

# Written and Oral in Islamic Law: Documentary Evidence and Non- Muslims in Moroccan Shari‘a Courts

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In the spring of 1881, a Jewish merchant named Ya‘akov b. Shalom Assaraf sued his Muslim associate Ḥadd b. al-Zīrnibānī.<sup>1</sup> Ya‘akov appeared before a shari‘a (Islamic law) court in Fez, his hometown, claiming that al-Zīrnibānī owed him 50 riyāls. The Jewish plaintiff backed up his claim with a legal document (*rasm*).<sup>2</sup> Al-Zīrnibānī responded that he only owed Ya‘akov 25 riyāls, not 50. Thus far, this lawsuit is entirely unremarkable; Jews and Muslims sued each other all the time, particularly for unpaid debts, and disputes like this one fell under the jurisdiction of Morocco’s shari‘a courts.<sup>3</sup> Nor was Morocco unique in this regard, in that Jews and Muslims had been facing each other in shari‘a courts since at least the medieval period.<sup>4</sup> This sort of legal interaction was the stuff of everyday life for Jews and Muslims in nineteenth-century Morocco, as elsewhere in the Islamic world.

But the judge’s response to al-Zīrnibānī’s denial *was* remarkable, particularly in light of the received wisdom concerning evidentiary proof in Islamic

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<sup>2</sup> Ya‘akov also claimed he was owed another 216 riyāls originally pledged to his father Shalom (for whom Ya‘akov had power of attorney), and that he had other documents to prove this second debt. Al-Zīrnibānī wanted to see the evidence of the 216 riyāls he had supposedly agreed to pay Shalom, and demanded that Ya‘akov bring the documents to court.

<sup>3</sup> Such civil disputes could also be brought to an administrative court adjudicated by a government official. It was not unheard of for Muslims to bring these sorts of inter-religious disputes to Jewish courts: Jessica M. Marglin, *Across Legal Lines: Jews and Muslims in Modern Morocco* (New Haven: Yale University Press, 2016), 41–42, 94–97.

<sup>4</sup> See the references below.

law. The *qāḍī* (Muslim judge) ruled that al-Zīrnibānī had to pay Ya‘akov the full 50 riyāls. That is, he accepted the claim of the Jewish plaintiff over that of the Muslim defendant. But the only evidence presented in the case was a written document. Most scholarship on Islamic law has claimed that documents alone are not probative, especially when contested (except in a few limited cases, discussed below). Yet Ya‘akov had won his case based on the document in his possession, notwithstanding al-Zīrnibānī’s denial of the full debt and the lack of witnesses to testify orally. Moreover, Ya‘akov was Jewish, and thus his word should not have held against that of a Muslim. The scholarship on Islamic law asserts that Jews cannot testify against Muslims because they are Jewish, and thus Ya‘akov’s claim should not have counted against his Muslim opponent’s.

It would be easy to dismiss this case as an anomaly that defies Islamic legal norms. But that would ignore the weight of archival evidence and the backing of jurisprudential literature suggesting that Ya‘akov’s case in fact conformed to the standard procedure of shari‘a courts in nineteenth-century Morocco. The records of lawsuits brought by Jews like Ya‘akov suggest that we need to rethink the received wisdom about the probative nature of written documents in Islamic law. Rather than rely solely on oral testimony, Moroccan *qāḍīs* regularly adjudicated based on notarized documents. This practice had particularly important implications for Jews, who, as *dhimmi*s, could not give oral testimony against Muslims in court. In Morocco, however, Jews, as well as other non-Muslims, could access and deploy notarized documents just like their Muslim associates.

Lawsuits such as this one from Moroccan shari‘a courts raise the broader question of the relationship between orality and writing in Islamic law. The oral and the written carry a great deal of baggage, particularly in Western culture. Many Europeans placed orality below writing on the civilizational hierarchy. As Claude Lévi-Strauss wrote, “Of all the criteria by which people habitually distinguish civilization from barbarism, this should be the one most worth retaining: that certain peoples write and others do not.”<sup>5</sup> Throughout the early modern period, European observers of Islamic legal institutions disparaged Islamic law’s emphasis on oral testimony over documents. In 1768, Sir James Porter explained that “all proof is determined by witnesses,” rather than by recourse to written documents.<sup>6</sup> This practice introduced inevitable corruption, for witnesses “are found in abundance who will swear any thing for pay, [and] when a cause is desperate, an immediate resource is at hand; for such witnesses may be brought to any point as will puzzle the clearest cause....”<sup>7</sup> Muslim reformers took these criticisms to heart. In the decades before and after the

<sup>5</sup> Claude Lévi-Strauss, *Tristes Tropiques* (New York: Criterion Books, 1961), 291.

<sup>6</sup> Sir James Porter, *Observations on the Religion, Law, Government, and Manners of the Turks*, 2 vols. (London: J. Nourse, 1768), v. 2, 5.

<sup>7</sup> *Ibid.*

turn of the nineteenth century, Egyptian shari‘a courts “were expressly precluded from hearing litigation in the absence of written evidence.”<sup>8</sup>

The old privileging of the written over the oral has had something of an after-life in economic-historical scholarship, particularly that on the Middle East. Timur Kuran’s influential book *The Long Divergence: How Islamic Law Held Back the Middle East* argues that the exclusive reliance on oral testimony is a hallmark of underdeveloped economic systems.<sup>9</sup> In Europe, “as commerce expanded and exchanges became more and more impersonal.... Documentation became more common to facilitate both the tracking of payable and receivable accounts and their communication to others.”<sup>10</sup> Yet, Kuran argues, Muslim judges refused to accept notarized documents as proof, which caused local economic institutions to “stagnate” and helps to explain how Islamic law “held back” the Middle East.<sup>11</sup> The kinds of court cases won by Ya‘akov Assaraf suggest that Muslim jurists and court officials did not necessarily reject written documentation: on the contrary, documents constituted valid forms of proof in Moroccan shari‘a courts. The practice of Moroccan courts calls into question Kuran’s sweeping statements about Islamic law’s preference for orality across the Middle East.

Anthropologists, literary scholars, and historians have not only questioned the privileging of written (civilization) over oral (barbarism), but have sought to do away with their dichotomous relationship altogether.<sup>12</sup> Jacques Derrida hoped to discredit this hierarchical distinction as a central aspect of our understanding of language.<sup>13</sup> Michel de Certeau argued that orality and writing are not “two opposed terms,” but rather, “plurality is originary.”<sup>14</sup> Yet calls to

<sup>8</sup> Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 106. Similarly, in Yemen documents were deemed acceptable forms of proof in modern law codes: Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993), 215–16.

<sup>9</sup> Timur Kuran claims that reliance on oral testimony only works in a closed society in which “everyone knows one another intimately through dense webs of interaction”: *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton: Princeton University Press, 2011), 240.

<sup>10</sup> *Ibid.*, 242.

<sup>11</sup> *Ibid.*, 249. Kuran argues that extraterritorial privileges granted to foreigners in the early modern period eventually contributed to the “de-Islamization of commercial life” and thus to an increased reliance on documentary evidence (*ibid.*, ch. 12, esp. 251–53). In general, Kuran’s argument about the importance of impersonal exchange in creating economic growth relies on Avner Greif, *Institutions and the Path to the Modern Economy* (Cambridge: Cambridge University Press, 2006), ch. 10. Ghislaine Lydon for the most part accepts Kuran’s arguments: “A Paper Economy of Faith without Faith in Paper: A Reflection on Islamic Institutional History,” *Journal of Economic Behavior and Organization* 71 (2009): 647–59.

<sup>12</sup> For Lévi-Strauss, writing was a tool of political domination, and his fascination with oral, “primitive” societies was precisely an effort to find people free of this corruption. Derrida and de Certeau more explicitly call any hierarchy into question.

<sup>13</sup> For Jacques Derrida, Lévi-Strauss commits the error of “radically separating language from writing,” thus giving “the illusion of liberating linguistics from all involvement with written evidence”: *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1997), 120.

<sup>14</sup> Michel de Certeau, *The Practice of Everyday Life* (Berkeley: University of California Press, 1984), 133.

discard hierarchical and dualist understandings remain largely unheeded among scholars of Islamic law, for whom written and oral remain fundamentally distinct, even opposed. Brinkley Messick stands out as an exception; he argues that in twentieth-century Yemen orality and writing in Islamic law were intertwined and even mutually constitutive.<sup>15</sup> The practices of Moroccan shari‘a courts suggest the need to further examine the interrelated nature of oral and written testimony in Islamic law and, ultimately, erase the bright line separating them.

Given the state of scholarship on Islamic law, Ya‘akov’s lawsuit raises two conundrums. First and foremost, his mobilization of documentary evidence, and the use of legal documents in Moroccan shari‘a courts more broadly, contradicts the historiography on Islamic laws of evidence. Even as scholars of Islamic law have done much to construct a more nuanced understanding of the role documents played in shari‘a courts, the majority still conclude that oral testimony was the gold standard of evidence. But the archival sources regarding Moroccan shari‘a courts paint a very different picture of the role of documentary evidence. The second puzzle stems from the fact that a Jew like Ya‘akov could sidestep the restrictions on his oral testimony, which poses a distinct yet interrelated challenge to the historiography. His use of documentary evidence challenges the received wisdom about non-Muslims’ experiences in Islamic courts, where their oral testimony was restricted. The archives containing records of Ya‘akov’s legal endeavors are from the personal collections of Jewish merchants, and they offer insight into the implications of Moroccan shari‘a courts’ reliance on documentary evidence for non-Muslim plaintiffs in particular.<sup>16</sup> In the legal world these archives depict, judges regularly considered notarized documents probative, even when presented by non-Muslims.

Just as importantly, the practices of Moroccan shari‘a courts were not the result of ignorance or marginal legal customs: quite the opposite, since they are well supported by jurisprudential literature. The Mālikī school of law has long been the only one of the four legal schools of Sunni Islam prevalent in Morocco (and it is the most common in the Maghrib generally).<sup>17</sup> Mālikī jurists developed justifications for relying on written documents that are distinctive among the four Sunni schools. The relative marginality of the Mālikī school, both demographically and in Western scholarship, has kept Mālikī jurisprudence mostly out of the scholarly debate. Bringing the margins to the center of our analysis illuminates the diversity of the oral and the written in Islamic law.

<sup>15</sup> Messick, *Calligraphic State*, 226–27.

<sup>16</sup> Although my archival evidence stems solely from cases involving Jews, there are indications that Muslims used documentary evidence in similar ways (discussed below).

<sup>17</sup> The differences between the four Sunni schools of law (*madhhab*, pl. *madhāhib*: Mālikī, Ḥanafī, Shāfi‘ī, and Hanbalī) are often relatively minor and jurists from the different schools recognize the authority of other schools over their own constituents. See, for example, Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), ch. 9.

