CHAPTER ONE

Between a Witness, a Reporter, and a Judge: The Probative Status of the Expert

1. INTRODUCTION

The purpose of this chapter is to analyze the juristic discourse with regard to the probative value of expert testimony. Due to its casuistic nature, Islamic fiqh does not have a general theory of evidence in general and of expert witnessing in particular. There are, however, discussions on the rules of witnessing and of reporting in treaties of jurisprudence as well as in treaties of applied law. These rules serve as the general framework for treating cases of expert witnessing. Thus, questions relating to the legal status of the expert, to the probative meaning of his testimony, and to the procedures informing his work and his appearance in court may be answered only by trying to reconstruct the general idea of expert witnessing from the many actual cases discussed in the literature. Before I delve into these questions, I shall begin with a general discussion.

The unique knowledge and experience of craftsmen, each in their field of expertise, rendered their testimony essential for qadis, who summoned them to their court in cases of need. The general reasoning behind this procedure is demonstrated by the maxim “With respect to each craft, seek the assistance of the best practitioners of the same craft (ista'īnū 'alā kull šan'a bi-ṣāliḥ ahlihā).” This saying is related to a tradition according to which, when the Companion Sa’d (b. Abi Waqas) got sick, the Prophet came to treat him. After examining Sa’d, the Prophet realized that someone more knowledgeable than he was needed, and therefore summoned al-Harith b. Kalada (d. circa 670) from the tribe of Thaqif, who was renowned as a physician (rajal yaṭabbib). What made the knowledge of experts indispensable for qadis was that
experts—on the basis of indicators (adilla, sg. dalīl) known only to them, due
to their professional experience—could testify as to the existence of things
that were hidden from the layman’s eye. It is significant that the legal litera-
ture refers to experts as having this special quality of “seeing” things related
to their area of expertise—for example, by using the phrase “someone who
has insight in this field” (man lahu al-baṣar [or: al-naṣar] fi dhālika al-bāb).
The Hanbali jurist Ibn Taymiyya (d. 1328) discusses the legality of the sale
of a product that cannot be seen (is hidden) at the time at which the sale is
contracted—for example, the sale of a carrot that is at the time in the field and,
being a root, cannot be seen. According to the general rules of the fiqh, such a sale
contract is void because the object of sale should be “known” (ma’lūm). If,
however, agricultural experts indicate that the plant is indeed a carrot, Ibn
Taymiyya validates this contract and explains that the experts possess knowl-
edge that jurists do not, in spite of the latter being more knowledgeable in
religious matters.

In al-Mabyūḥ, the Hanafi jurist Sarakhsi (d. 1097) justifies the recom-
mendation to judges to consult expert witnesses, on the grounds of the general
not know.” The phrase ahl al-dhikr is usually understood by Qur’anic
commentators to mean not expert witnesses but rather scholars among “the
People of the Book” (ahl al-khitāb), to whom Muhammad referred his opponents
for confirmation that the messengers (of God) who preceded Muhammad had
been human beings and not angels.

The late Hanafi Salih b. Muhammad al-‘Umari (known as al-Fullani; d.
1803), the author of Iqaz Himam Uli al-Absar, uses the hadith literature to
support his interpretation of the Qur’anic term ahl al-dhikr as meaning “ex-
erts.” According to a tradition, one of the Muslim warriors, after being hit on
the head by a stone, asked his comrades-in-arms for permission to use sand
instead of water for the ablution before prayer. The permission was denied;
he washed his head with water and then died. When notified about this, the
Prophet was angry and said that if the warriors were ignorant about that med-
cal point, they should have consulted experts. Al-‘Umari concludes that, since
the Prophet and his successors used to consult experts, the shari‘a instructs
rulers and judges to consult such experts as the physiognomist (qā‘if) and
the assessor (khāris). It is difficult to determine exactly when the relationship
between the Qur’anic term ahl al-dhikr and expert witnesses was established,
but its appearance in Sarakhsi’s work attests that this linkage was recognized
in the eleventh century.

Modern legal writers find support for the legitimacy of expert testimony
in other revealed texts. The Egyptian 'Ajila mentions Q. 33:14: “None can inform you like Him” (wa-la yunabb'i'uka miithl khabir),8 The term khabir, which appears in other chapters of the Qur'an, is usually interpreted as Allah himself9 or, alternatively, as ahl al-kitab, to whom the Qur'an refers for confirmation those Arabs who doubted that Allah had created the universe in six days.10 'Ajila also cites the prophetic hadith: “The adviser is reliable” (al-mustashar mu'taman).11

The Moroccan Kamal al-Wadghiri finds a precedent for expert testimony in Q. 12:24–26, which tells the story of Yusuf and his Egyptian master’s wife, who tried to seduce him. When Yusuf tried to leave her house, the woman grabbed his garment, trying to hold him, and the garment was torn. Wishing to take revenge on Yusuf, the woman told her husband, who was sitting outside the house, that Yusuf had tried to assault her. Yusuf denied the allegation. Then “a witness from among her relatives testified [wa-shahida shahid min akhi] [by saying]; if the front part of his garment is torn, then she is right and he is a liar, and if the back part of his garment is torn, then she lied and he is a truth-teller.” Most classical Qur'an exegetes hold that the witness, who was sitting with the woman’s husband outside the house and therefore could not have seen the event, was a knowledgeable (wa-kim) person whom the pharaoh used to consult. The Qur'an exegete Fakhru'd-Din al-Razi (d. 1209) cites a saying of an earlier exegete, the Mu’tazili al-Jubba’i (d. 916 in Basra), to the effect that a conclusion drawn from the way the garment was ripped is weak, presumptive evidence (al-istidāl bi-tamzīq al-gamīs min qubul wa-min dubur dalil zanni da‘if), not certain evidence (huwa qaṭiya).12

As noted earlier, distinguished persons from the first generations of Muslims, including the Prophet himself, are presented as either demonstrating personal qualities of expertise or using experts. According to one tradition, two brothers who contested the ownership of a fence separating their properties asked the Prophet to judge between them. The Prophet commissioned Hudhayfa b. al-Yaman to settle the case. After visiting the disputed site, Hudhayfa judged in favor of the litigant whose property was adjacent to the knots that had been made in the strings that supported the fence (fa-qadā bi'll-ḥizār li-man waqada ma‘āqid al-qumūt takîli). When Hudhayfa informed the Prophet of the way he had handled the case, the Prophet praised him.13 Another tradition concerns a Medinese woman who fell in love with a man who rejected her wooing. Wishing to take revenge on him, she spilled the white of an egg on her dress and thighs and then complained to the caliph ‘Umar b. al-Khattab (r. 634–44) that the man had raped her. As ‘Umar was about to pass judgment against the man, ‘Ali b. Abi Talib intervened. After pouring boiling
water on the liquid that, according to the plaintiff, was the defendant’s semen, he identified the real source of the liquid and urged the plaintiff to confess, which she eventually did.14

According to another tradition, the same caliph, ‘Umar, sent ‘Uthman b. Hanif to the al-Sawwad area to conduct a cadastral survey (mash) for purposes of tax levying. In another case, the Umayyad caliph ‘Umar b. ‘Abd al-‘Aziz (r. 717–20) sent currency experts to tax the non-Muslim merchants who entered the territories of the Umayyad state.15

The jurists debate the probative status of expert witnessing. The expert’s deliverance of his opinion in court is sometimes referred to by the term testimony (shahāda), sometimes as report (khabar)—hence the term mukhabir for an expert (pl. mukhabirūn or ahl al-khabra; also, “experts of a certain craft,” ahl al-khabra min ahl al-san’ā). An example of the use of both terms in one statement is found in the late Hanafi Ibn ‘Abidin (d. 1836). Discussing the case of two assessors summoned to evaluate the decrease in the values of goods that have been damaged, he says that they “report [to the qadi] by using the formula of testimony” (yukhbirūn bi-lafẓ al-shahāda).16 Two conclusions may be drawn from Ibn ‘Abidin’s statement: (1) the actions of reporting and witnessing are closely linked and (2) the expert is considered a witness due to his having to use the shahāda formula.

