gives the example of someone saying of another person, "I hate him because he is from the clan of so-and-so: *abghaḍuh li-annah min banī fulān*," as a

13 See, for example, Maʿmar b. Rāshid, *al-Jāmiʿ* (addendum to ʿAbd al-Razzāq al-Ṣanʿānī's *Muṣannaf*), 11:99, no. 20036.

14 Limiting the right to give testimony to pre-certified witnesses was a judicial innovation that was not, to my knowledge, theorized or discussed in legal writings of this period. See Émile Tyan, *Le notariat et le régime de la preuve par écrit dans la pratique du droit musulman*, 2nd ed. (Harissa, Lebanon: Saint Paul, 1959); and Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (New York: Cambridge University Press, 2013), 106–07.

15 On *shahādat al-ʿaduww*, see ʿAbd al-Salām b. Saʿīd Saḥnūn (d. 240/854) (comp.), *Mudawwana* (Riyadh: Wizārat al-Awqāf, n.d.; reprint of Cairo: Maṭbaʿat al-Saʿāda, 1906), 13:52.

16 Shāfiʿī, *Kitāb al-Umm*, ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib (Mansura: Dār al-Wafāʾ, 2001), 6:746.

statement that renders the speaker ineligible to testify. He derives the justification for such exclusion from the principle, articulated in both the Qurʾān and the *Sunna*, that the believers are brothers to one another. Factionalism thus constitutes open disobedience to God and therefore disqualifies the disobedient person from giving witness testimony, even in cases that have nothing to do with the hated group.

Besides tribal bias, Shāfiʿī also mentions theologically grounded bias. In his discussion of the testimony of heretical Muslims, Shāfiʿī distinguishes between heretics whose opinions have no precedent and are not based on any possible interpretation of revelation—and whose testimony is consequently rejected—and heretics whose views are based on a possible, even if extreme, interpretation (*yaḥtamil al-taʾwīl*) and whose testimony remains *prima facie* acceptable. By recognizing gradations of heresy with differing implications for the acceptability of the heretic's testimony, Shāfiʿī largely agrees with the Ḥanafī position and diverges from that of his teacher Mālik, who rejected the testimony of heretics without qualification.[17] Shāfiʿī outlines two further categories of people whose testimony ought to be excluded on the basis of theological convictions: individuals who believe false testimony to be permissible and those whose theological differences with their opponents have turned into enmity, rendering them ineligible to give testimony with regard to their opponents. In contrast to tribal affiliation-related factionalism, which undermines a potential witness's uprightness (*ʿadāla*) and precludes the acceptance of any testimony from that person, bias rooted in theological differences bars only testimony specifically against the target of the bias.

This approach to defining the grounds for excluding witness testimony focuses on the individual rather than the community: it evaluates potential witnesses on a case-by-case basis and disqualifies them only if they display traits that make them unfit to provide testimony. This can be the case when their testimony is epistemologically suspect, such as when they are biased against a particular party; or when they consider lying permissible; or when their uprightness (*ʿadāla*) is compromised, either in general or with regard to specific (groups of) individuals. For Shāfiʿī, the same reasoning applies to other questionable categories of potential witnesses, including poets and people obsessed with playing games such as chess or backgammon. His explicit discussion of these two groups suggests that he was arguing against a proposal to bar poets and game-players from giving testimony altogether. His own position is that neither group is categorically unfit to testify; however, certain actions can preclude

17 Abū Bakr al-Jaṣṣāṣ (d. 370/980) and Abū Jaʿfar al-Ṭaḥāwī (d. 321/933), *Mukhtaṣar Ikhtilāf al-ʿulamāʾ*, ed. ʿAbd Allāh Nadhīr (Beirut: Dār al-Bashāʾir al-Islāmiyya, 1996), 3:334.

individual members of the two groups from serving as witnesses. A poet may be excluded as a witness if he is an exaggerating sycophant, a liar, or a proponent of factionalism; and a chess player is disqualified if his passion for the game leads him to neglect the obligatory prayers.[18]