## DOCUMENTARY EVIDENCE IN THE HISTORIOGRAPHY OF ISLAMIC LAW

As I have noted, scholars of Islamic law tend to emphasize the role of orality over written documents in jurisprudence and practice.<sup>18</sup> Despite some notable exceptions and recent attempts to question the scholarly dismissal of documentary evidence, the consensus remains that Muslim jurists privileged oral testimony and only occasionally accepted a narrow range of documents as probative. This is largely due to a focus on the Ḥanafī school of law (the school formally adopted by the Ottoman Empire, and the most prevalent in the Islamic world). This historiographical bias has produced the apparent anomaly of Ya‘akov’s lawsuit, and the necessity of reevaluating our assumptions.

The mainstream position in scholarship on Islamic law is best exemplified by Joseph Schacht, whose work remains a reference point in the field. Schacht argues that documents lacked any probative quality in shari‘a courts: “Written documents are merely aids to memory, and their contents are evidence only insofar as they are confirmed by the testimony of witnesses.”<sup>19</sup> In other words, on their own they have no legal value and they only count as evidence in court when verbally confirmed by their authors. The inadmissibility of documentary evidence without oral corroboration is based on the enduring assumption that “oral testimony provided the only form of proof in the Shari‘a.”<sup>20</sup> If documents are presented in court, they are always trumped by oral testimony.

More recently, a number of scholars have questioned Schacht’s blanket assertion that orality was preeminent, demonstrating that there were exceptions to this rule. Baber Johansen asserts that Schacht was too sweeping in his dismissal of documentary evidence and points to a robust literature on the status of various documents—letters from the caliph, correspondence and records of *qādīs*, and so forth—that were considered probative by certain Ḥanafī jurists.<sup>21</sup> Ultimately, however, Johansen concludes that Ḥanafī jurists accepted only a few very specific types of documents as equivalent to verbal testimony, such as those produced by representatives of the politico-military authorities.<sup>22</sup> Christian Müller draws on a collection of seven hundred documents from the fourteenth-century shari‘a court of Jerusalem to argue that

<sup>18</sup> For a useful overview of the subject, see Guy Burak, “Documents,” in *Oxford Encyclopedia of Islam and Law* (Oxford: Oxford University Press, 2016).

<sup>19</sup> Schacht, *Introduction to Islamic Law*, 193.

<sup>20</sup> Jeanette A. Wakin, *The Function of Documents in Islamic Law: The Chapter on Sales from Ṭahāwī’s Kitāb al-shurūṭ al-kabīr* (Albany: State University of New York Press, 1972), 6.

<sup>21</sup> Baber Johansen, “Formes de langage et fonctions publiques: stéréotypes, témoins, et offices dans la preuve par l’écrit en droit musulman,” *Arabica* 44, 3 (1997): 333–76, 375. Johansen explains that Schacht ignored these discussions because most of them took place after the tenth century, at which point, according to Schacht, Islamic legal theory ceased to develop. See also Ron Shaham, *The Expert Witness in Islamic Courts: Medicine and Crafts in the Service of Law* (Chicago: University of Chicago Press, 2010), 5–6.

<sup>22</sup> Johansen, “Formes de langage,” 373.

legal documents were only effective in court insofar as they were orally confirmed by the parties concerned.<sup>23</sup> “In order to establish the proof, the judge convenes the people who signed their names at the bottom of the document and enquires into the honor of their reputation. The signatories testify orally concerning its contents before the judge.”<sup>24</sup> The majority of Müller’s documents came from the court of a Shāfi’ī judge, the most prevalent school in the Near East at the time.<sup>25</sup>

Along the same lines, historians have shown that even when legal documents were used they remained secondary to oral testimony. Francisco Apellaniz observes that notaries in the Mamluk Empire did not produce documents that could stand as evidence on their own. Whenever a case was contested, notaries public (‘*adl*, pl. ‘*udūl*) were called upon to verify their documents verbally in court. Thus European merchants doing business in the Mamluk Empire in the fifteenth century described these notaries as “witnesses who wrote.”<sup>26</sup> Boğaç Ergene’s studies of eighteenth-century Ottoman *sijillat* demonstrate that plaintiffs did occasionally present written evidence. However, Ergene concludes that this was uncommon and such evidence was almost always backed up by oral testimony. Furthermore, only the oral testimony was probative, making the documents more or less as insignificant as Schacht described them.<sup>27</sup> Yavuz Aykan’s study of legal institutions in an Ottoman city in eastern Anatolia during the eighteenth century reaches a similar conclusion: although documents were regular and essential parts of legal procedures, they were almost never probative in and of themselves.<sup>28</sup>

Ghislain Lydon’s impressive research on nineteenth-century merchant networks of the Western Sahara is one of the few studies to address the use of documentary evidence in the Mālikī school. Lydon demonstrates the centrality of documentation to the practice of commerce. Yet she, too, concludes that

<sup>23</sup> Christian Müller, “Ecrire pour établir la preuve orale en Islam: la pratique d’un tribunal à Jérusalem au XIVe siècle,” in Akira Saito and Yusuke Nakamura, eds., *Les outils de la pensée: étude historique et comparative des textes* (Paris: Maison des sciences de l’homme, 2010), 63–97.

<sup>24</sup> *Ibid.*, 72.

<sup>25</sup> *Ibid.*, 83. Müller also relies heavily on the Shāfi’ī scholar Ibn Abī al-Damm, author of a manual for judges: Ibrāhīm b. ‘Abdallāh Ibn Abī al-Damm (d. 1244), *Kitāb adab al-qaḍā*, Muḥammad al-Zuhaylī, ed. (Damascus: n.p., 1975).

<sup>26</sup> Francisco Y. Apellaniz, “Judging the Franks: Proof, Justice, and Diversity in Late Medieval Alexandria and Damascus,” *Comparative Studies in Society and History* 58, 2 (2016): 350–78, 361.

<sup>27</sup> Boğaç Ergene, “Evidence in Ottoman Courts: Oral and Written Documentation in Early-Modern Courts of Islamic Law,” *Journal of the American Oriental Society* 124, 3 (2004): 471–91, 473–77. Indeed, Ergene does not find evidence even for the use of court records as evidence in the *sijillat* he examines (478–79). See also Ronald C. Jennings, “Limitations of the Judicial Powers of the Kadi in 17th C. Ottoman Kayseri,” *Studia Islamica* 50 (1979): 151–84, 173; Işık Tamdoğan-Abel, “L’écrit comme échec de l’oral? L’oralité des engagements et des règlements à travers les registres de cadis d’Adana au XVIIIe siècle,” *Revue du Monde Musulman et de la Méditerranée* 75–76 (1995): 155–65.

<sup>28</sup> Yavuz Aykan, *Rendre la justice à Amid: Procédure, acteurs et doctrines dans le contexte ottoman du XVIIIe siècle* (Leiden: Brill, 2016), ch. 11, esp. 93, 108–10.

documents were not probative in court and “that *à priori* written documents had no intrinsic legal value.”<sup>29</sup> While she concedes that Mālikī jurists were more flexible concerning documentary evidence, she focuses on *responsa* literature that rejects a sole reliance on documents. Given the evidence from nineteenth-century Moroccan shari‘a courts, Lydon’s sources suggest that the ways in which Moroccan *qāḍīs* relied on notarized documents were not representative of all Mālikī legal institutions.<sup>30</sup>

Another angle from which scholars have begun to question Schacht’s conclusions concerns the judicial status of archival records and under what circumstances they could constitute legal proof. Guy Burak explores these questions in the early modern Ottoman context, focusing on a seventeenth-century *fatwā* that justifies the reliability of *defters* (official court records) as legal evidence.<sup>31</sup> This was largely predicated upon the Ottoman innovation of storing the *qāḍī*’s *diwān* in a state-sanctioned, secure location, which would ensure its reliability. Yet even those jurists who argued for a more expansive use of written evidence only accepted official archives. Moreover, their position was sharply contested. Some Ḥanafī jurists remained “reluctant to accept [Ottoman judicial] registers as uncorroborated evidence, thus rejecting what they perceived an [*sic*] attempt to generate non-Shari‘a evidence.”<sup>32</sup>

There are important exceptions to this general trend in the scholarship on written evidence in Islamic law. Brinkley Messick identifies a network of courts that relied a great deal on documents. In his groundbreaking study of law in modern Yemen, Messick asserts that documentary evidence was accepted, with some reservations, by imams, *qāḍīs*, and ordinary individuals belonging to the Zaydī branch of Shi‘ī Islam.<sup>33</sup> Zaydī jurists argued that “just [i.e., honest] writing” was acceptable, but cautioned against the havoc that could be unleashed by “false writing.”<sup>34</sup> The solution they proposed was to accept documents written by trustworthy individuals, although unlike in Morocco, they did not develop a system of authorized notaries public. Messick also observes that his informants put great faith in documents, especially as evidence in court, and documents were regularly presented as probative evidence

<sup>29</sup> Lydon, “Paper Economy of Faith,” 655. See also Ghislaine Lydon, *On Trans-Saharan Trails: Islamic Law, Trade Networks, and Cross-Cultural Exchange in Nineteenth-Century West Africa* (Cambridge: Cambridge University Press, 2009), esp. 289, 293–95, 379–80.

<sup>30</sup> Lydon, *Trans-Saharan Trails*, 295.

<sup>31</sup> Guy Burak, “Evidentiary Truth Claims, Imperial Registers, and the Ottoman Archives: Contending Legal Views of Archival and Record-Keeping Practices in the Ottoman Empire (17th–19th Centuries),” *Bulletin of the School of Oriental and African Studies* 79, 2 (2016): 233–54. Aykan also finds a few occasions on which the *cadi* relied on documents from his own tenure in his court’s archives (*hüccet*) to resolve a case (*Rendre la justice à Amid*, 151). Burak’s and Aykan’s findings confirm aspects of Johansen’s argument (Johansen, “Formes de langage,” 349–50). See also Wakin, *Function of Documents*, 9.

<sup>32</sup> Burak, “Evidentiary Truth Claims,” 236.

<sup>33</sup> Messick, *Calligraphic State*, ch. 11.

<sup>34</sup> *Ibid.*, 213–15.

during lawsuits.<sup>35</sup> Yet he also writes about prominent Zaydī jurists who rejected documents as anything other than aids to memory, and who required oral testimony to validate their contents.<sup>36</sup> Messick limits his observations to the local context he observed and avoids making statements about Zaydī jurisprudence as a whole, let alone other schools of Islamic law.

Paradoxically, some of the oldest work on documentary evidence in Islamic law foreshadowed a more nuanced approach that developed much later. In 1945, Emile Tyan published a short book on notarization and written proof in Islamic law, which remains the only monograph in a Western language devoted to this subject.<sup>37</sup> Tyan argued that although early Muslim jurists rejected written proof as valid evidence unless corroborated by oral testimony, later jurists came to consider documents acceptable.<sup>38</sup> Indeed, Tyan paints a picture in which judges regularly relied upon legal documents. But subsequent scholars rejected his claims as too sweeping. Johannesen, for instance, rightly points out the difficulty with accepting Tyan's "conclusions concerning the evolution of a general formula that was valid for all, specifically concerning Hanafī doctrine in the Ottoman period."<sup>39</sup> Though Tyan may have been correct that documentary evidence was accepted *de facto*, he overreached in claiming that all schools accepted it *de jure*.<sup>40</sup>

That said, there are indications that Tyan may have been more accurate in his assessment of the Mālikī school than he was regarding other schools of Sunni law. He noted that the Mālikīs were exceptionally accepting of documentary evidence.<sup>41</sup> Sami Bargaoui, a scholar of law in early modern Tunisia, similarly argues that the Mālikī school treated documents differently from either the Ḥanafī or the Shāfi'ī schools. He relies on both jurisprudential literature and *waqfiyyāt* (pious endowment deeds) to assert that Tunisian Mālikī jurists were willing to rely on the signatures of *'udūl* who were absent or deceased

<sup>35</sup> *Ibid.*, 221–22.