As an example of treating the expert as a reporter, consider the following scenario: Shortly after taking possession of a slave, the buyer discovers a physical defect in the slave. The buyer comes to court and argues that the defect already existed when the slave was in the seller’s ownership and that the latter concealed from him any information about the defect at the time at which the sale contract was concluded. The defendant-seller argues that the defect did not occur until the slave was already in the possession of the buyer, and the latter therefore has no ground to demand compensation or to annul the contract and get his money back. The Andalusian Malik jurist Tulaytuli (d. 1067) writes that if the qadi decides to send the same slave to be inspected by trusted experts who subsequently testify about the “age” of the defects, the qadi is not required to notify the defendant (this notification is called ‘iḍār).17 Because the experts advise the qadi by way of a report and not by way of a testimony (a’lamāhu ‘alā tariq al-ikhbār la ‘alā tariq al-shahāda).18 To understand this debate fully, we must pay attention to the differences between the terms shahāda and khabar (and riwāya).

According to the jurists, there is no essential difference between transmission (riwāya) and testimony (shahāda). Both are modes of informing (ikhbār), as stated by the Egyptian Malik jurist al-Qarafi (d. 1285): “testimony and
transmission are both reports" (al-shahāda wa‘l-riwāya khabarān). Fiqh, however, makes a technical distinction between the field of testimonies (bāb al-shahādat) and the field of reports (bāb al-tikhbār). Qarashi, for example, dedicates the first chapter of his al-Furūq to this distinction. The complexity of this topic is attested by his acknowledgment, at the beginning of that chapter, that it took him eight years of study to identify the criteria by which a jurist can categorize cases of reporting (especially unprecedented ones) as either testimony or transmission.

Let us start by comparing the purest form of shahāda—a court testimony—and the purest form of riwāya—the transmission of hadith. Later I will apply this comparison to expert opinion. First, testimony is specific (khāss) because it is in favor of a certain person or against him. Since testimony usually leads to a court decision, it affects only the litigants and those related to them. Also, since testimony brings about a benefit to one party and a loss to the other, it is suspected that a witness who hates someone will provide false testimony in order to harm him. On the contrary, the content of a hadith report (riwāya) is general (‘āmm) and usually applies equally to the reporter and to the recipients of the report. Report does not involve personal loss or gain and is therefore not associated with hostile feelings.

Both a witness and a transmitter must be upright (‘adl) persons who are not subject to forgetfulness or confusion. Yet the above-mentioned differences between testimony and transmission led the jurists to prescribe different probative requirements for each. Because of the potential hostility associated with testimony, the jurists insisted that the number of witnesses be two. The testimony of the second witness, if it corroborates that of the first, makes the information contained in the testimony more probable (or, in Sarahsi’s words, it increases the “confidence of the heart”). Also, a witness should not be related to either of the litigants, and there may be no hostility between him and the litigants. By contrast, in riwāya there is no need to add a second transmitter to the first one, because it is implausible that the first is hostile to the entire Muslim community. Several transmitters in each generation and multiple channels of transmission, however, are better than one transmitter in each generation because they increase the probability that a certain hadith is authentic.

The general rule is that the witness must be a free Muslim male. The requirement of masculinity in testimony is justified on two grounds. (1) The witness achieves a measure of control of and superiority to the person against whom he testifies. The superiority of the witness to the person against whom he testifies humiliates the latter, especially if he is a male and the witness is a
female. To prevent this humiliation, the testimony of women is avoided on principle. (2) Females lack reason and morals (al-nisā' nāqisāt 'aql wa-dīn), and their forgetfulness and tendency to err may therefore lead to the perversion of justice, a potential harm that must be prevented. By contrast, a female is accepted as a transmitter of reports. How is it that a female’s lack of reason and tendency to make mistakes do not prevent her being accepted as a transmitter? The answer is that since the content of hadith has general applicability, many people are interested in it and there are many transmitters. If a female transmitter is mistaken, her mistake will certainly be discovered in the course of time. Court testimony, by contrast, has a short life, and therefore the probability of discovering the mistake of a female witness is low.

The requirement that the witness be a free person is designed to prevent the humiliation caused to a free person by a slave who might testify against him. Also, servitude creates negative feelings in slaves that may lead them to give false testimony. By contrast, the reporter of hadith may be a slave, because the content of the hadith binds him as well as his listeners. Another difference between the two is that a witness must not be blind, because he usually testifies about events he has seen, while the transmitter may be blind, because he receives the information by way of hearing. Finally, the witness has to use the verbal formulas of testimony when he speaks in court, whereas the reporter of hadith does not.

Having noted the differences between “pure testimony” and “pure transmission,” let us return to the experts. Ibn Qayyim al-Jawziyya claims that regular witnesses are unable to discern certain physical and natural signs and that only experts, such as the assessors (ahl al-kharṣ) and the dividers of estates (qāsimūn), can discern such signs, due to their special sensory abilities. The existence of such signs, he says, may be proved on the basis of the report of one or two experts (qawil al-wāḥid wa'l-ithnayn). Supporting his claim that certain natural phenomena that seem clearly evident at first sight are noticed only by people endowed with unique sensory abilities, Ibn Qayyim cites the following example. A group of Muslims have gathered to watch the appearance of a new moon, but only one or two persons in the crowd notice the new moon and report it to the qadi. On the basis of this report, the qadi rules on the beginning of the month, notwithstanding the fact that most of the people in the crowd had not noticed the appearance of the moon. 27

Two elements in Ibn Qayyim’s discussion deserve attention. (1) He is not decisive about the required number of experts. He implies that since experts must have unique qualities not possessed by laymen, it is impossible to require
two experts for each case (which is the number required in testimony), and a report by one expert must be accepted as sufficient evidence. (2) He draws an analogy between an expert’s report or opinion and a report on issues related to religious ritual and worship, such as the appearance of a new moon.

Another jurist, the Maliki Qarafi, makes a similar connection between expert testimony and a report on issues related to religious ritual and worship. He argues that, in addition to pure transmission and pure testimony, there is a third type of report (khabar) that has elements of both testimony and transmission (muwakkab min al-shahāda wa`l-riwāya). He discusses ten cases of the third type: five are expert testemonies or opinions (the physiognomist, translator, assessor, divider, and physician), and three are worship-related reports (on the new moon of Ramadan, on the number of prayers, and on the impurity of water).28

The analogy mentioned by both Qarafi and Ibn Qayyim between the testimony of an expert and a report on worship-related issues leads me to the next section of this chapter, in which I discuss the status of a reporter on worship-related issues, as well as other types of witnesses whose reports have characteristics of both shahāda and riwāya. This discussion provides further insights about the probative status of the expert, to whom I will return later.

2. REPORT AND VARIOUS TYPES OF “REPORTERS”

The parallel drawn by Ibn Qayyim between the expert’s report and a report on the appearance of a new moon exemplifies reports on worship-related issues (khabar dīnī; akhbar al-diyyānāt). There are three types of such reports. (1) In reports relating to the impurity of water, food, or clothing, the permissibility or prohibition of food, and the arrival of prayer time, contrary to shahāda, one upright reporter is sufficient, females are equal to males, and blind persons are equal to sighted. An infidel, a sinner, a lunatic, and an undiscriminating (ghayr nunayyīt) minor are disqualified from reporting. (2) In reports relating to the direction of prayer (qibla), the same rules apply. The Shafi‘is and some Hanbalis accept a report from a sinner. (3) The third type of report relates to the beginning of the Ramadan fast.29

A judicial ruling on the beginning of Ramadan, based on a testimony about the appearance of the new moon, is a condition for the beginning of the fast. The dispute among the schools of law concerning the minimum number of witnesses required to testify about the new moon is reflected in the existence of apparently contradictory hadiths. According to one tradition, transmitted
by ʿAbd al-Rahman b. Zayd b. al-Khattab, the Prophet ordered that the fast start and finish on the basis of the testimonies of two witnesses. According to a second tradition, transmitted by Ibn ʿAbbas, the Prophet ordered that the fast be launched on the basis of the testimony of one Bedouin. A third tradition, transmitted by the Tabiʿi Rihāʾ b. Hirash (d. 719 in Kufa), relates that the Prophet declared that the end of the Ramadan fast be based on the testimonies of two Bedouin.  