In all of these cases, Shāfiʿī argues against the wholesale exclusion of entire groups of people from the category of acceptable witnesses. However, in the case of non-Muslims' testimony, he takes a diametrically opposed stance, arguing not only that they cannot testify against members of other religious communities, but that they are excluded from giving witness testimony under any circumstances. In his defense of this position, Shāfiʿī ignores the statements of previous jurists on the issue and, given the absence of reliable *ḥadīth* reports on the topic, relies exclusively on two Qurʾānic verses that address the issue of witnesses. Verse 2:282 calls on the parties to a contract or a dispute to choose "from those you approve as witnesses," while verse 65:2 refers to "upright witnesses from among you." Neither of these verses actually deals with court procedure; rather, both relate to private documents and contracts—namely, the recording of a debt and the resolution of a marital dispute, respectively. Shāfiʿī nonetheless finds it acceptable to use these verses to set standards for judicial testimony, even though this extension is conceptually problematic.[19] Take the first verse that refers to "those you approve": in the context of two individuals recording a private debt, it seems plausible to read this phrase as stipulating the parties' mutual agreement on a witness to the contract. For Shāfiʿī, by contrast, the category of "those you approve/are content with" (*mimman tarḍawna*) necessarily excludes non-Muslims, since their denial of Islam precludes them from being approved by Muslims. Shāfiʿī thus extends the meaning of "approval" from a practical sense to a doctrinal one. As for the second verse, in Shāfiʿī's reading, the "you" to whom the verse is addressed and among whom upright witnesses are to be sought refers to the community of Muslims, rather than to the families of the quarrelling partners.[20]

Shāfiʿī's final argument for barring non-Muslim testimony takes an *a fortiori* approach against his interlocutor Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804–5), who endorsed the acceptability of testimony from non-Muslims who belonged to scriptural religions on the grounds that it was necessary for maintaining their legal rights. In his challenge to

18 Shāfiʿī, *Umm*, 7:513–16.

19 See Ibn Taymiyya's (d. 728/1328) critique of this extension in Mohammad Fadel, "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought," *International Journal of Middle East Studies* 29, no. 2 (1997): 185–204.

20 Shāfiʿī, *Umm*, 7:573–74.

Shaybānī's position, Shāfiʿī first asks rhetorically why the right to testify should be granted to scripturalists but withheld from non-Muslims without a revealed scripture, even though the latter, unlike scripturalists, have not falsified their scripture and should thus be considered more trustworthy. Second, he queries, why does Shaybānī not show equal concern for guaranteeing the legal rights of Muslims whom both Shāfiʿī and Shaybānī consider unacceptable witnesses, such as slaves or such as Bedouins and seafarers, whose uprightness (ʿ*adāla*) cannot be ascertained?[21]

Shāfiʿī's arguments on the issue of excluding testimony are consistent with his overall legal approach, which granted decisive authority to scripture. For Shāfiʿī, the opinions of legal authorities belonging to the *tābiʿūn* and subsequent generations no longer constituted authoritative precedents. The criteria for valid testimony were now sought in the Qurʾān, and earlier approaches that had focused on the classification of entire groups, such as the wholesale exclusion of those embroiled in tribal animosities, were reduced to individualized tests of factionalism. For Shāfiʿī, factionalism was defined as a contravention of the divine law that entailed a loss of uprightness (ʿ*adāla*), which was a prerequisite for witness eligibility. Shāfiʿī justified the exclusion of testimony by non-Muslims both through an interpretation of Qurʾānic verses relating to testimony and by pointing out what he saw as an inconsistency inherent to the acceptance of witness statements from scripturalist non-Muslims, but not from pagans or from Muslims whose uprightness was either compromised or could not be ascertained.

Of the three other schools of Sunnī law, the Ḥanbalīs followed the Shāfiʿī position quite closely,[22] with one exception. In contrast to Shāfiʿī, Aḥmad b. Ḥanbal (d. 241/855) granted the opinions of post-prophetic legal authorities some probative weight. He thus permitted a non-Muslim to testify in a Muslim court for the specific purpose of confirming the otherwise unattested testamentary wishes of a Muslim who dies while traveling. This position was based on a Qurʾānic verse (Q. 5:106), supported by the reported practice of the Companion Abū Mūsā al-Ashʿarī (d. between 42/662 and 53/673), and was widely adopted among early jurists.[23]

21 Shāfiʿī, *Umm*, 8:40.

22 Interestingly, Isḥāq b. Rāhawayh disagreed with Aḥmad Ibn Ḥanbal and maintained the opinion of earlier jurists that the testimony of scripturalists is acceptable; however, he excluded testimony across communal boundaries. See Marwazī (comp.), *Masāʾil al-Imām Aḥmad*, 8:4096–97.