<sup>36</sup> Brinkley Messick, "Evidence: From Memory to Archive," *Islamic Law and Society* 9, 2 (2002): 231–70, 261–66. Paolo Sartori's work on Islamic law in Russian-ruled Central Asia presents a vision of a legal system awash with documents, although he does not discuss in detail the probative nature of written evidence. See, for example, *Visions of Justice: Sharī'a and Cultural Change in Russian Central Asia* (Leiden: Brill, 2016).

<sup>37</sup> Emile Tyan, *Le notariat et le régime de la preuve par écrit dans la pratique du droit musulman* (Harissa: Imprimerie St. Paul, 1945).

<sup>38</sup> Some, like the Ḥanafī scholar Ibn 'Ābidīn (1783–1836, lived in Ottoman Syria), justified this based on custom: *ibid.*, 91. Robert Brunschwig, an important scholar of Maghribi history and law, gave a brief account of written evidence in Islamic law that adhered to Tyan's general conclusions, though he provides few details: "Le système de la preuve en droit musulman," in Robert Brunschwig, ed., *Etudes d'islamologie* (Paris: Editions G.-P. Maisonneuve et Larose, 1976), 201–18, 215–16.

<sup>39</sup> Johannesen, "Formes de langage," 334–35.

<sup>40</sup> In this respect, Tyan would have merely demonstrated the old adage about the separation between legal theory and legal reality in the Islamic world. On this, see especially Schacht, *Introduction to Islamic Law*.

<sup>41</sup> Tyan, *Le notariat*, 76; see also Messick, *Calligraphic State*, 205–6.



as valid evidence.<sup>42</sup> Bargaoui's research suggests that the Mālikī school approached the question of written versus oral evidence differently, and we must account for that if we are to understand the kinds of lawsuits in which Ya'akov Assarraf was involved.<sup>43</sup> The Mālikī school's distinctiveness is particularly important given the tendency of scholars like Müller and Schacht to make general statements about "premodern Islamic law" without due qualifications for variations among schools.<sup>44</sup>

#### THE HISTORIOGRAPHY OF NON-MUSLIMS IN ISLAMIC COURTS

That Ya'akov won his case despite being Jewish also calls into question the received wisdom about the status of non-Muslims in Islamic courts. One of the most frequently cited restrictions placed on unbelievers in Muslim courts concerns the inability of non-Muslims—both foreigners and those protected monotheists living under Islamic rule (called *dhimmi*s)—to testify against Muslims in court.<sup>45</sup> Because the overwhelming scholarly opinion is that oral testimony is preeminent in Islamic law, the assumption is that non-Muslims were at a considerable disadvantage in all shari'a courts since they could give no evidence against Muslims before a *qāḍī*.

Such restrictions contributed to a narrative of non-Muslims' legal isolation. Some scholars concluded that the inherent inequality of Islamic law meant that Jews and Christians tried to avoid Islamic legal institutions. Why would they voluntarily seek out a tribunal in which they were so disadvantaged?<sup>46</sup> This assumption is problematic on multiple fronts, including the implication that other groups prohibited from giving testimony on par with Muslim males, such as Muslim women, would similarly attempt to avoid shari'a courts, for instance by resolving disputes informally outside of court. Yet we know that Muslim women used shari'a courts extensively.<sup>47</sup> Even beyond the structural disincentives, Jews and Christians had internal motives for avoiding Islamic law. Jewish law prohibited Jews from bringing their co-religionists before non-Jewish judges, and generally frowned on the use

<sup>42</sup> Sami Bargaoui, "Les titres fonciers dans la régence de Tunis à l'époque moderne: Interrogations autour d'une mutation documentaire," *Revue de l'Institut des belles-lettres arabes* 74, 208, no. 2 (2011): 165–85. Bargaoui identifies the shift toward the preservation of documents as occurring after the Ottoman conquest of Tunisia in 1574 (178–80).

<sup>43</sup> See Messick, *Calligraphic State*, 205–6.

<sup>44</sup> Müller, "Ecrire pour établir la preuve orale," see, for example, 67.

<sup>45</sup> Schacht, *Introduction to Islamic Law*, 192–93; David Santillana, *Istituzioni di diritto musulmano malichita, con riguardo anche al sistema sciafiita*, 2 vols. (Rome: Istituto per l'oriente, 1925–1938), v. 1, 100–1.

<sup>46</sup> See, for example, Norman Stillman, *The Jews of Arab Lands in Modern Times* (Philadelphia: Jewish Publication Society, 1991), 4–5; Michel Abitbol, "Jews and Arabs in Colonial North Africa," in Tudor Parfitt, ed., *Israel and Ishmael: Studies in Muslim-Jewish Relations* (Richmond, Surrey: Curzon Press, 2000), 130, 132.

<sup>47</sup> See, for example, Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998).

of gentile courts.<sup>48</sup> Medieval canon law similarly tried to prevent Christians from seeking out the services of Muslim jurists.<sup>49</sup> Together, Muslim and non-Muslim jurisprudence easily forged a narrative of isolation. Accordingly, scholars tended to view non-Muslims as staying within their respective legal orders as much as possible.

A fundamental problem with this narrative of isolation is that Jews and Christians were no strangers to Islamic legal institutions. The majority of studies of non-Muslims' use of Islamic legal institutions comes from historians of the Ottoman Empire and draws on the vast trove of archival material from Ottoman shari'a courts.<sup>50</sup> More recently, scholars have similarly shown that Jews and Christians regularly used shari'a courts in other places and times.<sup>51</sup> For the most part, these findings have not led scholars to challenge their understandings of the extent to which Jewish and Christian legal authorities opposed their communities' use of Islamic courts. Rather, most have concluded that, people being people, they often broke their own laws.<sup>52</sup> But there is evidence that Jewish legal authorities were more accommodating of the use of non-Jewish legal institutions than has been previously thought.<sup>53</sup> For instance, Jewish jurists in Morocco from the sixteenth to the early twentieth centuries

<sup>48</sup> See, for example, Simḥa Assaf, *Batei ha-din ve-sidreihem aharei hatimat ha-Talmud* (Jerusalem: Defus ha-po'alim, 1924), 11–24; Jacob Katz, *Exclusiveness and Tolerance: Studies in Jewish-Gentile Relations in Medieval and Modern Times* (Springfield, N.J.: Behrman House, 1961), 52–55; Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: P. Feldheim, 1964).

<sup>49</sup> Uriel I. Simonsohn, *A Common Justice: The Legal Allegiances of Christians and Jews under Early Islam* (Philadelphia: University of Pennsylvania Press, 2011).

<sup>50</sup> On Jews in Ottoman Islamic courts, see, e.g., Amnon Cohen, *A World Within: Jewish Life as Reflected in Muslim Court Documents from the Sijil of Jerusalem (XVIIth Century)*, 2 vols. (Philadelphia: Center for Judaic Studies, University of Pennsylvania, 1994); and subsequent compilations in Hebrew published by Yad Izhak Ben-Zvi; Haim Gerber, *Crossing Borders: Jews and Muslims in Ottoman Law, Culture, and Society* (Istanbul: Isis Press, 2008), ch. 2. On similar studies of Christians in Ottoman shari'a courts, see, e.g., Ronald C. Jennings, "Zimmis (Non-Muslims) in Early 17th Century Ottoman Judicial Records: The Sharia Court of Anatolian Kayseri," *Journal of the Economic and Social History of the Orient* 21, 3 (1978): 225–93; Rossitsa Gradeva, "Orthodox Christians in the Kadi Courts: The Practice of the Sofia Sheriat Court, Seventeenth Century," *Islamic Law and Society* 4, 1 (1997): 37–69.

<sup>51</sup> Simonsohn, *A Common Justice*; Jessica M. Marglin, "Jews in Shari'a Courts: A Family Dispute from the Cairo Geniza," in Arnold Franklin et al., eds., *Jews, Christians and Muslims in Medieval and Early Modern Times; A Festschrift in Honor of Mark R. Cohen* (Leiden: Brill, 2014), 207–25; Mark S. Wagner, *Jews and Islamic Law in Early 20th-Century Yemen* (Bloomington: Indiana University Press, 2015).

<sup>52</sup> See especially Joseph Hacker, "Jewish Autonomy in the Ottoman Empire, Its Scope and Limits: Jewish Courts from the Sixteenth to the Eighteenth Centuries," in Avigdor Levy, ed., *The Jews of the Ottoman Empire* (Princeton: Darwin Press, 1994), 153–202; Najwa Al-Qattan, "Dhimmi in the Muslim Court: Legal Autonomy and Religious Discrimination," *International Journal of Middle Eastern Studies* 31, 3 (1999): 429–44; Richard Wittmann, "Before Qadi and Vizier: Intra-Communal Dispute Resolution and Legal Transactions among Christians and Jews in the Plural Society of Seventeenth Century Istanbul" (PhD diss., Harvard University, 2008).

<sup>53</sup> Shlomo Dov Goitein, *A Mediterranean Society*, 5 vols. (Berkeley: University of California Press, 1967–1988), v. 2, 400.

accommodated their co-religionists' desires to make use of Islamic courts and even, in some cases, required it.<sup>54</sup>

Although Jews' and Christians' use of Islamic courts has become common knowledge, the assumption that they were subject to serious restrictions in doing so has been left largely unchallenged. Most scholars assume they used Islamic courts despite their inability to testify against Muslims. Najwa al-Qattan notes that, in rare cases, "The evidence provided by a *dhimmi* litigant or witness outweigh[ed] that of a Muslim in inter-communal cases." Most of the time, though, "the courts followed the Hanafi refusal to entertain" the testimony of non-Muslims.<sup>55</sup> Scholars conclude that even if *qāḍīs* fudged the rules from time to time, Jews and Christians had to presume that their testimony would not be accepted against a Muslim, and so tried to find Muslims to testify orally on their behalf. The assumption is that the need to rely on Muslim witnesses could constitute an obstacle for non-Muslims, whose main social networks tended to be within their respective faith communities. Under the best of circumstances, they faced an additional transaction cost (as economic historians would put it) in using Islamic legal institutions, because finding a Muslim witness would require extra effort and perhaps extra expense. At worst, and according to a more lachrymose view of history, non-Muslims' inability to testify would inevitably lead Islamic courts to deny them justice, a charge leveled by many nineteenth-century European observers of the Islamic world, and one often used to justify colonialism.<sup>56</sup>

The present state of scholarship, then, fails to explain the lawsuit in which Ya'akov sued al-Zīrnibānī. As a Jew, Ya'akov should not have been able to give evidence against a Muslim because the testimony of a *dhimmi* cannot be used against a Muslim. And the kind of evidence he provided—documents notarized by *'udūl*—should not have been considered probative in an Islamic court. And yet that lawsuit was representative of the procedure followed in Moroccan shari'a courts in the nineteenth century and up to colonization in 1912. This forces us to reexamine our assumptions about both documentary evidence and non-Muslims in Islamic law.