The opinions of the law schools are presented as being based on one of the above-mentioned traditions or on a compromise between them. The opinion of Abu Hanīfa (d. 767), the eponym of the Hanafi school, is that if the sky is cloudy, the report of one person on the new moon is sufficient; but if the sky is clear above a large town, the testimonies of a large number of people (al-istifāda; shahādat al-jamm al-ghafir; al-tawāhir mi-man yaqa n al-īlm bi gawilīm) is required. He reasons that if the sky is clear and a group of people are searching for the new moon, it is implausible that only one person will notice it. According to another hadith transmitted from Abu Hanīfa, if the sky is clear, the testimonies of two reliable witnesses are required. According to the transmission of al-Muzanī, Shafīʿi (d. 820) is satisfied with one witness. The same opinion is held by Ibn Hanbal (d. 855), the eponym of the Hanbali school, but it is also related that he prefers two witnesses (iṭhnayn aʿjabu ilāyya). Unlike Abu Hanīfa, Ibn Hanbal thinks that it is plausible that only one person from among a large group of people would notice the new moon, for reasons such as the angle of his position and the quality of his vision. In contrast with Abu Hanīfa, Shafīʿi, and Ibn Hanbal, who in principle permit the reliance on one person’s report, Malik b. Anas (d. 795), the eponym of the Maliki school, requires at least two reliable witnesses; it is also related that if the sky is clear, he requires more than two. He argues that there is no ground for making the new moon of Ramadan an exception to all other months, with respect to which the requirement is two witnesses.

The Hanafi Sarakhsi argues that even those Companions who permitted reliance on the testimony of one person on issues related to worship prefer that more than one person testifies, not as a condition of the validity of the testimony but as a precaution (iḥtiyāt)—that is, a way to achieve more confidence that the report is accurate. It is reported that ‘Āli b. Abī Talib required a single witness to take an oath for precisely that reason.

Ibn Rushd the Grandson (d. 1198) explains that the conflict of opinions among the eponyms of the law schools is based, inter alia, on the doubt as to whether the report on the new moon of Ramadan is classified as a shahāda.
or as a khabar (taraddada al-khabar fi dhālika bayna an yakūn min bāb al-
shahāda aw min bāb al-ʿamal brīʾ- ʿahādīth allāti la yushtraṭu fiḥā al-ʿadad). 
Abu Hanīfa was understood by later jurists as regarding testimony on the new
moon of Ramadan as the transmission of a report (ajrāhu majrā al-khabar)
and therefore permitting the report of a female and of a slave in this context.
Indeed, Ibn Rushd the Grandson holds that the similarity between a reporter
on the new moon and a transmitter of hadith is closer than the similarity be-
tween a reporter on the new moon and a witness (tashbhīh al-rāʾi biʿl-rāwī
huwa anthaṭahum min tashbihīhī biʿl-shāhid). 35

What are the specific grounds for the similarity found by jurists between a
report on the new moon and transmission of a hadith? In both cases there is
equality between the reporter and the recipients of the report: in the case of
hadith, both the transmitter and the recipients are obliged to follow the legal
rule contained in the report. Similarly, both the reporter on the new moon (if
he is a Muslim) and the recipients of his report are obliged to start worshiping
(al-shurūʿ fiʿl -ībāda). This parallelism appears very clearly in the text of the
Hanbali Ibn Qudama (d. 1223):

Since it is a report by way of a testimony on the timing of the religious
obligation, it is accepted from a reliable single [reporter], similar to a
report on the arrival of prayer time; and since it is a report related to
a worship in which both the reporter and the recipient of the report
participate, it [the report] is accepted from a single reliable [reporter],
similar to the transmission [of hadith]. 36

That the reporter on the new moon is obliged to perform the act of worship
like any other believer prevents his having any interest in lying. Thus a single
reporter is sufficient. The same logic applies to a report on prayer time and
on the purity of water used for ablution, as well as to testimony regarding a
person’s conversion to Islam. 37 The jurists mention another ground for the
acceptability of a single report on the new moon of Ramadan: since this re-
port results in the believers’ entering a state of worship, and since worship is
the “right of God” (ḥaqq Allāh; mahd ḥaqq al-sharīʿ), it is permissible to rely
on a single report out of caution (iḥtiyāṭ)—that is, to prevent possible dis-
respect to the “right of God.” 38

An absolute majority of the jurists holds that reporting on the new moon of
Shawwal, leading to the end of fasting and the beginning of ʿīd al-fīṭr, should
be done by two witnesses and according to the standard rules of shahāda.
What is the difference between the new moon of Ramadan and that of Shawwal? First, a report on the new moon of Shawwal terminates a state of worship (al-khurūj min al-ibāda)—the end of fasting—and it therefore requires two witnesses, similar to a testimony on the apostasy of a fellow Muslim. Also, ending of worship, in this case breaking the fast, involves benefit for the believers (manfa‘a lil-nās)—they can eat and no longer suffer the fasting. As a result, a report on the new moon of Shawwal is similar to a standard testimony in favor of a litigant (naṣīr al-shahāda ‘alā haqīq al-ibād), which requires two witnesses. The logic is that if the report brings about the end of worship, the reporter may have a greater incentive to lie, to release himself as soon as possible from the burden of fasting. This motive may create conflict and mutual suspicion in the community. It is therefore appropriate to be stricter in the requirement of testimony in the case of Shawwal, similar to a standard lawsuit involving material rights in which the insistence on two witnesses is aimed at casing the mutual suspicion of the litigants.  

In fiqh discussions on evidentiary rules, we find references to additional situations in which it is arguably permitted to be satisfied with one witness and in which the question of whether this witness is indeed a witness or a reporter is debated. One such situation is a secondhand testimony, or, literally, a testimony on a testimony (al-shahāda ‘alā al-shahāda). In this case, the primary witnesses (shuhūd al-nābīl)—those who witnessed the event that is the subject of the lawsuit—are unable to appear in court in person, due to a journey, sickness, or some other justifiable reason. They relate their testimonies to secondary witnesses (shuhūd al-furū‘), who appear in court in their stead. The jurists are split between two main opinions. According to the first, attributed to the majority of Iraqi and Hijazi jurists, including Abu Hanifa, Malik (as related by al-Mawardi and Ibn Qudama), and Shafii, two secondary witnesses should represent each primary one. The reasoning behind this position is that since the qadi makes a ruling on the basis of al-shahada ‘alā al-shahada, the effect of such a testimony is binding (shahada mutzina) and the standard requirements of testimony should apply. By contrast, Shafii (according to al-Muzani’s transmission) demands two pairs of different secondary witnesses for each of the primary ones—four secondary witnesses in all. 

According to a second opinion, attributed to Ibn Hanbal and, according to Sarakhsi, also to Malik, it is sufficient that one secondary witness represent each primary one. They reason that the secondary witness is a substitute (badal) for the primary one, and that the total number of secondary witnesses should be the same as that of the primary ones. Moreover, the secondary wit-
nesses merely transfer the testimonies of the primary ones to the court and are therefore messengers on behalf of the primary ones. Thus, Ibn Hanbal argues it is obligatory to accept the report of one secondary witness (qawāl wāḥid), as in the case of reporting on religious matters (akhbār al-diyānāt). According to Sarakhsi, Malik regarded al-shahāda ‘alā al-shahāda as similar to the transmission of Prophetic reports or reporting on religious matters (riwāyat al-akhbār).\footnote{41}

Another functionary who falls between the categories of a reporter and a witness is the one responsible for the screening of witnesses. Verification of the witnesses’ uprightness (ta’dīl) is a condition of the acceptability of their testimonies by the court. This verification is conducted through a procedure called tazkiya. The qadi authorizes a reliable messenger to question the witnesses’ neighbors and the people of the market regarding the credibility of the witnesses. This part of the procedure is called secret screening (tazkiyat al-sīr). Every secondary witness who testifies on the reliability of a primary witness before the qadi’s messenger is called a muzakkī.\footnote{42}

What is the required number of muzakkīs? The first opinion, that of Muhammad al-Shaybani (Abu Hanifa’s student, d. 802), Malik, and Shafi‘i, requires two muzakkīs for each primary witness. These jurists argue that since the tazkiya is meant to allow a testimony by which the plaintiff establishes his rights against the defendant (that is, ḥaqq al-‘ibād matter is involved), the standard rules of shahāda should apply. These jurists permitted each of the muzakkīs to testify on the reliability of the two primary witnesses.

The second opinion, that of Abu Hanifa, his student Abu Yusuf (d. 798), and Ibn Hanbal, regards tazkiya testimony as a khabar (ajrāhu majrā al-khabar) and holds that one muzakkī for each primary witness is sufficient; also, the muzakkī does not have to use the shahāda formula. Abu Hanifa and Abu Yusuf explain that the tazkiya brings about the determination of the evidence (taqarrur al-hujja), which in turn facilitates the handing down of a court decision. Making a court ruling is the “right of God” (ḥaqq al-shar‘; in contrast with the first opinion, which regards it as ḥaqq al-‘ibād). Abu Hanifa and Abu Yusuf also argue that since a single report is acceptable on matters of religious worship, all the more so is it acceptable on the issue of inspecting the reliability of the witnesses (al-jarh wa‘l-ta’dīl). The Hanbalī Ibn Qudama rejects the similarity that the eponym of his school, Ibn Hanbal, draws between tazkiya testimony and transmission of hadith. Ibn Qudama adopts the first opinion, arguing that tazkiya testimony is different from hadith transmission, in which the evidentiary rules are eased (fa-innahā [riwāyat al-ḥadīth] ‘alā al-musāhala).\footnote{43}
3. EXPERT WITNESSES—HOW MANY ARE REQUIRED AND WHY?