23 Abū Dāwūd al-Sijistānī (d. 275/888), *Sunan Abī Dāwūd*, ed. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd (Beirut: al-Maktaba al-ʿAṣriyya, n.d.), 3:307, under the heading "Bāb shahādat ahl al-dhimma wa-fī al-waṣiyya fī al-safar"; Aḥmad b. Muḥammad al-Khallāl (d. 311/923), *Aḥkām ahl al-milal min al-jāmiʿ li-masāʾil al-Imām Aḥmad b. Ḥanbal*, ed. Sayyid Kasrawī Ḥasan (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 128 and 134; and Bayhaqī, *al-Sunan al-kubrā*, ed. ʿAbd al-Raḥmān al-Muʿallimī (Hyderabad: Majlis Dāʾirat al-Maʿārif al-Niẓāmiyya, 1925–37), 10:165–66.

The early Mālikī opinion on non-Muslim testimony is unclear. Mālik b. Anas (d. 179/795) does not address the issue in his own work, the *Muwaṭṭaʾ*, but the third/ninth-century compilation of his opinions, the *Mudawwana*, claims that Mālik did not accept witness testimony by non-Muslims in any situation, even in the case of a Muslim traveler's last testament. However, the *Mudawwana* offers as evidence the earlier opinions that bar non-Muslims only from testifying against members of other religious communities and against Muslims, leaving open the obvious question of why the testimony of non-Muslims against their own coreligionists should be disallowed.[24]

The Ḥanafī position diverges significantly from that of the other schools by allowing any non-Muslim to give testimony against any other non-Muslim, regardless of the particular faith of either party. The Ḥanafīs rooted their position explicitly in earlier juristic precedent. The imperial grand judge Yaḥyā b. Aktham (d. 242/857) claimed that "consulting the opinions of the earliest jurists, I have found no one forbidding the testimony of the protected people, except two [conflicting] opinions attributed to Rabīʿa."[25] The Ḥanafīs appealed to the precedent set by the report about ʿUmar II and Shaʿbī, which has a continuous history of transmission and use in early Ḥanafī law. By the second half of the second *hijrī* century, the argument from precedent had been joined to a sophisticated theoretical justification. This new argument relied on the legal canon "Unbelief constitutes a single community: *al-kufr milla wāḥida*," which has diverse applications in various areas of the law but had originally been extracted from a statement attributed to the caliph ʿUmar I on the topic of inheritance: "All of unbelief is one community; neither do we inherit from them, nor they from us."[26] Based on this statement, Ḥammād b. Salama al-Baṣrī (d. 167/784) concluded that "all of the idolators may testify against each other;" Sufyān al-Thawrī (d. 161/778) proclaimed that "Islam is a community and unbelief is a community, and testimony within them is permitted;" and Abū Ḥanīfa's student Abū Yūsuf (d. 182/798) stated that "testimony of the protected people against each other is permissible, even if they are from different communities, for unbelief is a single community."[27]

24 Saḥnūn, *Mudawwana*, 6:44, 12:132.

25 Shams al-Aʾimma al-Sarakhsī (d. 483/1090), *Mabsūṭ*, ed. Khalīl al-Mays (Beirut: Dār al-Fikr, 2000), 16:135.

26 Abū Yūsuf, *Kitāb al-Āthār*, ed. Abū al-Wafāʾ al-Afghānī (Hyderabad: Lajnat Iḥyāʾ al-Maʿārif al-Nuʿmāniyya, 1355/1936), 171.

27 Ibn Abī Shayba, *Muṣannaf*, 4:532, nos. 22873, 22874; Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804-5), *Aṣl*, ed. Mehmet Boynukalın (Qatar: Wizārat al-Awqāf and Beirut: Dār Ibn Ḥazm, 2012), 11:516.

Already in Abū Yūsuf's discussion, cited by Shaybānī, the rules of testimony are placed in a hierarchical order: a non-Muslim foreigner cannot bear witness against a protected (i.e., resident) non-Muslim, and a protected non-Muslim may not bear witness against a Muslim. Within this hierarchy, one can testify against individuals of equal or lower social status, but not against one's superiors.[28] By the time of Shams al-Aʾimma al-Sarakhsī (d. *ca.* 490/1096), if not earlier, this notion of hierarchy came to be theorized with reference to the concept of legal authority (*wilāya*). This concept represented an acknowledgment that testimony was not just about the imparting of information and the concomitant efforts to ascertain whether this information could be trusted; rather, it involved an exercise of power by the witness over the parties in the case. The debate over the categorical exclusion of testimony was therefore a debate about which groups could legitimately exercise such power, and under what circumstances.[29]