<sup>54</sup> Marglin, *Across Legal Lines*, 80–88.

<sup>55</sup> Al-Qattan, "Dhimmis," 437. See also Amnon Cohen, *Jewish Life under Islam: Jerusalem in the Sixteenth Century* (Cambridge: Harvard University Press, 1984), 122; Gradeva, "Orthodox Christians," 67; Kuran, *Long Divergence*, 229–31.

<sup>56</sup> Saba Mahmood, "Religious Freedom, the Minority Question, and Geopolitics in the Middle East," *Comparative Studies in Society and History* 54, 2 (2012): 418–46; Jessica M. Marglin, "A New Language of Equality: Jews and the State in Nineteenth-Century Morocco," *British Journal of Middle Eastern Studies* 43, 2 (2016): 158–75. For an example of the lachrymose view, see Bat Ye'or, *The Dhimmi: Jews and Christians under Islam* (Rutherford: Fairleigh Dickinson University Press, 1985), 56–57.

## SOURCES

In order to contextualize Ya'akov's lawsuit within the nineteenth-century Moroccan legal system, a word on the nature of the sources is in order. The majority of archival evidence documenting the procedures of Moroccan shari'a courts concerns trials between Jews and Muslims, a reality that stems from the nature of Morocco's archival practices in the precolonial period. Prior to 1912, Moroccan shari'a courts did not keep systematic records that were archived by the state.<sup>57</sup> *'udūl*, who functioned as the equivalent of notaries public, drew up legal documents (*'uqūd* or *rusūm*), including records of court proceedings, which they gave to the individual plaintiffs. Individuals then preserved these documents in their own private collections.<sup>58</sup> If *'udūl* did keep records of their activities, they did so privately and did not deliver them to state authorities. The decentralized nature of the legal system meant that record-keeping was left to individuals, rather than overseen by the central government.<sup>59</sup>

Today, most of these documents remain in private hands. Many Moroccan Muslims preserve their legal deeds as living archives, since these documents might still carry legal weight or contain sensitive information that families would rather keep private. The living quality of these personal archives militates against donating them to libraries or making them available to researchers. But the fact that most Moroccan Jews no longer live in Morocco means that their personal archives no longer have the same legal significance. Some Jews brought these family archives with them while others left them behind; regardless, such documents more easily made their way into public and

<sup>57</sup> Part of the French colonial judicial reforms involved implementing regulations concerning record-keeping in Moroccan shari'a courts. See Marglin, *Across Legal Lines*, 181.

<sup>58</sup> On the lack of record-keeping by either *'udūl* or *qādīs*, see Louis Mercier, "L'administration marocaine à Rabat," *Archives Marocaines* 7 (1906): 350–401, 394–96; Jacques Caillé, *Organisation judiciaire et procédure marocaines* (Paris: Librairie générale de droit et de jurisprudence, 1948), 19; Léon Buskens, "Mālikī Formularies and Legal Documents: Changes in the Manuscript Culture of the 'Udūl (Professional Witnesses) in Morocco," in Yasin Dutton, ed., *The Codicology of Islamic Manuscripts* (London: Al-Furqān Islamic Heritage Foundation, 1995), 137–45, 140. See also Direction des Archives Royales (Mudiriyyat al-wathā'iq al-mālikīya, Rabat, Morocco), Safi, Italian consul in Safi to al-Ṭayyib b. Hīma, 10 Rabī' II 1299/1 Mar. 1882.

<sup>59</sup> There is no clear reason why relatively few archival documents survived from before the nineteenth century. I strongly suspect that this is merely the result of physical degradation. The few archival sources I have found from the eighteenth century are mostly similar to those from the nineteenth century, but because my archival sources only stretch back to the nineteenth century it is difficult to know when the reliance on documentary evidence began or under what circumstances. I do, however, think that Moroccan shari'a courts' reliance on documentary evidence predated European influence on the Moroccan legal system; elsewhere, I have traced ways in which the spread of Western consular courts in Morocco influenced the practices of local shari'a courts, and there is no indication that the probative nature of documentary evidence stemmed from this encounter. On the contrary, consular courts adapted practices of shari'a courts: see Marglin, *Across Legal Lines*, esp. 157–66; and *idem*, "Extraterritoriality Meets Islamic Law: Legal Pluralism and Elements of Proof in the International Mixed Court of Morocco, 1871–2," *Quaderni Storici* 51, 3 (2016): 673–700.

private collections.<sup>60</sup> Though Jews constituted only 3–5 percent of Morocco's nineteenth-century population, the legal documents preserved by Jewish families offer researchers unparalleled access to the practices of Moroccan shari'a courts more broadly.<sup>61</sup>

The records of litigation between Jews and Muslims in shari'a courts mostly concern commercial disputes. Jews, especially merchants, were in regular commercial relations with Muslims. Shari'a courts were particularly important because Jewish merchants sold most of their goods on credit. Banks were absent from nearly all of Morocco until the colonial period.<sup>62</sup> Credit was therefore extended by individual merchants, who assumed a fair amount of personal risk.<sup>63</sup> Many if not most of these Jewish merchants' clients were Muslim. In order to mitigate the risks inherent in extending credit, merchants-cum-moneylenders recorded the debts their clients owed to them with Muslim notaries public, so if a client defaulted the creditor could bring him before a *qāḍī* with proof of the original loan. These dense commercial ties between Jewish merchants and their Muslim clients produced extensive documentation of loans on credit as well as records of litigation pursued in shari'a courts, mostly over unpaid debts.

A collection of nearly two thousand legal documents notarized by *'udūl*, which belonged to a single Jewish merchant family from Fez, provides rich insights into how Jewish merchants used Islamic legal institutions for commercial purposes. This collection represents the remains of the personal archive of

<sup>60</sup> Paul Dahan, of the Centre de la Culture Judéo-Marocaine in Brussels, has built up an impressive personal collection of Judaica and Jewish manuscripts from Morocco, including many Jewish and Islamic legal documents. Dahan acquired the vast majority of his collection from dealers in Morocco, Europe, and Israel. Similarly, the Judaica Collection at Yale Library recently purchased from dealers in Jerusalem a large collection of Jewish manuscripts from North Africa, including legal documents from Morocco (mostly in Hebrew, but some in Arabic). Some documents destined for destruction were fortuitously saved: Professor Leon Buskens explained to me that he found two large boxes full of manuscript documents in Hebrew, Arabic, and Judeo-Arabic, including many legal documents, in a scrap paper heap in Marrakesh. Luckily, he was able to buy the lot, which is now preserved in the Special Collections division of the Library of the University of Leiden (catalogue nos. Or.26.543 [1 and 2]).

<sup>61</sup> Estimates put Morocco's total population at between 2.75 million and ten million, and the most reliable estimates put the Jewish population at around 180,000; Frederick V. Parsons, *The Origins of the Morocco Question, 1880–1900* (London: Duckworth, 1976), 539.

<sup>62</sup> There were a limited number of banks in Tangier after 1900, but these mainly served to send money abroad or change currency and did not disrupt older forms of credit extension in cities like Fez; Abdelwahab Lahlou, "Note sur la banque et les moyens d'échanges commerciaux à Fès avant le Protectorat," *Héspéris* 24 (1937): 223–32, 228–30; Roger Le Tourneau, *Fès avant le protectorat: étude économique et sociale d'une ville de l'occident musulman* (Rabat: Editions La Porte, 1987), 289–90.

<sup>63</sup> Jews were not solely responsible for lending money in Morocco; Muslim merchants also extended credit to their clients. However, Jews were disproportionately represented among the country's network of merchants who sold primarily on credit: Mohammed Kenbib, *Juifs et musulmans au Maroc, 1859–1948* (Rabat: Faculté des lettres et des sciences humaines, 1994), 253–62; Mohammed Ennaji, *Expansion européenne et changement social au Maroc (XVIe–XIXe siècles)* (Casablanca: Editions Eddif, 1996), 60–65.

the Assarrafs, and spans the years from 1860 to 1912. Of the notarized documents in this archive, 98 percent concern commerce with Muslims. The patriarch of the family, Shalom Assarraf (1830–1910), was so dependent on the services of *‘udūl* and *qāḍīs* that during the height of his career he visited Islamic legal institutions nearly every week.<sup>64</sup> Although the Assarraf collection is somewhat singular in its coherence, it is representative of broader trends in both commerce and litigation by Moroccan Jews. Other collections show that Jewish merchants regularly used the services of *‘udūl* and *qāḍīs* to acquire notarized bills of debt and related documents, as well as to pursue their recalcitrant debtors in court.<sup>65</sup> These records give us an unparalleled view into how Jews used Islamic legal institutions, how those institutions functioned in Morocco, and how they incorporated documentary evidence.

#### DOCUMENTARY EVIDENCE IN MOROCCAN SHARI‘A COURTS

The records of commercial litigation between Jews and Muslims in nineteenth-century shari‘a courts demonstrate that documentary evidence played a starring role in court procedure. *Qāḍīs* relied on notarized documents presented by Jews even when these directly contradicted the oral testimony of a Muslim, as we saw in Ya‘akov’s lawsuit against al-*Zīrnibānī*. In the cases preserved in Jewish merchants’ personal archives, Moroccan *Mālikī* courts considered notarized documents equivalent to oral testimony. This reliance on the written word had significant implications for the experiences of Jews in Moroccan shari‘a courts, and essentially allowed them to present evidence on par with their Muslim neighbors.

The most common type of lawsuit between Jews and Muslims concerned unpaid debts, and these will serve as our main source of evidence. (All lawsuits followed the same strict order laid out in the *adab al-qāḍī* literature outlining

<sup>64</sup> Aside from some markedly low years (from 1868–1869/1285 AH, 1872–1875/1289–1291 AH, 1876/1293 AH, and 1881–1882/1299 AH), between 1864 and 1883, Shalom averaged about forty-nine visits to a shari‘a court per year. (Including the remarkably low years, Shalom averaged thirty-nine entries per year between 1281 and 1300 AH.) Bills of debt for goods sold on credit account for the majority of the collection, and were the single most common type of document sought out by the Assarrafs (constituting 64 percent of the total: 1,229 documents out of 1,930 are bills of debt). Other types of legal documents relate to commerce—sales of property, releases for debts paid, attestations to the collection of debts, partnerships—and constitute 9 percent of the total (173 out of 1,930). Another 25 percent of the collection records aspects of litigations, almost all of which concerned Muslims who had defaulted on debts: these include records of trials (*maqāl*) and *lafīf* documents (235), and guarantees for payment or appearances in court (249).