3.1. General

The linkage between expert testimony, on the one hand, and testimony on issues relating to religious worship and hadith transmission, on the other, raises a number of questions: Do the jurists hold that one expert is sufficient, as in other cases of *khabar*, or that two experts are required, as in *shahāda*? And, assuming that one expert is sufficient, what are the juristic justifications for that relaxation of evidentiary requirements?

According to Brunschwig, who studied Maliki texts, the theoretical classification of experts in Islamic law is basically as witnesses, and they are therefore subject to the rules pertaining to testimony. Practical considerations (in his words: *les besoins de la procédure*), however, created a judicial reality in which the theoretical evidentiary requirements with respect to experts were relaxed. The final result was that the jurists had to justify the acceptability of one expert instead of two.⁴¹

By contrast, Baber Johansen argues that “the expert does not testify or take an oath; rather, he conveys an opinion based on knowledge and, for that reason, he may stand alone: his deposition is valid even without a second witness or co-jurors.” This argument is related to Johansen’s discussion of how Maliki jurists of the Mamluk period—namely, Ibn Taymiyya, Ibn Qayyim al-jawziyya, and Ibn Farhun—integrated circumstantial evidence into *fiqh* doctrine of evidence and procedure. Ibn Qayyim went so far as stating that physical indicators are stronger evidence than the testimony of witnesses, because they do not lie. Expert witnesses, by knowing how to interpret physical indicators, or how to interpret “the language of things,” become indispensable aids to judges.⁴⁵

Mohammad Fadel, discussing the status of females as witnesses, develops the distinction between normative reporting, for example the transmission of hadith and the issuance of a legal opinion, and political reporting, such as court testimony. Expert opinion, according to this categorization, falls under the first category. Fadel explains:

Court-appointed experts, it was believed, simply reported facts about the external world that were universally valid, just as a mufti reported facts about the law that were universally valid; the testimony of the ... doctor ... lacked the partisan nature that was the distinguishing charac-
teristic of testimony; Maliki jurists, for example, were so committed to the notion that expert testimony was objective that they did not subject it, unlike ordinary testimony, to rebuttal. 46

In support of his statement, Fadel provides a quotation from the Maliki jurist Ibn Hisham (d. 1209):

There is no rebuttal of them [i.e., expert opinions], because they were not asked to testify. Indeed, the judge only asked them for information, so they provided him with it. Rebuttal is only allowed in [cases of] doubt and suspicion of the witnesses, and this has been the basis of [legal] practice according to the master jurists. (Ibid.)

In conclusion, Fadel states that because expert opinion is objective, females were allowed to serve as court-appointed experts. Moreover, the court accepted the opinion of one expert female as sufficient evidence. 47

In what follows, I present a detailed analysis of the juristic discourse on the probative status of various experts—the translator, the physician, the assessor (muqawwim or qayyiım), the divider (qāśiım), and the physiognomist (qā’if). I demonstrate that the jurists, on the basis of the distinctions between riwāya and shahāda, seek to categorize various experts as either reporters or witnesses. At the end of this chapter, I use the findings of this analysis to challenge the thesis of Johansen and Fadel.

3.2. Translation

When litigants or witnesses speak a language that the qadi does not understand, he needs the services of a translator. What are the personal qualifications demanded of a translator? He must be an upright Muslim, like a hadith transmitter and a reporter on religious matters (riwāyat al-akhbār). If an upright translator is unavailable, however, it is permitted to use a person of suspicious character, due to necessity, analogous to a non-Muslim physician. 48

Unlike a hadith transmitter, a translator must be a free male. This is because a legal rule contained in a tradition applies to the person who transmitted this tradition, while the content of a translated text obliges the litigants but not the translator himself.

Is one translator sufficient or are two required 49 Abu Hanifa, Abu Yusuf, and Ibn Hanbal (the latter according to the transmission of Abu Bakr ‘Abd al-‘Azīz) hold that one is sufficient, because translation is in the category of
reporting and not of witnessing; but two translators are preferable out of caution (wād‘-mathnā aḥwāl; li-an-naḥu fī al-iḥtiyāt aqrāb). The opinion that one translator is sufficient is supported by the precedent of Zayd b. Thabit, who served as a single translator of the Jewish scriptures for the Prophet.\(^{50}\)

According to one transmission, Malik holds that one translator is sufficient if the qādi appoints him. If the translator is hired by a litigant, however, two are required, similar to a standard testimony. According to a second transmission, Malik requires two translators unconditionally.\(^{51}\) Qarāfī, who does not have a clear-cut opinion, thinks that translation bears a greater resemblance to testimony than to reporting. Another Maliki, Ibn al-Shatt, presents a unique argument by saying that the character of the translated text decides the status of the translation—if the text is a transmitted tradition, one translator suffices, but if it is a court testimony, two translators are required.\(^{52}\)

The Hanafi Shaybāni, differing from Abu Hanīfa and Abu Yusuf, requires two upright and free Muslim translators, as in shahāda, because the translator’s sayings have a binding effect (ilzām) on the qādi’s ruling and because the qādi can understand the content of the testimonies only through the translation. The translator, however, does not have to use the shahāda formula. This formula is meant to deter witnesses from lying, but the translator does not have any motivation to lie.\(^{53}\)

The Shafi‘īs also demand two translators, arguing that the translation brings about the affirmation of an acknowledgment (lathbī‘ iqrār). Because such affirmation requires freedom and honesty, it requires the same number of witnesses as in shahāda. The Shafi‘ī Mawardi contests Abu Hanīfa’s position. To the Hanafi claim that just as religious rules (sharā‘ī al-dīn) are accepted through a single transmission (khabar al-wāḥid), the more so is the translation of one person, Mawardi answers that accepting traditions from a slave transmitter is invalid, whereas the translation of a slave is void, and therefore the analogy created by the Hanafis between transmission of hadith and translating is faulty. As for the Hanafi inference from the acceptability of both a translation by a blind man and the reporting of tradition by a blind man that both cases are categorized as khabar, Mawardi responds that a blind man can be a witness on issues that require only hearing, and it is therefore impossible to infer from his acceptability as a translator whether he is a witness or a reporter.

Ibn Qudama, who represents the preponderant Hanbali opinion (not that of Ibn Hanbal himself), argues that translation is a transmission (naql) of something that is hidden from the judge and related to the litigants, and therefore the number of required translators is two, as with witnesses.\(^{54}\) Translation
is different from religious reports and similar to reporting to the qadi on an acknowledgment made by a person out of court, which requires two witnesses. According to Ibn Qudama, if the lawsuit in which translation is required involves the Qur’anic punishments (ḥudūd) or retaliation of physical injury (qisāṣ), two honest male translators are required. If it is a monetary lawsuit, one male and two female translators are acceptable, and they may be slaves.

3.3. Physicians and the Assessment of Physical Defects and Wounds

Earlier I mentioned the exemplary case of a dispute between a recent buyer of a slave and the seller concerning physical defects in the slave discovered by the buyer soon after taking possession of the slave. The buyer argues that the defect originated when the slave was still in the ownership of the seller, who concealed from him any information about the defect at the time at which the sale contract was concluded. The seller, however, argues that the defect occurred after the sale contract was concluded and the slave was conveyed to the buyer, and the latter therefore has no ground to demand compensation or to annul the contract and get his money back.

Hanafi jurists refer to this context to physical defects known only to physicians. The majority of Hanafi jurists agree that the testimony of two upright Muslim physicians to the effect that the defect is “old” is required to enable the qadi to rule on the annulment of the sale and the return of the slave to his original owner. Sarakhsi says explicitly that the testimony of a number of physicians (namely, two) is required, because their report (qawāl) is as binding as a testimony (lā buidda min al-‘adad fī dhālika l’annahu qawāl mutẓīm kalī-shahāda). The point of difference among Hanafi jurists is how many physicians must testify on the existence of the defect for the buyer to be entitled to file his claim (li-tawajjih al-khūṣūma) against the buyer. Most Hanafis think that one upright physician is sufficient; others, however, hold that two are required. Ibn ‘Abidin opts for the first opinion, on the grounds that since two physicians are required to determine that the defect is “old,” the testimony of one is sufficient for establishing the mere existence of the defect.