In the Ḥanafī scheme, non-Muslims did possess some legal authority—in the first instance over themselves, but also potentially over others, such as their children. The Ḥanafī hierarchy differentiated not only between members of different religious communities but also between insiders and outsiders (*dhimmī* vs. *ḥarbī*), men and women, adults and children, and free individuals and slaves. On the axis of religion, non-Muslims of *dhimmī* status could testify against each other and against non-Muslim foreigners (*ḥarbī*s), but not against Muslims, whereas non-Muslim foreigners could not testify against *dhimmī* non-Muslims owing to the latter's superior status.[30] So while Shāfiʿī applied purely individual criteria to evaluate the testimony of Muslim witnesses, while dismissing non-Muslim testimony on purely communal grounds, the Ḥanafīs placed both Muslims and non-Muslims within a hierarchical framework defined, *inter alia*, by community affiliation. Although the Ḥanafīs, too, required potential witnesses to display individual uprightness, this individual criterion was subordinated to the rules imposed by the communal hierarchy.

One of the challenges facing such a hierarchical view of testimony was the existence of the Qurʾānic verse 5:106, which appears to permit non-Muslim testimony in the affairs of Muslims in the particular circumstance, mentioned earlier, of the testament of a Muslim who dies while away from home. The verse states: "O you who believe: when death approaches you, let two upright men from among you act as witnesses to the setting down of a bequest, or two men from another people if you are traveling when

28 On social hierarchies in the classical period, see Louise Marlow, *Hierarchy and Egalitarianism in Islamic Thought* (New York: Cambridge University Press, 1997).

29 Fadel, "Two Women, One Man," 195–98.

30 Sarakhsī, *Mabsūṭ*, 5:44.

death approaches." The phrase "from another people" could reasonably be understood to refer to non-Muslims, and it had been so understood in a case brought before the Companion Abū Mūsā al-Ashʿarī. As noted earlier, Aḥmad Ibn Ḥanbal permitted non-Muslim testimony in this particular situation as an exception to his general position, but the Iraqi jurist and foundational forebear of the Ḥanafī school Ibrāhīm al-Nakhaʿī (d. 96/715) declared the verse to have been abrogated by a later verse (Q. 65:2).[31] The latter view was also adopted by the early Mālikī jurist Ibn al-Qāsim (d. 191/806).[32] Shāfiʿī, too, held the verse to have been abrogated; as an alternative argument, he denied that "from another people" necessarily referred to non-Muslims, claiming that it had also been glossed as members of other tribes. He thus refused to grant an exception to his general rule to accommodate this scenario.[33]

For those Muslim jurists who did, in principle, accept the testimony of non-Muslims in a Muslim court, evaluating the individual reliability of potential non-Muslim witnesses posed a challenge. The Egyptian *ḥadīth* scholar and judge Khayr Ibn Nuʿaym (in office 120–27/738–45), who allowed non-Muslims to testify against their coreligionists, ascertained the probity of non-Muslim witnesses by making inquiries regarding their uprightness among other members of their religious community (*yasʾal ʿan ʿadālatihim fī ahl dīnihim*).[34] His contemporary, the Iraqi jurist and teacher of Abū Ḥanīfa, Ḥammād b. Sulaymān (d. 120/737), also maintained a notion of non-Muslim uprightness, but he went further than Ibn Nuʿaym by also permitting cross-confessional testimony by non-Muslims.[35] Importantly, he specified that his criterion for potential witnesses was "uprightness in *their* religion," acknowledging that behavior that would have clearly undermined a witness's uprightness according to Muslim standards, such as nonperformance of obligatory Muslim rituals or consumption of forbidden foods, did not compromise the acceptability of non-Muslims who belonged to communities according to whose norms these behaviors were licit.