<sup>65</sup> In a sample of 295 nineteenth-century legal documents notarized by *‘udūl* that involved Jews, 82 percent concerned commercial relations with Muslims. These documents come from three archival collections: the private collection of Paul Dahan at the Centre de la Culture Judéo-Marocaine in Brussels; the special collections of the University of Leiden Library (Or.26.543 (1 and 2) and Or.26.544); and the archives of the Yad Ben Zvi library in Jerusalem.

the rules of procedure in court.<sup>66</sup>) The first step was for the plaintiff (*al-mudda'ī*) to bring an accusation against the defendant (*al-mudda'ā 'alayhi*); this accusation was called the *maqāl* (literally, a piece of writing). The plaintiff would then ask the defendant to either “acknowledge” the claim (*iqrār*) or provide an “answer” to it (*jawāb*)—that is, deny it.<sup>67</sup> While many lawsuit records do not specify what sort of evidence was presented (or even how the *qāḍī* ruled), those that do so indicate that there were two points at which the plaintiff might produce notarized documents to support his case.

In most cases plaintiffs presented their documents as evidence at the outset, presumably in anticipation of being asked to produce them eventually. In most instances, defendants simply acknowledged that they did, in fact, owe the money claimed. (Whether they could pay it was another matter, since many recalcitrant debtors pleaded bankruptcy when sued for payment.<sup>68</sup>) Indeed, the presentation of written evidence of debts was so standard in Moroccan shari'a courts that plaintiffs voluntarily noted when they had no written proof of their claim. Thus in a lawsuit brought by Shalom Assarraḡ, Ya'akov's father, on 20 June 1878, he accused 'Alī b. Muḡammad, known as al-Habūb al-Gīrī al-Qadūsi, of owing him two unpaid debts. The first, for 40 French riyāls, was attested in a notarized document (*rasm*), but the second, for 45 riyāls, was undocumented (*bi-lā rasmin*).<sup>69</sup> Unsurprisingly, al-Qadūsi acknowledged owing Shalom the first debt, but denied the second. The *qāḍī* of Fez ordered al-Qadūsi to pay the first debt and ordered Shalom to prove that al-Qadūsi owed him the second.

There were times when defendants contested the contents of a notarized document. In some cases, as in the lawsuit between Ya'akov and al-Zīribānī, the *qāḍī* simply ignored the claim of the defendant in favor of the evidence in the document. For example, in the spring of 1875 Shalom Assarraḡ sued al-'Arabī b. Laḡsan al-Dublālī al-Ya'qūbi and his two guarantors al-Mu'tī b. Ḥamm al-Dublālī al-'Ajiwī and al-Ḥājj 'Abdallāh b. Muḡammad al-Shayzamī for the enormous sum of 3,000 French riyāls.<sup>70</sup> First al-'Arabī, and then his

<sup>66</sup> For a brief, contemporary description of procedure in Moroccan shari'a courts, see Albert Maeterlinck, “Les institutions juridiques au Maroc,” *Journal de droit international privé* (1900): 477–83, 478–79.

<sup>67</sup> This plea was sometimes included as part of the original *maqāl*, though at other times it was written in a separate entry, almost always of the same date. One exception is the *maqāl* from TC, file #3, 21 Rajab 1329/7 July 1911: this long, drawn-out case was brought by Ya'akov Assarraḡ and his associate Eliyahu b. 'Azūz Kohen against al-Jilālī b. Aḡmad b. al-Faqīh b. 'Ab (?) al-Zarḡunī al-'Asārī. Before pleading, al-Jilālī had a number of questions about the claim, and it was not until 4 Ramaḡān (six weeks later) that he finally pled not guilty. This procedure was quite similar to that observed in *kadi* courts of Ottoman Empire: see, for example, Jennings, “Limitations,” 172–73.

<sup>68</sup> In eleven out of the twenty-three cases recorded in the Assarraḡ collection in which a debtor acknowledged a debt (i.e., pleaded guilty) the debtor also claimed bankruptcy.

<sup>69</sup> For another such case, see TC, file #2, 19 Jumādā II 1298/19 May 1881.

<sup>70</sup> TC, file #6, 19 Rabī' II 1292/25 May 1875.

guarantor al-Mu'tī, testified that Shalom had only given him 1,500 riyāls, and that they had paid back this amount already, even though they admitted that the bill of debt had been written for 3,000 riyāls. This was a common way in which merchants in Morocco charged hidden interest; they extended a loan for a certain amount of money, but wrote the bill of debt for twice that amount, thus collecting 100 percent interest without appearing to violate the Islamic prohibition on usury. This worked in large part because the *qāḍī* relied on the notarized documents presented in court. In this case, he ordered the debtors to guarantee the full amount of the debt to Shalom.<sup>71</sup>

In other cases of contested documentation, the *qāḍī* required further proof from the plaintiffs and did not rely solely on the document they presented.<sup>72</sup> For example, on 29 August 1866, Shalom sued a Muslim named Ibn al-Dīn b. 'Āmir al-Ḥasāmī al-'Agabī in a shari'a court in Fez, claiming that al-Ḥasāmī owed him 125 mithqāls. He specified that this was recorded in a "written document in his possession (*bi-rasmin lahu*)."<sup>73</sup> Although the language is characteristically elliptical, we can safely assume that the "written document" (*rasm*) to which Shalom referred consisted of a contract notarized by *'udūl*, the only type of document accepted in court. As per the standard procedure, Shalom asked al-Ḥasāmī to either acknowledge the debt or answer for it (*ḡurīdu minhu al-iqrāra bi-dhālika aw al-jawāba*). Al-Ḥasāmī denied Shalom's claims (*wa-ajāba bil-inkāri al-tāmi*), and the *qāḍī* ruled that al-Ḥasāmī had three days to prove his claim (as well as provide a guarantor for his presence in court). Here the archival record trails off: we do not know if or how al-'Agabī established his denial of the debt. However, the implication of this ruling is that without shari'a-approved evidence to counter the legal documents in Shalom's possession, al-'Agabī would be held liable for the debt.

Moroccan shari'a courts did not accept just any documents as evidence. The documents (*rusūm*) that Ya'akov, Shalom, and others presented in court were written and signed by two professional scribes-cum-witnesses known as *'udūl*. In general, Islamic law requires testimony from two adult Muslim men who fit the requirements of probity (*'adl*), or from one Muslim man and

<sup>71</sup> Al-'Arabī's brother 'Alī guaranteed the debt on 2 Jumādā I 1292/6 June 1875. Even when al-'Arabī and al-Mu'tī produced a *laḡfīf*—the recorded testimony of twelve Muslim men—attesting that the debt was for only 1,500 riyāls, the *qāḍī* remained unmoved. In another case, in which one of Ya'akov's creditors claimed he had been charged an even higher rate of hidden interest, the *qāḍī* completely ignored the creditor's claims and ruled that he had to guarantee the entire debt as it was recorded in the legal document (TC, file #1, 30 Rabī' I 1309/3 Nov. 1891). See also TC, file #7, 4 Sha'bān 1284/1 Dec. 1867; and file #8, 26 Ṣafar 1293/23 Mar. 1876.

<sup>72</sup> I have yet to find records that specify what sort of proof was brought; most trail off after the initial claim was made.

<sup>73</sup> TC, file #2, 17 Rabī' II 1283/29 Aug. 1866. For other lawsuits involving documents, see TC, file #1, 11 Jumādā I 1296/3 May 1879; file #3, 29 Jumādā I 1296/21 May 1879; 16 Shawwāl 1300/20 Aug. 1883; 12 Ṣafar 1314/23 July 1896; 8 Jumādā II 1320/12 Sept. 1902; 21 Rajab 1329/18 July 1911; file #5, 4 Rabī' I 1297/15 Feb. 1880.



two Muslim women. At some point in early modern Morocco, these evidentiary requirements developed into a reliance on *'udūl*, professional notaries who acted as “just witnesses.”<sup>74</sup> *'Udūl* existed outside the Maghrib as well—indeed, all over the Islamic world from the eighth century onward—but generally their role was that of professional witnesses (sometimes in addition to notaries); they appeared in court in person to testify verbally concerning the facts of a case or to corroborate documents.<sup>75</sup> But in Morocco, rather than come to court to testify orally, *'udūl* testified through their signatures, specifically by drawing up documents and signing them. In other words, “a document of sale is simply a written embodiment of an oral attestation.”<sup>76</sup> While nothing prevented *'udūl* from testifying orally, their role was, for all intents and purposes, reduced to writing documents attesting sales, debts, mortgages, and even facts relating to violent crimes.

These *'udūl* fulfilled the functions normally associated with notaries public in Western Europe. European notaries public were invested with the authority to produce documents “of a special quality of public faith.”<sup>77</sup> Although the roots of this institution lay in the Roman Empire, it was only around 1050 CE that notaries public emerged as such in the Christian Mediterranean. Moroccan *'udūl*, like European notaries public, were official state functionaries, though the degree of oversight which government officials exercised over them varied considerably. In theory, the chief *qāḍī* of a city was in charge of appointing and overseeing the *'udūl* who functioned in his jurisdiction, usually the city and part of the surrounding countryside. The *qāḍī*, in turn, was appointed by the chief *qāḍī* of Morocco, the *qāḍī al-quḍā'* in Fez, who the sultan himself appointed.<sup>78</sup> Some three hundred *'udūl* operated in Fez alone, either out of storefronts near the Qarawīyīn mosque or making house calls.<sup>79</sup> The idea

<sup>74</sup> Tyan, *Le notariat*, 84; Messick, *Calligraphic State*, 205–6. The exact nature of the process by which *'udūl* in Morocco came to act as professional notaries public is unclear, and further research on this history is needed.

<sup>75</sup> Emile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Leiden: Brill, 1960), 239–41.

<sup>76</sup> Thomas Kerlin Park, “Indirass and the Political Ecology of Flood Recession Agriculture,” in A. Endre Nyerges, ed., *The Ecology of Practice: Studies of Food Crop Production in Sub-Saharan West Africa* (London: Routledge, Taylor and Francis Group, 1997), 77–96, 81. In Morocco, the two witnesses necessary for a contract to be valid were also the *'udūl* who wrote up and signed the document; in Yemen, however, the witnesses were separate from the document writer (see Messick, *Calligraphic State*, 229–30).

<sup>77</sup> Mark Wayne Steinhoff, “Origins and Development of the Notariate at Ravenna (Sixth through Thirteenth Centuries)” (PhD diss., New York University, 1976), 3. See also Robert Ignatius Burns, *Jews in the Notarial Culture: Latinate Wills in Mediterranean Spain, 1250–1350* (Berkeley: University of California Press, 1996), 38–40.

<sup>78</sup> Le Tourneau, *Fès avant le protectorat*, 214. By contrast, in Yemen there was no formal state oversight of document writers (Messick, *Calligraphic State*, 224).

<sup>79</sup> A. Péretié, “L'organisation judiciaire au Maroc,” *Revue du monde musulman* 13, 3 (1911): 509–31, 522; Le Tourneau, *Fès avant le protectorat*, 215. See also Messick, *Calligraphic State*, 205–6, 208.

behind this system was to ensure that *'udūl* were truly just and upright Muslims whose testimony could be trusted, and to guarantee that they were knowledgeable enough about Islamic law to properly execute contracts, legal records, and other documents.