The preponderant Maliki opinion, associated with Malik himself, requires two upright experts, on the grounds that the physician’s report is a testimony. Ibn Kinana (d. 153 in Medina) attributed to Malik a slightly different opinion, according to which it is better to have two experts, but if two are unavailable, one reliable expert suffices. Put differently, if the evidence regarding the defect is provided by experts who are not reputable and there are no other ex-
experts (ahl al-baṣar biʾl-ʿuyūb) in the city, the qadi is permitted to rule on the basis of their opinions and even on the basis of the opinion of one such expert. The jurist Ibn al-Majishun (d. 827) is reported as holding that the qadi is allowed to rely on the opinion of one dubious expert, because the qadi does not possess medical knowledge. Ibn Rushd the Grandson says that if there is no alternative, a report by one physician is sufficient, even if he is a non-Muslim and of dubious character. In a different discussion, Ibn Rushd draws an analogy between a physician sent by the qadi to inspect a physical defect and other types of messengers sent by a qadi—for example, a messenger sent to receive the testimony (or the oath) of a witness who is not able to attend the court in person or to receive an acknowledgment concerning a ḥadd offense.

Although the above-mentioned Malikis in principle require two physicians but are willing to accept the testimony of one expert on practical grounds, a minority opinion of the school, associated with the Andalusian Ibn Habib (d. 853), holds that the qadi is allowed to rely on one expert, even a non-Muslim one, because his opinion is a report and not a testimony. This is also the opinion of Ibn Hisham (d. 1209). Ibn Hisham holds that the qadi is entitled to be satisfied with the report of one physician, even a non-Muslim, because the report is based on knowledge and is not a testimony (li-annahu ʾifi jihat al-ʾilm lā min bāb al-shahāda). Note that Ibn Hisham uses the opposing terms ʾilm and shahāda, whereas most of the jurists I have come across use khabar and shahāda. Elsewhere, Ibn Hisham says that, according to Maliki practice, if the physicians testify about a defect found in a slave, the litigant who is going to lose the case as a result of this testimony is not entitled to attack the character of the experts in an attempt to refute their opinion, because whereas such an attack is applicable in the case of witnesses, the physicians are only informers (fa-lami ḫuṣn fihim [fi ahl al-baṣar] ʾidhār li-annahun lam yusʾalū al-shahāda waʾin-namā al-qāḍī istakhbarahum fa-akibbaruhu; waʾl-ʾidhār innamā huwaʾal al-zināʾin waʾl-tuhma lil-shuḥūd).

The Egyptian Shafiʿi al-Suyuti (d. 1505) refers to consultation with physicians with regard to “mortal illness” (maraq al-mawāl). According to fiqh, any transaction (such as a last will and testament or the foundation of a waqf) conducted by a person on his deathbed that prejudices the rights of his legal heirs is void. Al-Suyuti cites the opinion of the Shafiʿi ʿAbd al-Karim b. Abi Saʿīd al-Rafiʿi (from Qazwin, d. 1226), who requires for this purpose two upright and free Muslim physicians. This opinion is categorized by al-Nawawi as the apodictic opinion of the school (al-madhhab al-jazm), on the grounds that determination of mortal illness affects the personal (monetary) rights of the dying person’s heirs. This differs from consultation with physicians on
whether to permit a sick person to use sand instead of water for his ablutions, in which case one physician is sufficient because ablution is the “right of God.”

The Hanbali Ibn Qudama refers to the same question in the context of evaluating the severity of a head wound caused by a beating. In this context, a physician’s opinion is required for assisting the qadi in determining the amount of blood money. In the same discussion Ibn Qudama includes the issue of a beast that is injured or becomes sick while in the possession of the person who rents it for work. The renter has to compensate the owner of the beast. Ibn Qudama quotes al-Khiraqi (d. 946), who says that if it is possible to get two physicians, it is not acceptable to be satisfied with the opinion of one physician or one veterinarian, because this is a matter of (monetary) rights. Only if a second physician is unavailable is it permitted to rely on the opinion of one, because such an opinion requires the expertise of professional physicians. Al-Khiraqi draws an analogy between this case and that of physical defects in the intimate parts of a female body, with regard to which it is permissible to rely on the report of only one female expert (see below). If one female expert is sufficient, argues al-Khiraqi, all the more so is one male expert. Ibn Qayyim al-Jawziyya, quoting Ibn Qudama almost word for word, adds that the justification for relying on only one expert is a state of necessity (ḥalat ḩārūra).

3.4. The Evaluation of Property Value and the Division of Assets

Debates on the required number of expert witnesses appear in fiqh discussions concerning the evaluation of estates and goods, the value of damages caused to both movable and immovable property, and rental prices. The Hanafi Ibn ‘Abidin discusses a case in which there is a need to evaluate certain merchandise—one time if it is intact and a second time when it is defective. He argues that two assessors (muqawwimūn, sg. muqawwim) who practice the same craft to which the defective goods belong (al-muqawwim al-ahl fi kull ḥirfā) must report their evaluations by using the formula of testimony (yukābirēn bi-lafz al-shahāda). The Shafi`is and Malikis likewise require two assessors, arguing that the assessment is a testimony concerning the value.

The Hanafi Sarakhsi discusses a conflict of opinion among the assessors (in one place he calls them “knowledgeable people,” ahl al-ilm; in a second he calls them “assessors,” muqawwimūn) about the value of stolen property—one says it is above ten dirhams (the niṣūb, the minimum value of stolen property required for applying the ḥadd punishment), the other assessor says it is
less than the niṣāb. This disagreement prevents the application of the ḥadd. It is therefore necessary, Sarakhsi says, that two assessors agree that the value of the stolen property exceeds the niṣāb, because evidence on the basis of which a judgment on ḥadd punishment can be handed down is not completed by one opinion (al-ḥujjā al-hukmiyya lā tatimmu bi-qawil wāḥid).73

The Hanafi jurist Haskafi (d. 1677) discusses a case in which a person claims that the rental price of an endowed asset (waqf) is far below the market price. He determines that if an expert (dhū khibra) supports the claimant’s claim, the qādi has to annul the rent contract and instruct the parties to raise the rent to the customary market level.74 Ibn ‘Abidin infers from Haskafi’s use of the term dhū khibra (singular) that one expert suffices, which is in accordance with the opinions of Abu Hanīfa and Abu Yusuf and in contrast with the opinion of Shaybani (who requires two).75 Malik also permits reliance on a single assessor, except for ḥadd cases, in which two assessors are required.76

The Malikis Qaraḍī and Ibn al-Shatt disagree with Malik. Qaraḍī argues that assessment is more similar to testimony than it is to either transmission of hadith or judgment (ḥukm), implying that two assessors are required. Ibn al-Shatt argues the same, on the grounds that an assessment facilitates a judgment that in turn creates monetary obligations.77

A particular type of assessor was the khāris, whose role, as the ruler’s delegate, was to assess the quantity of fruit or crops before they are picked or harvested. This early assessment was needed for tax purposes. The first khāris in Islamic history was the Companion ʿAbd Allah b. Rawāha (from the tribe of al-Khāzaraj in Medina; d. 629), who was sent by the Prophet to assess the date crops of the al-Khaybar Jews. The historical example of Ibn Rawāha serves as a precedent for the Maliki, Shahī, and Hanbali preponderant opinion that one khāris is sufficient. Some of the jurists holding this opinion draw an analogy between a khāris and a judge (ḥākim), both of whom act alone according to their individual discretion (iḥtīād). Shahī, however, recommends sending two assessors, or even more if possible.78

The divider (qāsim) was an expert whose role was to divide estates and goods among partners and heirs. According to Malik, one divider is sufficient but two are better (al-aḥsan). Qaraḍī confirms that the opinion supporting one divider is the dominant opinion of the school (mashhūr). He explains that division is similar to both judgment and transmission, but that the strongest (al-ahhar) similarity is to the first, because the judge nominates the divider as his representative (istanābah). Ibn al-Shatt differs with Qaraḍī, arguing that the divider’s report is a testimony and not a judgment. This is also the opinion of the Maliki Abu Ishaq al-Tunṣī (d. 1052).79
According to the Maliki al-Kharashi,\textsuperscript{80} all the jurists agree that one divider is sufficient, because he reports on the basis of knowledge possessed by only a small number of people (\textit{li-annahu tārīqahu al-khabar ʿan ʿilm yakhṭaṣ biḥt qalīl min al-nāṣ}), comparable to the physiognomist, the muftī, and the physician (even an infidel one). If the divider is sent by the judge, he must be upright. If the division involves, as a preliminary step, assessment of the properties, two dividers are required, because the assessment is a testimony concerning the value, and the standard rules of shahāda therefore apply.\textsuperscript{81} The Maliki Tulaytūlī, in a legal formulary of assessment, refers to one assessor whose religiosity, reliability, and expertise are accepted by the parties (\textit{rajud dīnahu wa-aminatuhu wa-bāṣarahu biʿl-qisma}) who appoint him to assess their property and divide it among them.\textsuperscript{82}