A century later, Aḥmad Ibn Ḥanbal rejected this idea of non-Muslim uprightness, asking, "Who examines the *dhimmī*: *man yuzakkī al-dhimmī*?" He dismissed the claim that a culturally relative definition of uprightness could suffice to establish a witness's reliability, arguing of non-Muslims that "only their own community declares them upright" and that "even the

31 Abū Yūsuf, *Āthār*, 166.

32 Ibn Abī Zayd, *Nawādir*, 8:425.

33 Shāfiʿī, *Umm*, 7:358.

34 Kindī, *Governors and Judges*, 351.

35 Ṣanʿānī, *Muṣannaf*, 8:357, no. 15530 (*tajūz shahādatuhum baʿḍuhum ʿalā baʿḍ idhā kānū ʿudūlan fī dīnihim*).

best of them drink wine and eat pork, so who can declare them upright?"[36] For Aḥmad, uprightness as a guarantor of acceptable testimony was not predicated on the standards of the relevant community, but rather was an exclusive characteristic of Muslims.

Differing prerequisites for testimony also determined the exclusion or inclusion of other groups, such as slaves. Shāfiʿī tentatively sided with his teacher Mālik in disqualifying slaves from giving testimony, arguing that their lack of freedom necessarily compromised their uprightness as witnesses. But he admitted that he was not certain of this position, given that it had no clear scriptural foundation.[37] Aḥmad Ibn Ḥanbal, on the other hand, did not consider slave status to undermine uprightness, and therefore accepted the testimony of slaves.[38] Ḥanafīs, meanwhile, disallowed the testimony of slaves on grounds that had nothing to do with uprightness, but rather were based on the distinctly Ḥanafī concept of authority (*wilāya*): unlike non-Muslims, who possessed limited legal authority and thus qualified as witnesses in certain circumstances, slaves lacked any authority, even over their own selves.[39]

CONCLUSION

Let me summarize the overall developments that can be detected in the material I have discussed, fragmentary though it is. In the early second/eighth century, the acceptability of non-Muslims as witnesses in Islamic court proceedings appears to have been narrowed by the application of a notion of communal bias between different confessional groups. Concurrently, judges placed restrictions on intra-Muslim testimony on the same basis. It seems likely that both of these efforts to bar cross-communal testimony were motivated by a desire to rein in real or perceived communal animosities among Muslim factions and across religious communities alike. Over the course of the second/eighth century, the rationales for admitting or excluding witness testimony changed. Shāfiʿī, guided by his strictly scripturalist legal theory, transformed the notion of bias into an individualized test for Muslim witnesses, while disqualifying non-Muslims wholesale from giving testimony in Muslim court cases. At the other end of the spectrum, the Ḥanafīs upheld the early precedent of permitting non-Muslims to testify against other non-Muslims, regardless

36 Khallāl, *Aḥkām ahl al-milal*, 128–30.

37 Shāfiʿī, *Umm*, 8:134–35.

38 Marwazī (comp.), *Masāʾil al-Imām Aḥmad*, 8:4104.

39 Sarakhsī, *Mabsūṭ*, 16:135.

of confessional differences among them. But they placed such testimony within a multidimensional hierarchy of legal authority, which regulated the admissibility of witness testimony on the grounds of religion, *dhimma*, gender, and free or slave status.[40]

The formalistic criteria for excluding testimony developed in the second/eighth century by Ḥanafī jurists and Shāfiʿī would remain influential but not unchallenged over the ensuing decades and centuries. The most significant dissent came from jurists who considered the heart of the judicial process to consist not of the production of valid testimony but rather of efforts to convince the judge of one's claim beyond a reasonable doubt (the so-called *qaḍāʾ bi-ʿilm al-qāḍī* doctrine).[41] From such a perspective, any testimony that could shed light on the issue at hand was potentially valuable. The differences between these two judicial models remain largely unexplored, however, and a full consideration of their respective implications for the acceptance of particular types of witness testimony must await further study.

40 On the Ḥanafī conception of the legal authority of women (not discussed in this paper), see Sarakhsī, *Mabsūṭ*, 16:113.

41 See "Qaḍāʾ al-qāḍī bi-ʿilmih," in *MF*, 1:244; Muḥammad Raʾfat ʿUthmān, *al-Niẓām al-qaḍāʾī fī al-fiqh al-islāmī* (Beirut: Dār al-Bayrūt, 1994), 501–14; Mohammad Fadel, "Two Women, One Man," 197–99. Shāfiʿī famously believed in the *qaḍāʾ bi-ʿilm al-qāḍī* doctrine in theory, but he would not espouse it in practice out of fear of corrupt judges. See Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfiʿiyya al-kubrā*, ed. Maḥmūd al-Ṭanāḥī and ʿAbd al-Fattāḥ al-Ḥulw (Cairo: Maṭbaʿat ʿĪsā al-Ḥalabī, 1964), 6:251.