The primacy of notarization in Moroccan shari'a courts is clear in the encounter between European and Moroccan evidentiary practices. In 1871, the Moroccan government agreed to establish a "mixed court" in cooperation with the ambassadors of France, Great Britain, Spain, Italy, the United States, and Portugal.<sup>80</sup> Although this experiment was short-lived (disbanded by the summer of 1872), the attempts to align the expectations of European diplomats with the requirements of Islamic law produced a valuable account of procedure in Moroccan shari'a courts. The chief *qāḍī* of the Mixed Court, Aḥmad b. al-Ṭālib b. Sūda, observed that shari'a courts could not accept documents for which "the seal and signature" of the interested parties were "not legalized by two *'udūl*"—that is, the contract had not been witnessed and signed by *'udūl*.<sup>81</sup> Bills of debt or contracts signed by the parties themselves were, essentially, useless in shari'a courts. The only form of written evidence that Moroccan *qāḍīs* considered valid were documents signed by *'udūl*.

In those instances in which individuals, Jewish or Muslim, lacked any notarized contracts to support their claims, they could seek out a different sort of notarized document attesting a form of testimony particular to the Maghrib, called a *laḥfif*. In a *laḥfif*, twelve ordinary Muslim men—individuals who were not *'udūl*—testified to something based on their personal knowledge.<sup>82</sup> The document recorded their oral testimony (often preserving the colloquial dialect in which they gave it) and was notarized by two *'udūl* and signed by the *qāḍī* himself. The subsequent document could stand in for the more standard contracts of loan or sale on credit notarized by *'udūl*. Thus the most common way to compensate for the absence of a notarized contract was by producing another type of notarized document, one based on the testimony of twelve ordinary Muslims, yet still written up and notarized by two *'udūl*.

<sup>80</sup> On the Mixed Court, see Marglin, "Extraterritoriality."

<sup>81</sup> Archivo General de la Administración (Alcalá de Henares, Spain), Caja M 9, Exp. no. 1 (81/9), Diario del Tribunal Marroquí, p. 4, 23 Nov. 1871. Ibn Sūda further specified that the signatures of *'udūl* should be countersigned by a *qāḍī*, a practice that does not seem to have been widespread in nineteenth-century Morocco and might even have been introduced under European pressure (see Péretié, "L'organisation judiciaire au Maroc," 522). Sami Bargaoui notes that under normal circumstances documents signed by *'udūl* did not require authentication by a *qāḍī* unless they were part of litigation, in which case the *qāḍī* would countersign them a posteriori (Bargaoui, "Les titres fonciers," 180–81).

<sup>82</sup> Santillana, *Istituzioni*, 2: 603. The practice of relying on a *laḥfif* instead of two *'udūl* became widely accepted in the Maghrib over the course of the fifteenth and sixteenth centuries; Louis Milliot, *Recueil de jurisprudence chérifienne*, 3 vols. (Paris: Editions Ernest Leroux, 1920), v. 1, 119.

Jews theoretically had equal access to a *lafīf*, although the particularities of this form of evidence meant that they had a somewhat harder time availing themselves of it. As non-Muslims, Jews were ineligible to testify in a *lafīf*; they could not constitute one of the twelve ordinary men who gave their personal account of a matter. Thus for Jews to present a *lafīf* as evidence in a shari‘a court they had to find twelve Muslim men who would testify on their behalf. Muslims, on the other hand, could rely on their family members to constitute a *lafīf*, a practice that was quite common.<sup>83</sup> But while these requirements certainly put Jews at a disadvantage, they did not prevent them from making use of *lafīfs*, and Jews successfully presented *lafīfs* as evidence in lawsuits against Muslims.<sup>84</sup> In the lawsuit discussed above, in which Shalom was unable to produce a notarized document attesting that al-Qadūsī owed him an additional 45 French riyāls, the Jewish merchant resorted to just this type of evidence. Four days after suing al-Qadūsī in court, Shalom gathered twelve Muslim men and had them testify before the *qāḍī* of Fez and two *‘udūl* that they had personally witnessed Shalom give al-Qadūsī the 45 riyāls about eight months prior.<sup>85</sup> Although the *qāḍī*’s subsequent ruling has not been preserved, in general the evidence of a *lafīf* was considered probative and equivalent, or nearly so, to notarized documents.

Although thus far we have focused on cases involving Jews, there is evidence that cases involving only Muslims followed similar evidentiary practices. One of the few detailed, contemporary accounts of precolonial Moroccan shari‘a court procedure confirms the reliance on documentary evidence outlined above. Emile Amar, a French observer writing in the early twentieth century, described the centrality of documents to real estate litigation thus: “The procedure of shari‘a courts being a written procedure, the *qāḍī* limits himself to examining either the old deeds produced by the parties, which are actual, pre-existing proofs, or those that are written up during the course of the trial ... [thus] one sees the importance of these deeds in the judicial life of Muslims in Morocco.”<sup>86</sup> That is, a plaintiff made a claim by producing written evidence in the form of documents attested by *‘udūl*. If the defendant wished to contest the plaintiff’s claims, he did so by producing still more notarized documents. Amar goes on to elaborate the procedure followed in shari‘a courts, and lists four types of evidence that were acceptable: notarized deeds,

<sup>83</sup> There are many such *lafīf* documents in the Assarraf collection; see, for example, TC, file #5, *lafīf* from 18 Rabī‘ II 1291/4 June 1874 and file #10, 23 Sha‘bān 1294/2 Sept. 1877.

<sup>84</sup> TC, file #1, 1 Rabī‘ I 1297/2 Feb. 1880 (and the entry on the same page dated 19 Rabī‘ I 1297/1 Mar. 1880).

<sup>85</sup> TC, file #2, 23 Jumādā II 1298/23 May 1881.

<sup>86</sup> Emile Amar, *L’organisation de la propriété foncière au Maroc: Etude théorique et pratique* (Paris: Paul Geuthner, Editeur, 1913), 125. That Amar observed the use of documents in cases concerning real estate suggests that the cases I found concerning unpaid debts were representative of Moroccan shari‘a court procedure on the whole, and did not only represent debt litigation.

oaths, *fatāwā*, and a “*médjlès*” (*majlis*), “a meeting of jurisconsults that takes place before the *qāḍī*, at the request of one of the parties.”<sup>87</sup> At no point does he mention the oral testimony of witnesses being produced in court.

The rarity with which Moroccan *qāḍīs* demanded verbal testimony further underscores the primacy of documentary evidence. I found a single reference to a *qāḍī* asking for verbal testimony from witnesses in court. In 1866, the store of a British merchant named Joseph Crespo in Essaouira was robbed. The suspect turned out to be a Jewish subject of the Moroccan sultan. Frederick Carstensen, the British vice-consul in Essaouira, tried to have the case adjudicated by the local governor, but it was turned over to the *qāḍī*. Carstensen then received a message informing him: “1: Evidence of a Christian will not be admitted before the Moorish authorities. 2: Neither will the evidence of a Jew be taken.”<sup>88</sup> The archival record of this case makes it difficult to reconstruct exactly what happened. Did the Christian and Jewish witnesses attempt to give their testimony orally before Essaouira’s *qāḍī*? They certainly had the option to present notarized documents concerning the facts of the crime, documents that Jews and Muslims frequently obtained for this kind of occasion.<sup>89</sup> Perhaps more importantly, the fact that the crime was committed against a foreigner, Joseph Crespo, suggests an explanation for why the *qāḍī* treated this case differently. During the second half of the nineteenth century, resentment of foreigners was mounting in Morocco and many jurists were particularly concerned about the foreign threat. They directed much of their anger at Muslims who acquired foreign protection, primarily because they viewed this as siding with the enemy.<sup>90</sup> In later years judicial officials made concerted efforts to obstruct foreigners’ access to Islamic legal institutions.<sup>91</sup> The most plausible motive for this *qāḍī*’s objection to deciding a case involving the verbal testimony of non-Muslims was that he wanted an excuse to avoid ruling because of the foreigners involved. Given the evidence that the standard procedure followed by *qāḍīs* relied not on verbal testimony but rather on documents, this particular objection seems to have been a convenient way to avoid benefitting a foreigner.

<sup>87</sup> Ibid., 129. For Amar’s full discussion of procedure, see 127–35.

<sup>88</sup> The National Archives of the United Kingdom, Foreign Office records, London (hereafter FO), 631/3, Carstensen to Hay, 10 Mar. 1866.

<sup>89</sup> E.g., FO, 631/3, William James Elton to John Drummond Hay, 1 Mar. 1864; Centre d’Archives Diplomatiques de Nantes (Nantes, France), Tanger B 986, P. Achille Gambaro to Auguste Beaumier, 10 Jan. 1870; Tanger B 1002, 16 Rajab 1291/29 Aug. 1874.

<sup>90</sup> Ja’far b. Idrīs al-Kattānī, *Al-Dawāhī al-madhiyya lil-firaq al-maḥmiyya: fī al-walā’ wa-’l-barā’* (Amman: Dār al-Bayāriq, 1998); Muḥammad Al-Manūnī, *Maḥāhir yaqḍat al-Maghrib al-ḥadīth*, 2 vols. (Beirut: Dār al-Gharb al-Islāmī, 1985), v. 1, 321–34; Mohammed Kenbib, *Les protégés: contribution à l’histoire contemporaine du Maroc* (Rabat: Faculté des lettres et des sciences humaines, 1996), 215–24; Etty Terem, *Old Texts, New Practices: Islamic Reform in Modern Morocco* (Palo Alto: Stanford University Press, 2014), ch. 4.

<sup>91</sup> Marglin, *Across Legal Lines*, 167–69; and “Extraterritoriality.”

Now we come to the confluence of our two historiographical conundrums: the consequences for non-Muslims of their reliance on notarized documents in court. That Jews and Muslims relied on *'udūl*, and that Jews could present such documents on a basis that was nearly equal to Muslims, meant that Moroccan court procedures neutralized one of the most significant disabilities Jews faced in shari'a courts. Though Jews could not testify orally in court, we have seen that this was essentially irrelevant since *qāḍīs* almost never asked for oral testimony. Nor could Jews serve as *'udūl*, by virtue of being Jewish. But in this sense, Jews differed little from Muslims; since the role of witness-cum-scribe was professionalized, the prohibition on Jews serving as *'udūl* did little to make their experience in court distinct from that of ordinary Muslims who similarly relied on professional *'udūl*. Additionally, a large percentage of the Muslim population was also ineligible to testify as *'udūl*, and thus to give oral testimony in most instances: these included Muslim women, slaves, minors, Muslim men considered to lack the qualities of uprightness and justice, and after 1877, Muslims who had acquired foreign protection (which gave them a degree of extraterritoriality).<sup>92</sup> Everyone, regardless of faith, sex, class, or education, relied on *'udūl* to produce legally valid documents.