The Shafi’ī jurist al-Nawawi (d. 1277) says that a divider nominated by the qadi must be a free, upright, legally capable (\textit{mukallaṭ}) male Muslim who is knowledgeable in measurement, arithmetic, and assessment. If the divider is chosen mutually by the parties, the requirements of uprightness and freedom do not apply. This is because the qualifications required of a divider whose status, as the qadi’s delegate, is that of a judge (ḥākim) naturally are higher than those required of a divider chosen by the parties, in which case his legal status is that of a representative (wukālī).\textsuperscript{83} If the division does not include assessment, the school opinion is that one divider is sufficient, although a few Shafi’īs hold that there are two school opinions (one and two dividers, respectively). If the division involves assessment, two dividers are needed. The ruler is entitled to nominate a divider as a judge with regard to the assessment (\textit{li-jālihi ḥākim fiʿl-taqwīm}).\textsuperscript{84} The Shafi’ī Mawardi refers to two statements by al-Shafi’ī regarding a division that does not involve assessment. According to the first, two dividers are required; according to the second, the divider is equated to a judge (ḥākim), which means that one is sufficient. The Shafi’ī jurists are confused by what seems to be two opposing views of al-Shafi’ī. Most of them argue that there are two school opinions: (1) that one divider is sufficient, like one measurer (kayyūl) and one weigher (awazzān);\textsuperscript{85} (2) that two dividers are required, like two assessors and two judges with respect to “punishment for hunting” (\textit{jazā ʿal-ṣayd}). The last term is derived from Q. 5:95, which prohibits hunting during the pilgrimage (ḥajj). According to the verse, a Muslim who violates this prohibition breaks his state of sanctity (iḥrām) and must pay compensation, the value of which is determined by two reliable persons (yaḥkumu bihi dhawā ʿadī mínkum).\textsuperscript{86} According to this opinion, if the divider is considered a judge (ḥākim), it is possible that the required number of dividers be two (\textit{an yuṣmaʿ...}
fihi bayna ithnayn), because Q. 4:35 says (in the context of marital dispute): “send one arbitrator (or adjudicator) from his family and one from hers.”

Other Shafi‘is, those who deny that there are two school opinions on the matter, hold that the school differentiates between two situations: (1) if one of the partners is a minor or a missing person and unable to defend his rights, two dividers are required; (2) if the partners are present and able to defend their interests, one divider suffices. The judge has to accept the divider’s conclusions, because the latter represents him (istinābahatihi lahu), in the same way that the qadi has to accept the judgments of his deputies (khulafā’). 87

3.5. Physiognomy

The pre-Islamic Arabs perfected the science of physiognomy (qiyya‘a), which permitted them to verify lines of parentage by finding similar signs (imārat or ‘alāmāt) on the bodies of the child and his presumed father or mother. In his al-Turūq al-Hukmiyya, Ibn Qayyim al-Jawziyya explains that these signs may be invisible to the layman’s eye and that only the physiognomist, due to his unique sensory abilities, is able detect them. Ibn Qayyim adds that the Prophet and the Companions, the Righteous Caliphs, considered physiognomy the means for establishing paternity (ja‘alāhah da‘il min adillat thubūt al-nasab) and made use of it. The Sunni schools of law, except for the Hanafis, accept the reliance on physiognomy. 88

According to the Shafi‘i al-Mawardi, four features are inspected: bodily form and the form of organs; color of skin and type of hair; patterns of movement; and way of talking, voice, and temperament. These elements may be apparent (zāhir) or hidden (khafīyy). Some physiognomists excel in detecting many features of similarity; others excel in determining the strength of each feature. In addition to his professional expertise, a physiognomist must be a free, upright (Muslim) male, because his determination of paternity falls between a judgment and a testimony (li-annahu mutaraddid al-hal bayna ḥukm wa-shahāda). If he functions in court as an informer (manzilat al-mukhbir), he does not have to be knowledgeable in fiqh; but if he appears as a judge (manzilat al-hākim), he must be familiar with the laws of paternity. 89

Mawardi says it is for the qadi to decide whether the physiognomist functions as a judge or as a reporter (ijtahada [al-qadi] ra‘yahu fi taḥkīm al-qā‘if aw istikhābārihi). If the qadi uses the physiognomist as a judge, he delegates to him his adjudicative authority (in adāhū ijtihādahu ilā taḥkīmihī, kāna dhālika istikhābatf min lahu fi‘l-ḥukm baynahumā). If the chosen physiognomist excels in his profession, the qadi may be satisfied with just one, because the
physiognomist is in the position of a judge. If, however, the qadi designates two physiognomists, this brings about greater certainty (fa-in jamā‘a bayna qā‘ifayn ihṭiyāṭn hāna awkud), analogous to the designation of two adjudicators in the case of a dispute between spouses. If the qadi decides to use the physiognomist as an informer, he has to nominate two of them, because he is forbidden to hand down a decision on the basis of a single report (khabar al-wāhid). He must base himself on the testimonies of two witnesses, analogous to the requirement to have two assessors.

Mawardi adds that after the two physiognomists have completed their inspection, there are two ways (waḏān) in which they may deliver their conclusions to the court: (1) in the form of a report (khabar yu‘adda bi-laḏf al-ikhbār); (2) in the form of a testimony (shahāda tu‘adda bi-laḏf al-shahāda). The first option is justified on the grounds that a witness usually testifies about an event he saw or heard, and since these two modes—observing an event or hearing about it—are absent from the physiognomist’s work, his conclusions must be categorized as a report. The second option is justified on the grounds that the physiognomist’s report is a shahāda, in spite of its not being based on an event he saw, because the circumstances testify (al-ḥāl yashhadu) and also because a judgment must be based on a testimony and not on a report.

The Maliki school position is that the report of one physiognomist (even if he is of dubious character or a non-Muslim) is sufficient because he is a reporter (rather than a witness). However, the Maliki Qaraḍi holds that physiognomy resembles both testimony and transmission: with regard to the first, the physiognomist’s report applies to specific persons and not to the entire community; with regard to the second, the physiognomist’s function serves the entire public. Qaraḍi holds that the similarity to testimony is stronger, meaning that two physiognomists are needed, contrary to the dominant position of his school. It may be argued, says Qaraḍi, that the element of potential hostility associated with the provision of testimony is absent in the case of physiognomy, because the physiognomist used to be chosen (during the lifetime of the Prophet) from among the Banū Mudlij, an Arab tribe whose members were well known as experts in that realm. But this argument does not hold water: first, because the Banū Mudlij did not have a monopoly on the role of physiognomists; second, because the physiognomist’s report is accepted even without his previous nomination by a qadi—as was the case with the physiognomist Muṣṭaẓẓal al-Mudlij, who established the paternity of Zayd b. Haritha (the Prophet’s adopted son) over Usama (d. 674 in Medina) without the Prophet’s asking him to do that.

Another instructive illustration relating to the probative status of expert
testimony is provided by the Hanbali Ibn Qayyim al-Jawziyya. Discussing the categorization of the physiognomist as a witness or as a judge, Ibn Qayyim says that this disputed categorization is useless, because there are cases in which one witness is sufficient—examples being the divider, the khamis, the assessor, and the physician—while there are cases in which two judges are needed, an example being the above-mentioned hakim al-jaza al-sayd.

Ibn Qayyim then discusses a second pair of disputed categories: is the physiognomist a witness or a reporter (mukhabir)? He maintains that these categories are useless, because the witness is a reporter and the reporter is a witness. Anyone who testifies about something is a reporter. The shari'a, argues Ibn Qayyim, does not distinguish between the two (al-shari'a lam tufarriq bayna dha'ila wa asl). The distinction is mistakenly created by those jurists who make the acceptance of testimony conditional upon the use of the shahada formula and are not satisfied with a simple reporting. Ibn Qayyim holds that the reasoning behind this distinction is weak and that there are many indicators to the contrary, both in the Qur'an and in the hadith. He quotes Ibn Hanbal, who holds that if one physician is sufficient in a case in which a second one is unavailable, how much more so is one physiognomist, because there are more physicians than there are physiognomists.

4. THE STATUS OF FEMALES AS EXPERT WITNESSES AND THEIR REQUIRED NUMBER

The position of women in Muslim societies in general, and in the fiqh in particular, is reflected in the rules of evidence. Generally speaking, Muslim jurists, like Jewish jurists, are reluctant to rely on female testimony. The majority of jurists agree that female testimony is entirely excluded, not only from all Qur'anic punishments (hudud) and penal (uqabat) cases, but also from claims of marriage and divorce, because these fields encompass issues dealing primarily with the human body and its status (for example, a marriage contract entitles the husband to exclusive enjoyment of his wife's body). As for financial matters, according to a literal interpretation of Q. 2:282, the standard testimony is of two males; if, however, there is only one male witness, it is permitted to replace the second male witness with two females. The traditional rationalization for the two-to-one ratio is that females are forgetful and imprecise in relating details. The two female witnesses remind each other about the details of the transaction under consideration, thereby complementing each other and producing a full testimony, equal to that of one male.

A few recent studies shake up this monolithic patriarchal narrative by pro-
posing a modernist reading of Q. 2:282. Muhammad Fadel, for example, argues that two discourses with regard to female testimony may be found among post-Ayyubid Sunni jurists. The first, which he calls “normative,” recognizes the equality of women to men as transmitters of hadith and as mujtahids.\(^7\) The second, which he calls “legal-political,” discriminates against women as witnesses and judges. A few jurists, among them the Maliki al-Qarafi and the Syrian Hanafi al-Tarābulṣi (d. 1440), were troubled by the fact that it is impossible to justify the gap between the two discourses on the grounds of the natural intellectual inferiority of women. They therefore developed socially oriented justifications for this gap. This interpretive line, certainly not a dominant one, has been revived by the Islamic reformer Muhammad ‘Abdul and his followers, who argue that female testimony has been discounted because women have traditionally pursued domestic occupations that prevented them from developing memory skills, precision in details, and proficiency in such public matters as contracts.\(^8\)

Although Muslim jurists generally hold that female testimony is not “basic evidence” (ḥuṣṭa asliyya), there is one field in which the testimony of women has been essential and enjoyed a privileged status—testimony relating to the hidden parts of the female body (in legal jargon: “under the dress,” ṭaḥt al-thīyāb). This is the only field in which fiqh, on the grounds of necessity (darūra), permits women to testify alone and not alongside a male.\(^9\) The necessity is created, as in Jewish law, by males being prohibited from viewing the intimate parts of the female body.\(^10\)

The jurists disagree about events involving females that men are forbidden from seeing. For example, Abu Hanifa holds that unrelated males are permitted to see a woman breast-feeding and thus are able to testify about it. Similarly, he holds that males are prohibited from witnessing a birth but may testify about the first cry of the newborn (istihlāl). It seems, however, that Abu Hanifa’s is a minority opinion and that the majority of jurists prohibit males from witnessing breast-feeding and the istihlāl. According to Hanafi sources, if a male happens by chance to view a “female-exclusive” event, such as a birth, he is permitted to testify about it if he is an upright person.\(^101\)

It is convenient to divide female testimony regarding the female body into two types. In the first, the female supplies standard eye-witnessing on events in which she participates and that are closed to males, such as birth and breast-feeding. Every Muslim female who is a major and is reliable is qualified to supply this kind of testimony. In the second, a female who is a midwife or possesses medical knowledge provides her expert opinion about events that she has not observed personally (for example, sexual intercourse between a recently wed-
ded couple) on the basis of her interpretation of signs found on the inspected female’s body (for example, signs of the existence or absence of virginity). These two types of testimony are different, the first being standard, whereas the second is expert witnessing. The juristic discourse, however, does not make a systematic distinction between the two types, and they are discussed jointly. Also, that the jurists, in referring to expert females, use neutral wording, such as “a woman” (imra‘a), “women” (nisā), “a just woman” (imra‘at ‘adl), and “women trusted by the qadi” (minman yathiqu [al-qadi] bihikna), as well as wording indicating expertise, such as “a midwife” (qābila, pl. qawābil) or “a woman knowledgeable in medicine” (imra‘a māhira bi‘l-ṭibb), makes it difficult for the reader to distinguish between the two.\textsuperscript{102}

A female who testifies about signs found on another female’s body is an expert witness. The Hanafi Sarakhshi, discussing the case of a convicted female adulterer who is arguing that she is pregnant, instructs the qadi to delay the application of the hadd punishment (for the sake of the baby’s life) and have females inspect her. He explains that the qadi must consult with experts whenever he faces difficulty (wa-mā yashku ’alā al-qādī fa-innamā yarji’u fihi ilā man lahu baṣar fi hādhā al-bāb), and compares the inspecting female to a male expert, qayyim al-mutlafat—that is, an expert in assessing the decrease in the value of damaged property.\textsuperscript{103}

A few prominent traditions provide the framework for the juristic discourse on female expert testimony.\textsuperscript{104} According to one tradition, the Prophet says that the testimony of women (shahādat al-nisā) is permitted with regard to events that males are forbidden to observe. According to a tradition transmitted by the Prophet’s Companion Hudhayfa b. al-Yaman (d. 656), the Prophet allowed the testimony of a (single) midwife concerning a birth. According to another tradition, ‘Uqba b. al-Harīth married Umm Yahya b. Abi Ihab, and, following their marriage, a black female slave (her name is not indicated) claimed that she had breast-fed both ‘Uqba and his wife, which created a ban on their marriage. ‘Uqba sought relief from the Prophet, arguing that the slave was lying. The Prophet dismissed his claim and held that he must separate from his wife on the basis of the slave’s testimony.

These traditions formed the basis of two juristic attitudes. The first, attributed to the Malikis and Shafi‘is, requires anywhere between two and four female expert witnesses, on the grounds that such testimony falls within the scope of the term shahāda. The supporters of this opinion argue that the fact that the tradition narratives use the term shahāda (rather than khabar) and the term female in the plural (rather than in the singular) proves that all the standard rules of testimony apply, excluding the requirement that the witness
be a male. The number of female experts therefore must be two (the Maliki opinion), while the Shafiis require four, according to the standard ratio of “one male equals two females.” In support of their view, these jurists state that the fact that the female expert is required to be a free Muslim proves that the testimony she provides is a standard shahida.

The second attitude, associated with the Hanafis and Hanbalis, permits reliance on the testimony of one female, on the grounds that such testimony is not a standard shahida but rather a khabar, a report, similar to the transmission of a tradition. This approach is based on the following grounds. (1) In the hadith one finds support for the testimony of one female in this context—for example, the above-mentioned tradition of ‘Uqba b. Harith concerning the black slave wet nurse. The Hanafi Sarakhsi, a supporter of this approach, deals with the difficulty emanating from certain traditions that use the term females rather than a female by arguing that females may be treated as a generic noun (ism al-jins), which may be interpreted as either singular or plural. (2) Against the Shafiis’ position, the Hanafis argue that the rule that “one male equals two females” is applicable only to financial claims in which females testify alongside males and is inapplicable to claims pertaining to the female body, in which females testify without corresponding male testimony. (3) Sarakhsi argues that from a socio-moral perspective, there is a need (darura) to minimize the shame and disrespect caused to the inspected female by allowing only one female (rather than two) to inspect her.