In the same vein, it is important to remember that Jews' equal ability to access written evidence was an unintended consequence of Mālikī jurisprudence; Mālikī jurists did not accept notarized documents in order to give Jews equal access to elements of proof in court. Nonetheless, Jews' reliance on written evidence significantly changed their experience of using Islamic courts. Rather than appear before a *qāḍī* unable to testify on their own behalf, Moroccan Jews could come to court with notarized documents just like the ones presented by their Muslim counterparts. Jews' inability to testify orally in shari'a courts was thus almost irrelevant, since *qāḍīs* did not regularly call upon either Jews or Muslims to prove their cases *viva voce*. Moroccan *qāḍīs* instead asked everyone to present notarized documents, to which Jews and Muslims had equal access. Theoretically, at least, the playing field was level.

Jews' reliance on legal documents to support their business pursuits raises broader questions about the relationship between legal institutions and commercial practices. The particular nature of Moroccan shari'a courts allowed Jews to avoid many of the difficulties (or transaction costs) of using shari'a courts experienced by *dhimmi*s elsewhere, particularly the need to find Muslims to testify on their behalf. It might therefore be tempting to postulate that equal, or nearly equal, access to shari'a courts allowed Jews to be more integrated into the Moroccan economy. Yet this hypothesis would imply that

<sup>92</sup> The sultan Mawlāy Ḥasan (r. 1873–1894) established a rule that Muslims who had acquired foreign protection were ineligible to serve as *'udūl*: see Mūdirīyat al-Wathā'iq al-Mālikīya, *Al-Wathā'iq* (Rabat: al-Maṭba'a al-mālikīya, 1977), v. 4, 426–27.

Jews and other non-Muslims were hindered from participating in the economy in places where they did not have equal access to legal proof, such as in the Ottoman Empire, where Ḥanafī law privileged oral testimony over notarized documents. Determining the implications of the distinctive Moroccan approach to documentary evidence on Jews' commercial integration would require comparable studies of non-Muslims in Islamic courts in other, non-Mālikī settings. Unfortunately, although a growing body of work has explored the ways in which Jews and Christians used shari'a courts in the Ottoman Empire, nearly all of these studies focus on how non-Muslims brought intra-*dhimmi* cases to Islamic courts.<sup>93</sup> Few studies explore the ways in which Jews and Christians pursued their everyday commercial ventures with Muslims in shari'a courts.<sup>94</sup>

Ultimately, a comparative approach to the question of how Islamic law shaped non-Muslims' economic integration is something of a counterfactual; it implicitly asks whether Jews would have been as integrated into Morocco's economy had they *not* had access to notarized documents that constituted valid evidence in court. Historians are often uncomfortable with counterfactuals, since they are ultimately impossible to prove and stray too far from the task of explaining the past as it actually happened. Yet counterfactuals can be useful tools for thinking through historical questions, even if they cannot in themselves provide satisfying answers. A sustained comparison between Jews' use of shari'a courts in the Ottoman Empire and Morocco might provide insight into the relationship between law and commerce, and thus between law and society. Of course, such a comparison might show that Jews in both settings had similar levels of integration into the economy. Different practices around documentary evidence might not have produced different types of commercial systems. We already know that non-Muslim merchants were able to work around the various transaction costs that arose from their unequal access to legal evidence in Ottoman shari'a courts. Perhaps further comparative studies would simply indicate that Jews managed to make their

<sup>93</sup> See note 50 citations.

<sup>94</sup> Similarly, the extensive literature on Jewish merchants' use of Islamic law in the medieval Mediterranean, based on documentary evidence from the Cairo Geniza, focuses on questions of whether or not, and to what extent, Jews relied on legal institutions, and if so which ones. But this literature does not engage with the experience of Jews in those Islamic legal institutions, including whether they suffered from restrictions regarding their use of evidence, and if so, how they got around them. For instance, Avner Greif concludes that medieval Jewish merchants did not rely primarily on legal institutions; see esp. "Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders," *Journal of Economic History* 49 (1989): 857–82; and *idem*, "Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition," *American Economic Review* 83, 3 (1993): 525–48. Jessica Goldberg emphasizes the importance of a range of institutions, including legal ones, in *Trade and Institutions in the Medieval Mediterranean: The Geniza Merchants and Their Business World* (Cambridge: Cambridge University Press, 2012). Phillip I. Ackerman-Lieberman argues that Jews relied more on Jewish legal institutions than on Islamic ones, in *The Business of Identity: Jews, Muslims, and Economic Life in Medieval Egypt* (Stanford: Stanford University Press, 2014).

business commercially viable in a wide range of legal settings. Such a conclusion would suggest that there is not always a direct causal relationship between the nature of legal institutions and the types of social and economic contexts in which they operated.

Beyond the experiences of Jews and other *dhimmi*s, drawing conclusions about the reliance on documentary evidence in Morocco from the archives of Jewish merchants raises questions about how representative these sources are. As mentioned, Muslims accounted for the overwhelming majority of Morocco's population during the nineteenth century (95–97 percent). And Muslims might not have used documentary evidence in the same way as Jews. Aomar Boum, an anthropologist who conducted fieldwork in the south of Morocco in the late 1990s and the early 2000s, was told by local Muslim residents that Jews relied on documentary evidence more readily than did Muslims.<sup>95</sup> Yet we do not know how widespread this pattern was or how far back it stretched. The Jews whom Boum's informants knew may have begun relying more heavily on documents only under French influence during the colonial period, and before that Jews and Muslims may have relied equally on them. Or perhaps Jews had always relied more heavily on documentary evidence than did Muslims to counteract their inability to testify orally in inter-communal cases.

Be that as it may, the available evidence suggests that Jews were largely representative of the ways in which Moroccans in general used documentary evidence in shari'a courts. Amar's observations about the procedure of Moroccan shari'a courts in the early twentieth century follow almost exactly what is described in the archival documents from the Assarraf collection, and Amar only wrote about lawsuits among Muslims. His text suggests that Muslims relied on written evidence in exactly the same ways that Jews did. The most crucial point for our purposes, though, is that Mālikī *qāḍīs* in Morocco accepted the notarized documents presented by Jews as valid evidence in court. How, then, does the practice of Moroccan shari'a courts relate to Mālikī jurisprudence?

#### MĀLIKĪ JURISPRUDENCE ON DOCUMENTARY EVIDENCE

There are significant archival and ethnographic sources indicating that Moroccan *qāḍīs* relied primarily, and sometimes solely, on documentary evidence. One might object that this was merely another instance of the practice of law diverging from its theory. Yet the jurisprudential tradition of the Mālikī school supports the view that courts did rely on documentary evidence. This jurisprudential tradition has been largely ignored in the historiography, since most scholarship on Islamic law, especially in European languages, has focused on the Ḥanafī school. But when one moves west, both the

<sup>95</sup> Aomar Boum, *Memories of Absence: How Muslims Remember Jews in Morocco* (Stanford: Stanford University Press, 2013), 51.

jurisprudential literature and the archival evidence differ considerably, which further underscores the need to question blanket statements about the entire Islamic world or the Middle East (such as those made by Kuran concerning the preeminence of oral testimony). Mālikī jurisprudence, like the archival documents from the Assarraf family, also suggests the need to abandon a binary approach to understanding the oral and the written in Islamic law.

In discussing the question of the probity of writing (*al-shahāda 'alā al-khaṭṭ*), Mālikī jurists concluded that documents were nearly equivalent to oral testimony.<sup>96</sup> The Mālikī acceptance of documents has its roots in the formative period of the school. In juridical literature from as early as the eighth or ninth centuries, Mālikī jurists argued that documents were acceptable because one could analyze the handwriting and signatures to determine who had written them, and thus whether they were the valid production of trustworthy individuals.<sup>97</sup> According to Ibrāhīm b. Farḥūn, a prominent Mālikī jurist from Medina (d. 1397), the signatures of witnesses are equivalent to oral testimony because “the eye can perceive them and reason can distinguish them, just as it distinguishes other people and images.”<sup>98</sup> That is to say, just as a *qāḍī* can recognize a trustworthy witness (an *‘adl*) by sight, so can he recognize that person’s signature. Ibn Farḥūn (following ‘Abdallāh b. Najm b. Shas, d. 1188) divides written evidence into three types.<sup>99</sup> The first concerns those documents signed by witnesses who cannot be present because they are either dead or missing, and the “prevalent opinion (*mashhūr*) of the [Mālikī] school is that it is permitted.”<sup>100</sup> (Among the dissenting opinions are those jurists who only permit reliance on documentary evidence for commercial matters, but not matters like divorce, marriage, or serious crimes (*hudūd*).<sup>101</sup>) The second type consists of a document of acknowledgment (*khaṭṭ al-muqirr*), which is also permitted.<sup>102</sup> The final type of written evidence concerns the affirmation

<sup>96</sup> I know of no detailed account of the development of Mālikī jurisprudence on this issue. Moreover, why Mālikī jurists were, from very early on, more willing to rely on documents than other schools remains an open question.

<sup>97</sup> Bargaoui, “Les titres fonciers,” 171–72. Ibn Farḥūn, for example, cites a number of authorities claiming that Imam Mālik (d. 795), the eponymous founder of the school, permitted reliance on written evidence (though a minority among Mālikī scholars claim that Mālik did not permit written evidence: Ibrāhīm Ibn Farḥūn, *Tabṣīra al-ḥukkām fī uṣūl al-aqḍīya wa-manāhij al-aḥkām*, 2 vols. (Riyadh: Dār al-kutub al-‘ilmīya, 2003), v. 1, 304. Ibn Farḥūn also relies on Saḥnūn (Abū Sa’īd ‘Abd al-Salām b. Sa’īd al-Tanūkhī, d. 855), one of the most important Mālikī scholars, credited with spreading the Mālikī school to the Maghrib. On Saḥnūn, see Ibrāhīm Ibn Farḥūn, *Al-dībāj al-mudhhab fī ma’rifā a’yān ‘ulamā’ al-madhab* (Beirut: Dār al-kutub al-‘ilmīya, 1996), 263–68; and M. Talbi, “Saḥnūn,” in P. Bearman, et al., eds., *Encyclopedia of Islam* (Leiden: Brill, 2003).

<sup>98</sup> Ibn Farḥūn, *Tabṣīra al-ḥukkām*, v. 1, 303. See also Tyan, *Le notariat*, 67.

<sup>99</sup> On the attribution to Ibn Shas, see Abū al-Ḥasan b. ‘Abdallāh b. al-Ḥasan al-Nubāhī, *Tārīkh quḍāt al-andalus* (Beirut: Al-Maktab al-tijārī lil-ṭabā’a wa-’l-nashar wa-’l-tūzī’, 1967), 199.

<sup>100</sup> Ibn Farḥūn, *Tabṣīra al-ḥukkām*, v. 1, 304.

<sup>101</sup> *Ibid.*, 305.