In an attempt to refute the Hanafis, who allow reliance on the report of one female expert, the Shafiis argue that the Hanafis’ preferring to have two female experts rather than one, for the sake of caution and certainty, implies that they consider the testimony of a female expert a shahida. Responding to this polemical argument of the Shafiis, Sarakhsi says that the Hanafis do not require reports from two female experts, yet if it happens (in other words, accidentally, in itlaafa qara qul alil) that a woman is inspected or observed by more than one female expert, they do not object to that, since the double inspection increases the reliability of the report. Later Hanafis, more outspoken than Sarakhsi, recommend reliance on two females. For example, Ibn al-Humam (d. 1437) is quoted as saying that reliance on one female expert is accepted, but two or three are better, because their report creates legal obligations. The jurists al-Mawsili (d. 1284) and al-Tarabulsli acknowledge that in issues in which women are permitted to testify without corresponding male testimony, the number requirement is dropped, as in the transmission of reports. He adds, however, that “two [female experts] are better for caution, and three are more favorable in the eyes of Allah, and by four any controversy is eliminated”
(wa’ll-thintān ahwaṭ wa’ll-thalāth ahbab ilā Allāh wa’llbi-arba‘ yakhruj/ yuḥkrīj ‘an al-khīlāf).112 This is also the Hanbali position.113

The need to minimize the inspected female’s humiliation, Sarakhsi adds, justifies the waiving of two requirements of the witness: gender (female instead of male) and number (one witness instead of two); but it does not justify waiving the requirement of freedom, since an inspection by a free female does not cause a greater shame to the inspected female than an inspection by a slave. The female expert therefore must be free.114

The Hanbali Ibn Taymiyya (d. 1328) refutes the Shafi‘i application of the “two-females-equal-one-male” ratio to female expert testimony. The reason for applying this ratio to female testimonies on financial matters is the inclination of females to forgetfulness and inaccuracy. This reasoning, Ibn Taymiyya argues, is irrelevant to female testimony on the female body, because in this type of testimony the female uses her senses rather than her mind. A single female therefore equals a single male in this respect.115

The approach that permits reliance on one female expert draws an analogy between expert female testimony and the transmission of traditions (riwāya; riwāyat al-akhbār) by females, as with the analogy made between a male expert and a transmitter of a religious report or of a tradition. Sarakhsi says that the testimony of a female concerning events that males are forbidden to watch is a report (khabar) in which the requirement of masculinity is waived, and that the requirement of the number of witnesses should therefore be waived as well, as with the transmission of reports (riwāyat al-akhbār).116

At the same time, Sarakhsi tries to reconcile the two positions by arguing that a female’s expert testimony resembles both testimony and report (khabar min wajh wa-shahāda min wajh) and that there is ambiguity (shubha) in this respect. On the one hand, it is a shahāda because the female witness must be a Muslim and free; she must use the formula “I testify” (ashhāda) in the framework of a judicial procedure, and her testimony is binding (ilzām), because the qadi bases his decision on it. On the other hand, it is a khabar because the requirements of gender (female instead of male) and number (one witness instead of two) are waived.117

5. CONCLUSIONS

Examination of the legal discourse on the probative status of experts reveals that the jurists base both the general justification for the use of experts and the determination of the required number of experts on textual (Qur’an and hadith) as well as analogical grounds. With regard to the Qur’an, interpreta-
tion of the term ahl al-dhikr as “knowledgeable people” provides support for the call to consult experts. As for the hadith, a number of traditions establish that the Prophet relied on the opinion of one expert. For example, Zayd b. Thabit translated the content of Jewish scriptures for the Prophet; the latter sent ‘Abd Allah b. Rawaha to assess the date crop of al-Khaybar’s Jews; the solitary opinion of Mujazziz al-Mudliji was regarded by the Prophet as sufficient evidence for establishing the paternity of Zayd b. Haritha over Usama b. Zayd; and the Prophet annulled the marriage of ‘Uqba b. Harith and Umm Yahya on the grounds of the testimony of the black slave to the effect that she had breast-fed both.

These traditions naturally encouraged the jurists to link expert testimony to the transmission of hadith and to the deliverance of reports on worship-related issues. This linkage was made on the basis of the identical probative relaxation. In all three cases—hadith transmission, reporting on worship-related issues, and expert witnessing—it is permitted, on the basis of particular traditions referring to each case, to rely on a solitary report or testimony, although the ideal situation is to have as many reporters as possible.

Considerations of necessity may be the logical common denominator for the relaxation of probative requirements in the three cases. As for hadith transmission, the fear of losing binding Prophetic dictums and the absence of an alternative encouraged the validation of solitary traditions. In religious matters, since worshiping God is a duty of believers, the fear of prejudicing God’s rights required the casing of probative demands. Finally, with regard to expert witnessing, it was often practically impossible to find two qualified and upright experts for each legal suit. I must emphasize, however, that I have not found this common denominator presented in this explicit way in the legal literature, so it remains my own speculation.

Finding textual support—in the Qur’an and especially in the hadith—for the sufficiency of one expert may have made further deliberation on this topic redundant, because these textual sources are the strongest sources of the law (usūl al-fiqh). But the existence of contradictory traditions and perhaps the desire of the jurists to increase theoretical consistency in this topic led them to search for logical justifications (by way of analogy, qiyās) for the probative status of the expert. To this end, they made use of the differences between the transmission of hadith, on the one hand, and court testimony, on the other. Since expert testimony was conceived of by the jurists as falling between the two, they tried to find, for each type of expert, the similarities to both hadith transmission and court testimony. If they found that the similarity to hadith reporting was stronger, they concluded that one expert was sufficient; if the
similarity to court testimony was stronger, they concluded that two experts
were needed. In a few cases, as in the case of the divider and the physiog-
nomist, the jurists found that the strongest similarity was neither to a hadith
reporter nor to a court witness but rather to a judge (hākim), thereby permit-
ting the reliance on one.

As a generalization, it seems that the more prevalent juristic position holds
that the expert is a witness. A physician’s report on the “age” of physical de-
fects found by the buyer in his recently bought slave may serve as a good
example. The Hanafis, Malikis, and Hanbalis all held that reports by two phy-
sicians are a condition for the annulment of the sale contract; the Malikis and
Hanbalis permitted reliance on a report of one physician only if two were
unavailable.\(^{118}\)

Many of the jurists who concluded that the expert is in principle a witness
held that, in exceptional cases, necessity (daruire) justifies the mitigation of
probative requirements by relying on a single expert, on experts of dubious
prestige, and even on non-Muslim experts. This necessity was created by the
difficulty in finding in every geographical area quality experts in the quantity
that would satisfy judicial needs. These jurists, being sensitive to practical
considerations, were aware that insistence on two experts for each lawsuit had
the potential of stifling the judicial system and preventing it from producing
effective justice. A similar commitment on the part of the jurists to encourag-
ing smooth handling of vital economic and commercial activities is attested by
their relaxation of other probative demands.\(^ {119}\)

At the same time, those jurists who concluded that one expert is in prin-
ciple sufficient, as with a hadith reporter and a reporter on religious-related is-
ues, clearly expressed their preference for two or more experts to strengthen
the reliability of expert testimony. This position resembles their preference
for a hadith transmitted through multiple channels, and for the testimony of a
large crowd on the appearance of a new moon.

The same principles apply to reports by female experts. Those jurists who
classified such a report as khabar were willing to rely on a single female expert,
but preferred two or more for achieving higher reliability. Those who consid-
ered it a court testimony required two, but were prepared to make a concession
by being satisfied with one, on the grounds of necessity—the unavailability of
more than one expert—or on moral grounds—that an examination by one fe-
male expert rather than two is less embarrassing for the inspected female. A
few jurists made the analogical claim that since the standard requirement for
the masculinity of the witnesses is waived in the case of female expert testi-
mony, it is permissible to waive the requirement for two witnesses as well.
My findings in this chapter suggest that Brunschvig, by concluding that expert testimony is basically subject to the shahāda rules and that relaxation of that standard was motivated by practical judicial considerations, represents the more prevalent opinion among Muslim jurists, whereas the opinions of those jurists cited by Johansen and Fadel are less prevalent. Even Ibn Qayyim al-Jawziyya, a strong supporter of the acceptability of circumstantial evidence, states clearly that reliance on two experts is required for the sake of greater reliability, unless it is impossible to find more than one.¹²⁹

The similarity found by Fadel between the transmission of hadith and the issuance of a legal opinion, on the one hand, and expert opinion, on the other, all three being normative, nonpolitical, and therefore objective, requires qualification. Expert opinion forms the basis for a judicial decision that is personal, binding, and immediately effective, whereas a hadith targets the entire Muslim community and a legal opinion is consultative in character and not judicially binding.

Moreover, a wrong or fabricated hadith or a misguided legal opinion will not in the long run cause severe damage to the Muslim community, because they will be balanced by alternative authentic hadiths or correct legal opinions, which will finally direct the community to follow Allah’s will. As the famous hadith says, Allah does not fail the entire community. By contrast, the opinion of a court-appointed expert, if wrong, eventually leads to the loss of legal rights of one of the litigants. In other words, unlike a hadith or a legal opinion, which are purely normative, an expert report, although explicitly normative and objective, is implicitly political, because it supports the position of one of the litigants; consequently, if incorrect, it may cause a qadi to hand down a wrong judgment. This explains why even those jurists who permitted a single expert preferred to have two, in order to achieve greater certainty and avoid as far as possible the danger of infringing on individual legal rights.

Drawing on this theoretical basis, the next two chapters discuss the practical operation of expert witnessing in premodern Islamic judicial systems.