<sup>102</sup> *Ibid.*, 307.



of one's own writing, which is permitted so long as there is no doubt concerning the hand (although some authorities also require the witness to remember the document's contents).<sup>103</sup>

Predictably, not every Mālikī scholar agreed with Ibn Farḥūn about the reliability of written documents. One of his contemporaries, Abū al-Ḥasan b. 'Abdallāh b. al-Ḥasan al-Nubāhī (d. after 1389–1390), offered a competing interpretation of the Mālikī school's attitude toward documents.<sup>104</sup> Al-Nubāhī, a *qāḍī* from Malaga, Spain, added a discussion of "testimony on writing" (*al-shahāda 'alā al-khaṭf*) to his history of *qāḍīs* in Iberia.<sup>105</sup> While he cited many of the same sources as Ibn Farḥūn, he emphasized those voices within the school that forbade reliance on documents.<sup>106</sup> Nevertheless, even al-Nubāhī suggested that his opinion went against the *practice* of most of his contemporaries. Following a discussion of the permissibility of relying on the signature of a dead or missing person (the first type above, which al-Nubāhī declared inadmissible), he reported the following: "I asked some *qāḍīs*: 'Do you permit the testimony of the dead?' They replied: 'What are you saying?' I said: 'You permit the testimony of a man after his death, if you found his signature on a document.' And they were silent [i.e., they had no good response]."<sup>107</sup> Al-Nubāhī was convinced that testimony on the basis of documents written and signed by witnesses long dead did not align with the requirements of the shari'a, so he tested his contemporaries. He asked some judges whether the testimony of a dead person is acceptable, and the judges were suitably incredulous (or perhaps just confused): "What are you saying?" they replied. But when faced with their own willingness to rely on documents signed by dead people, they remained silent, a tacit acknowledgement that they were stumped by al-Nubāhī's clever questioning. Ultimately, however, al-Nubāhī's more stringent position lost out, probably because he was a relatively minor figure among Mālikī jurists.<sup>108</sup> By contrast, other prominent Mālikī scholars took positions similar to Ibn Farḥūn's, among them Muḥammad b. Aḥmad al-Qurtubī (d. 1272).<sup>109</sup>

<sup>103</sup> Ibid., 309.

<sup>104</sup> A. Carmona, "al-Nubāhī (or, More Probably, al-Bunnāhī)," in P. Bearman, et al., eds., *Encyclopedia of Islam* (Leiden: Brill, 2003).

<sup>105</sup> al-Nubāhī, *Tārīkh quḍāt al-andalus*, 197–206. Al-Nubāhī covers much of the same ground as Ibn Farḥūn, but also treats questions such as what happens to a scholar who is found with anti-shari'a philosophical writing in his home (201–22).

<sup>106</sup> See esp. *ibid.*, 203–5.

<sup>107</sup> Ibid., 204.

<sup>108</sup> Al-Nubāhī was so minor that even the correct orthography of his name is disputed (some argue for "al-Bunnāhī"); see Carmona, "al-Nubāhī."

<sup>109</sup> Muḥammad b. Aḥmad al-Qurtubī, *Al-jāmi' li-ahkām al-qur'ān wa-l-mubayyin limā taḍamanahu min al-sunna wa-āy al-furqān*, 24 vols. (Beirut: Al-Resalah Publishers, 2006), v. 11, 426–27. On the school's position more generally, see: Muḥammad al-Tāhir al-Rizqī, *Mutaṭṭalabāt al-shahāda 'alā al-mashhūd 'alayhi* (Riyadh: Maktabat al-Rushd, 1998), esp. 112–13. Al-Rizqī

Scholars from other schools of Islamic law recognized the Mālikīs as relying more heavily on documents from the medieval period onward. Under the Mamluks (1250–1517), for instance, each school’s chief *qāḍī* was given privileges to adjudicate according to the particularities of his school. “The Maliki chief qadi is enjoined to apply his school doctrine so as ... to permit the use of documentary evidence.”<sup>110</sup> Non-Mālikī scholars who came into contact with Mālikī jurists were clearly aware that the Mālikīs had distinct practices when it came to documents. Sami Bargaoui discusses an eighteenth-century controversy in which a Ḥanafī mufti in Tunisia wrote that documents could only be considered valid if they were corroborated by oral testimony. This Ḥanafī jurist noted, however, that a Mālikī jurist had ruled that this sort of written proof could stand on its own in his school of law.<sup>111</sup>

Mālikī jurisprudence did not permit reliance on just any document, but only those whose signatories were known to the judge or other witnesses at hand. In other words, in theory, a plaintiff could present only notarized documents signed by *‘udūl* who were known to the *qāḍī*. Documents signed by *‘udūl* who lived long ago should include the verification of these signatures by currently living *‘udūl* (*ta-rīf bi-khaṭṭ al-‘udūl*). Based on legal documents held in the Tunisian National Archives, Bargaoui concludes, “Notary-verifiers in general declared that they knew expert writing, because of the circulation (*tadāwul*) and multiple, uninterrupted transmission (*tawātur*) of the writing of these deceased notaries, transmission that was guaranteed by the ‘previous’ notaries (*man sabaqa min al-‘udūl*).”<sup>112</sup> However, Bargaoui also notes that this requirement was not always observed punctiliously. Nor did it require notaries to verify signatures of *‘udūl* they had known personally; some documents were verified as much as one hundred years after they were produced.<sup>113</sup>

Still, Mālikī jurisprudence did not treat documents signed by *‘udūl* exactly the same way as European jurists treated documents notarized by their notaries public. European notarized documents were considered valid on their own for the foreseeable future, whether or not a particular judge recognized the signature of a notary. In the Mālikī school, documents signed by *‘udūl* constituted valid evidence insofar as they stood in for the oral testimony of a known person (even if that person was dead). The rules for accepting documents in Morocco worked much like those Messick observed for Yemen: “The power

seems to suggest that the other schools’ eponymous founders also accepted this practice, though he does not detail these schools’ respective jurisprudential traditions (113–14).

<sup>110</sup> Yossef Rapoport, “Royal Justice and Religious Law: *Siyāsa* and Shari’ah under the Mamluks,” *Mamluk Studies Review* 16 (2012): 71–102, 78.

<sup>111</sup> Bargaoui, “Les titres fonciers,” 172.

<sup>112</sup> *Ibid.*, 173. This is similar to what Messick observes for Yemen (*Calligraphic State*, 223).

<sup>113</sup> Thomas Park argues that only the last, and oral, testimony concerning a given document was valid, though there is convincing evidence that this was not always the case: Park, “Indirass,” 81–82.

and mystery of the legal document resides in the nature of writing as human signature.”<sup>114</sup> This limitation on the probative possibilities of documents might explain the rejection of the use of documentary evidence that Lydon found in the Mālikī *fatāwā* she examined, since the exact nature of the documents discussed in those *fatāwā* is unclear.<sup>115</sup>

The Mālikī approach to documentary evidence ultimately breaks down the binary between oral and written. The Mālikīs see documents as something akin to an embodiment of their author. Thus the signature of an *‘adl* can stand in for his presence in the court, much in the same way royal seals came to incarnate the presence of nobles in medieval Europe.<sup>116</sup> Documents “speak” for people: testimony delivered orally is not considered fundamentally different from testimony delivered in writing, so long as the testifier is known in both instances. This system created an identification between the written and the oral that challenges the very distinction between the two. In such a worldview, writing is not set opposite presence, but is rather an instantiation of that presence.

#### CONCLUSION

Reexamining the place of documentary evidence in Islamic law further upends the old dichotomies of oral/primitive versus written/advanced, binaries that have had surprisingly long shelf-lives. And like most dichotomies, that between the writing societies of the West and the orality of less “civilized” societies elides much of the complexity on both sides of the equation. In England, for example, the common law system came to rely more heavily on oral testimony in the sixteenth century, whereas before that those courts relied almost exclusively on written evidence. By the nineteenth century, modern laws of evidence in English courts came to be “centered on the oral testimony of witnesses at trial.”<sup>117</sup> The English example demonstrates that a narrative in which Western legal traditions evolved from oral to written is flawed. And if Derrida went beyond an understanding of writing as a mere “supplement to the spoken word,” many scholars of law, Islamic and otherwise, have been slow to fully appreciate the ways in which word and text are similarly interwoven in court.<sup>118</sup> As Ibn Farḥūn put it, documents are not ontologically different from words: “The eye can perceive them and reason can distinguish them, just as it distinguishes other people and images.”<sup>119</sup>

<sup>114</sup> Messick, *Calligraphic State*, 215.

<sup>115</sup> Lydon, “Paper Economy of Faith,” 655–57.

<sup>116</sup> Brigitte Miriam Bedos-Rezak, “Medieval Identity: A Sign and a Concept,” *American Historical Review* 105, 5 (2000): 1489–1533.

<sup>117</sup> William Holdsworth, *A History of English Law*, 16 vols. (London: Methuen & Co., 1926), v. 9, 130–31. See also John H. Langbein, “Historical Foundations of the Law of Evidence: A View from the Ryder Sources,” *Columbia Law Review* 96 (1996): 1168–202, 1194.

<sup>118</sup> Quoting Rousseau: Derrida, *Of Grammatology*, 7.

<sup>119</sup> Ibn Farḥūn, *Tabṣīra al-ḥukkām*, v. 1, 303.

The Jewish merchants of Morocco may appear at first glance to be irrelevant to the place of written evidence in the Islamic world. They are at the margins of the margins: the margins of Islamic society as non-Muslims, and the margins of the Islamic world, both as residents of the western frontier and as consumers of a minority school within Sunni Islam. Yet the margins are often the best places from which to shine light on the center. Archival records documenting Jews' experience in Moroccan shari'a courts are not, in and of themselves, more useful than records documenting the experience of Muslims suing other Muslims would be. But given the state of archival sources for Moroccan shari'a courts, Jews open a singularly illuminating window onto Islamic law in practice. And despite the Mālikī school's numeric and geographical marginality, Mālikī jurisprudence is clearly central to constructing a nuanced and textured picture of Islamic law's relationship to documentary evidence. Moroccan shari'a courts may be geographically marginal, and Mālikī jurisprudence may remain historiographically marginal, but this does not make them insignificant or unimportant. If we are to avoid the overgeneralizations that so plague popular discourse, and even some scholarship, about Islamic law, Islam, and law generally, we must bring the margins into the heart of the conversation.

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**Abstract:** This article begins from the premise that the margins can shine light on the center, and uses the experience of Jews (thought of as marginal in the Islamic world) in Moroccan courts (similarly thought of as marginal in Islamic history) to tell a new story about orality and writing in Islamic law. Using archival evidence from nineteenth-century Morocco, I argue that, contrary to the prevailing historiography, written evidence was central to procedure in Moroccan shari'a courts. Records of nineteenth-century lawsuits between Jews and Muslims show that not only were notarized documents regularly submitted in court, but they could outweigh oral testimony, traditionally thought of as the gold standard of evidence in Islam. The evidentiary practices of Moroccan shari'a courts are supported by the jurisprudential literature of the Mālikī school of Sunni Islam, the only one prevalent in Morocco. These findings have particular relevance for the experience of non-Muslims in Islamic legal institutions. Scholars have generally assumed that Jews and Christians faced serious restrictions in their ability to present evidence in shari'a courts, since they could not testify orally against Muslims. However, in Morocco Jews had equal access to notarized documents, and thus stood on a playing field that, theoretically at least, was level with their Muslim neighbors. More broadly, I explore ways in which old assumptions about the relationship of the written to the oral continue to pervade our understanding of Islamic law, and call for an approach that breaks down the dichotomy between writing and orality.

**Key words:** Islamic law, Morocco, North Africa, evidence, documents, orality, Jews, shari'a courts